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Identity Documents for Transgender Texans: A Proposal for a Uniform System for Correcting Gender Markers in Texas

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**IDENTITY DOCUMENTS FOR TRANSGENDER TEXANS:
A PROPOSAL FOR A UNIFORM SYSTEM FOR
CORRECTING GENDER MARKERS IN TEXAS**

LYDIA R. HARRIS*

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* J.D. Candidate at St. Mary's University School of Law, May 2022. B.A. University of Washington, 2018. I want to thank Claire Bow for being so generous with her time and having a conversation with me about this topic. I want to thank the Gender Affirmation Project team at both St. Mary's and University of Texas for highlighting the mess of a process Texas currently has, for helping transgender individuals obtain affirming identity documents, and for showing me that I can live my most authentic life here in Texas. I want to thank my *Scholar* family for welcoming my truest self into the family. I also want to thank my husband for letting me bounce ideas off of him, for endless encouragement, and for helping me feel safe being my most authentic self. This piece came from a place of love and immense gratitude for the transgender communities and individuals I have gotten to work with throughout my time in law school. While this piece focuses on a binary gender marker correction, I have hope that one day nonbinary markers will be allowed on Texas identity documents too. I hope my words will continue the conversation and help push Texas towards more transgender affirming policies.

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Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.¹

Unfortunately for transgender Texans, this sentiment is not echoed in Texas law.² Many transgender Texans are unable to obtain gender marker corrections³ on their identifying documents which violates their rights and exposes them to discrimination and mistreatment.⁴

Imagine going into a store in the mall, being asked to produce a piece of identification, and the gender on your identification does not match the gender you are.⁵ Already subject to heightened scrutiny by strangers,

1. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

2. Cf. *ID Documents Center Texas*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/texas> [<https://perma.cc/MNM9-L2BU>] (last updated July 2021) (listing the requirements to obtain a gender marker correction in Texas.) (“Texas does not have a specific gender change provision in statute.”).

3. The term “gender marker correction” was chosen in order to use the most affirming language. In other literature on this subject, you may see gender marker corrections referred to as gender marker changes.

4. See *ID Documents Center Texas*, *supra* note 2 (advising transgender Texans to request gender marker corrections in Travis County because judges there are more likely to grant gender marker corrections); see also Swathi Narayanan, *Correcting Gender on IDs a Painful Hurdle for Transgender Texans*, REPORTING TEX. (May 3, 2016), <https://reportingtexas.com/for-transgender-texans-correcting-the-gender-on-id-documents-can-be-a-painful-hurdle/> [<https://perma.cc/847C-LQ7Q>] (giving examples of transgender Texans denied gender marker corrections by Texas courts and the mistreatment they faced as a result).

5. See Narayanan, *supra* note 4 (recounting one transgender Texan’s experience of being harassed and humiliated because the sex listed on her identification card did not match her gender).

you now face public humiliation because the courts will not allow you to correct your identification to match who you truly are.⁶ This was the case for one transgender Texan, simply because the gender listed on her identification card did not match her gender.⁷

This comment will discuss the process of correcting one's gender marker in Texas. Part One will discuss the history of the legal recognition of transgender people in the United States, the history of gender marker corrections generally, and the history of gender marker corrections specifically in Texas. Part Two will discuss the legal and policy reasons for creating a uniform process to correct one's gender marker in Texas and provide examples of how other jurisdictions have approached correcting gender markers. Finally, Part Three will propose processes to fully enable Texans statewide to obtain a gender marker correction.

Before proceeding, it is best to understand some of the vocabulary that will be used in this comment. The term "gender identity" refers to a person's innermost sense of self as male, female, both, or neither.⁸ A person is transgender if that person's gender identity does *not* match the sex that person was assigned at birth.⁹ A person is cisgender if that person's gender identity *does* match the sex that person was assigned at birth.¹⁰ A "gender marker" is the gender assigned to a person on official documents, for example, the M, F, or sometimes X on a person's birth certificate.¹¹ For purposes of this comment, the phrase "identifying documents" refers to any legal documents used to identify a person including birth certificates, identification cards, driver's licenses, and

6. *See id.* (explaining the difficult process of obtaining gender marker corrections and providing examples of how that process directly impacts the daily lives of transgender individuals).

7. *See id.* (recognizing Texas as one of nineteen states with no statutory guidelines on changing the gender on driver licenses and birth certificates).

8. *See Gender Identity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gender%20identity> [<https://perma.cc/2UT9-PWWD>] (defining the phrase gender identity).

9. *See Transgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/transgender> [<https://perma.cc/8BWL-99WQ>] (defining the word transgender).

10. *See Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/2QVF-4X2U>] (defining the word cisgender).

11. *See Change Your Gender Marker/Legal Gender*, TRANS*YOUTH@MD, <https://transyouthmd.wordpress.com/change-your-gender-marker/> [<https://perma.cc/R52E-VA7J>] (defining the phrase gender marker).

social security cards.¹² The acronym “LGBT” stands for lesbian, gay, bisexual, transgender.¹³ Often, we see this acronym as “LGBTQ+,” standing for lesbian, gay, bisexual, transgender, queer, questioning, and leaving room for other individuals who fall under the non-heterosexual, non-cisgender umbrella.¹⁴ Moving forward, it is also important to understand the history of legal recognition of transgender people in the United States to better understand the history of gender marker corrections in Texas.¹⁵

I. PART ONE: HISTORY

A. Generally

One of the first times transgender rights were considered in the public eye was in 1959 when Ms. Christine Jorgensen was denied a marriage license because the sex on her birth certificate was male and the person she sought to marry was a man.¹⁶ Ms. Jorgensen decided not to take this issue to court; however, it gained national attention by being published in

12. See *Identification Document*, L. INSIDER, <https://www.lawinsider.com/dictionary/identification-document> [<https://perma.cc/W669-H992>] (explaining the phrase identifying documents).

13. See *What is LGBTQ?*, THE CTR.: THE LESBIAN, GAY, BISEXUAL & TRANSGENDER CMTY. CTR., <https://gaycenter.org/about/lgbtq/> [<https://perma.cc/D5VJ-SA8W>] (providing the meaning of the letters L, G, B, T in the acronym LGBTQ).

14. See Rachel Rosen, *LGBTQ+ Glossary for Parents*, PARENT INFO, <https://parentinfo.org/article/lgbtq-glossary-for-parents> [<https://perma.cc/43X6-TSKE>] (defining the acronym LGBTQ+ and each of the terms contained within that acronym).

15. See *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 382 (N.Y. App. Div. 1966) (illustrating a mid-century American case that addressed a transgender individual’s request to correct the sex designated on their birth certificate. The case exhibits the medical and legal analysis undertaken to determine whether New York could permit changing one’s gender; in the end, the court ultimately denied the request.); cf. Telephone Interview with Claire Bow, Attorney and Transgender Advocate (Sept. 11, 2020) [hereinafter Interview with Claire Bow] (describing the story of one of the first persons seeking a gender marker correction in Austin, Texas only twenty years ago).

16. See Mariam Morshedi, *United States History and Laws Relating to Transgender Rights*, SUBSCRIPT L. (Jan. 5, 2019), <https://www.subscriptlaw.com/transgender-rights> [<https://perma.cc/59QX-247E>] (visualizing a timeline of significant events in transgender legal history); see also *Bars Marriage Permit: Clerk Rejects Proof of Sex of Christine Jorgensen*, N.Y. TIMES, April 4, 1959, at 20 [hereinafter *Bars Marriage Permit*] (explaining the denial of Ms. Jorgensen’s marriage license); see generally *From GI Joe to GI Jane: Christine Jorgensen’s Story*, THE NAT’L WWII MUSEUM (June 30, 2020), <https://www.nationalww2museum.org/war/articles/christine-jorgensen> [<https://perma.cc/DT6J-3L4K>] [hereinafter *Christine Jorgensen’s Story*] (overviewing Christine Jorgensen’s life and her journey into the public eye when she medically transitioned through gender affirmation surgeries).

the *New York Times*.¹⁷ This publicity caused her fiancé to lose his job, which was reflective of the attitudes towards transgender individuals and transgender rights at the time.¹⁸ After Jorgensen, one of the first cases brought by a transgender person seeking to have their gender marker corrected on their birth certificate occurred in New York in the late 1960s.¹⁹ Having her gender affirmation surgery already completed, a transgender woman requested the New York City Health Department correct her birth certificate by changing the gender marker from male to female.²⁰ The Health Department refused, so the woman sued and requested the court issue an order directing the Health Department to correct the gender marker on her birth certificate.²¹ The court's power to review the Health Department's denial of her application was limited to whether the Health Department acted in an "arbitrary, capricious, or otherwise illegal manner," and the court ruled the woman did not establish sufficient evidence that an error was made at the time her birth certificate was filed.²² The court also held that judicial intervention in this matter would be an usurpation of the Health Department's power, so it denied the woman's application to amend her birth certificate and

17. See *Bars Marriage Permit*, *supra* note 16, at 20 (reporting Ms. Jorgensen and Mr. Knox were denied a marriage license because Ms. Jorgensen's birth certificate listed her as "male" and that Mr. Knox lost his job when his plans to marry Ms. Jorgensen became known); see also *Christine Jorgensen Denied Marriage OK*, DEMOCRAT & CHRON., April 4, 1959, at 11 (linking Howard Knox's termination to the publicity surrounding their seeking a marriage certificate); *c.f.* *Life Story: Christine Jorgensen (1926–1989)*, WOMEN & THE AM. STORY, <https://wams.nyhistory.org/growth-and-turmoil/cold-war-beginnings/christine-jorgensen/> [<https://perma.cc/NK/G6-32D9>] (explaining Ms. Jorgensen never married).

18. See *Bars Marriage Permit*, *supra* note 16, at 20 (reporting denial of Ms. Jorgensen's marriage license); see also *Christine Jorgensen's Story*, *supra* note 16 ("The media soon shunned her and, according to author David Serlin, 'they exposed her as an "altered male"—and, later, a "morbid" transvestite . . . Jorgensen was seen as nothing more than a limp wristed queer who indulged in activities culturally identified as female and therefore effeminate.'") (recognizing that Jorgensen, like many members of the LGBT communities, experienced her share of hate and discrimination).

19. See *Weiner*, 270 N.Y.S.2d at 320–22 (noting ten states had already permitted a correction of gender marker for transgender people who had undergone gender affirmation surgery).

20. See *id.* at 320–21 (highlighting "transsexualism" as a highly unexplored field of medicine).

21. See *id.* (relying on the New York Academy of Medicine for guidance on whether to grant the request).

22. See *id.* at 323 (describing the standard of review the court applied in this case).

dismissed the action.²³ This case is important because it established that health departments in the United States were free to deny transgender individuals, even post-operative transgender individuals, gender marker corrections.²⁴

In 1975, a federal district court finally established that states must assert a substantial state interest to refuse to grant a gender marker correction.²⁵ In *Darnell v. Lloyd*, a transgender woman sued the State Commissioner of Health for refusing to correct her birth certificate by changing her gender marker from male to female, alleging that the Commissioner's failure to do so violated her constitutional rights.²⁶ The state moved for summary judgment, arguing Ms. Darnell's case was already adjudicated through administrative courts, and claimed they lacked statutory authority to make corrections to birth certificates.²⁷ The court held that because she was required to engage in administrative proceedings regarding the denial of her gender marker correction prior to filing a legal action, the fact that she had participated in those proceedings did not preclude her from bringing the lawsuit.²⁸ Importantly, the court also held that denying people gender marker corrections implicated fundamental rights such as the right to marry, the right to privacy, and the right to travel outside the country.²⁹ Given that fundamental rights are implicated in the denial of gender marker corrections, the court held that there must be a substantial state interest in refusing to correct the gender

23. *See id.* at 324 (upholding the denial of a transgender woman's application for an amended birth certificate).

24. *See id.* (denying a transgender woman's request to correct the gender marker on her birth certificate to match her gender identity, despite her having gone through gender affirmation surgeries).

25. *See Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) (establishing "a substantial state interest" as the level of scrutiny to be applied in reviewing a state's denial of amended birth certificate applications and explaining that the state failed to show an interest in their policy of refusing to correct birth certificates to reflect current sexual status).

26. *See id.* at 1211 (recounting Ms. Darnell's allegation that denying her an amended birth certificate violated her right to equal protection under the law).

27. *See id.* at 1211–12 (pointing out the discrepancy in the Commissioner's assertion that he lacked authority to make corrections to Ms. Darnell's birth certificate because another correction to Ms. Darnell's birth certificate had already been made).

28. *See id.* at 1212 (noting that Ms. Darnell would be placed in the "paradoxical position of being barred from the federal courts if [she] had not exhausted administrative remedies and barred if [she] had").

29. *See id.* at 1214 (noting the impact a government issued identification card has on one's life).

marker on post-operative transgender individuals' birth certificates.³⁰ The state did not establish a substantial state interest in denying gender marker corrections for Ms. Darnell, thus, its motion for summary judgment was denied.³¹ This case is important because it identifies which rights are implicated when denying gender marker corrections to transgender individuals' identifying documents.³² *Darnell* provides a starting point for recognizing some of the legal issues surrounding gender marker corrections for transgender individuals, and it helps to imagine how those same legal issues might be implicated for all transgender people.³³

In 1975, Minneapolis made history by being the first city to pass transgender-inclusive civil rights legislation.³⁴ The ordinance barred discrimination against people “having or projecting a self-image not associated with one’s biological maleness or one’s biological femaleness.”³⁵ The policy was the first of its kind to protect transgender people among several areas including: employment, union membership, property ownership, education, and public services and

30. See *id.* (applying intermediate scrutiny to the denial of gender correction petitions).

31. See *id.* (explaining the significance of this case); see also Morshedi, *supra* note 16 (marking this case as a significant moment in transgender legal history in the United States).

32. See *id.* (“[S]he will be unable to obtain a license to marry a man unless she can produce a birth certificate proclaiming her a female. The humiliation of carrying a passport declaring one to be of other than his or her apparent sex is eerily imagined. It may be that none of these consequences directly implicates one of the traditional ‘fundamental interests.’ But at least tangentially one’s fundamental interest in marriage is allegedly implicated.”); see also Morshedi, *supra* note 16 (marking this event on a timeline of significant events in transgender legal history in the United States).

33. See Jody Lynce Madera, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals’ Interests in legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 148 (2002) (illustrating *Darnell’s* impact on transgender case law).

34. See MINN. STAT. ANN. § 363A.03 (2020) (adopting Minneapolis’ resolution statewide); see also Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections*, NBC NEWS: OUT. POL. & POL’Y (June 3, 2016, 9:28 AM), <https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291> [<https://perma.cc/798R-ARQX>] (reporting on Minneapolis’s historic transgender civil rights ordinance in response to allegations that allowing transgender people to use restrooms comporting with their gender identity would “pose a serious threat” to safety).

35. See Margolin, *supra* note 34 (describing the process Minneapolis went through to become the first city to successfully pass protective ordinances for transgender individuals); *c.f.* § 363A.03 (reflecting Minneapolis’ city ordinance language).

accommodations.³⁶ When this policy was enacted, it did not face similar thinly veiled homophobic or transphobic criticisms paralleling the modern transphobic criticisms that policies protecting transgender people face today, including concern over the safety of cisgender females in bathrooms.³⁷ Keeping these modern criticisms in mind, it is worth noting that after the passage of this ordinance, Minneapolis did not see an increase in violence against women in bathrooms perpetrated by cisgender men pretending to be transgender, nor did it see an increase in violence against women in bathrooms perpetrated by transgender women.³⁸

In 1976, transgender individuals had another big win when the Superior Court of New Jersey was the first court to rule that transgender people could marry on the basis of their gender identity, regardless of their assigned gender.³⁹ While progressive for its time, the court also ruled that transgender individuals must have undergone gender affirmation surgery prior to being able to marry consistent with their gender identity.⁴⁰ Subsequent courts of other jurisdictions have refused to follow this logic and have declared void the marriages between transgender people and their spouses on the basis of the transgender person's sex assigned at birth.⁴¹ This case, however, was the first time

36. *See id.* (describing the scope of the Minneapolis ordinance and how it protects transgender rights); *c.f.* MINN. STAT. § 363A.02 (2020) (integrating Minneapolis' ordinance into Minnesota's civil rights public policy, thus protecting transgender Minnesotans from discrimination in employment, union membership, property ownership and rental, enrollment in schools, and the use of public services and accommodations).

37. *See* Margolin, *supra* note 34 (recounting how some folks testified against the ordinance's transgender protections and compared those criticisms with critiques of modern policies).

38. *See* Margolin, *supra* note 34 ("The reality is, of course, quite different. In Minneapolis, as in more than 200 cities and 18 states that have since adopted similar protections, no increase in bathroom-related violence has followed . . .").

39. *See* *M.T. v. J.T.*, 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976) (agreeing with the lower court's decision and explaining that courts should not prohibit transgender individuals from leading normal lives, that transgender people are not sideshows in a circus, and that the general public opinion towards transgender individuals should not govern the law surrounding them); *see also* Morshedi, *supra* note 16 (flagging this case as an important moment in transgender history).

40. *See* *M.T. v. J.T.*, 355 A.2d at 208 ("In the opinion of the court, if the psychological choice of a person is medically sound . . . and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life.").

41. *See* *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App.—San Antonio 1999, *pet. denied*) (holding that as a matter of law, because of her original birth certificate and anatomy at birth, Ms. Littleton was a male and could not have been married to her husband); *In re* Estate of Gardiner,

transgender people were allowed to marry individuals whose sex matched the transgender's assigned sex at birth, a big deal and a spark of hope for many transgender individuals.⁴²

Then, in 1989, a cisgender woman brought a case to the Supreme Court which would go on to form the basis of protection for transgender individuals in the years that followed.⁴³ In *Price Waterhouse*, the Supreme Court held that employers could not discriminate based on an employee's failure to comply with gender stereotypes.⁴⁴ This meant that an employer's ideas of what a woman should look like, for instance, could not underlie its decisions relating to providing or revoking a job opportunity or term, condition, or privilege of employment.⁴⁵ This is and was a key case in the protection of transgender rights in employment contexts, even though it did not directly address transgender issues.⁴⁶

42 P.3d 120, 137 (Kan. 2002) (holding that Ms. Gardiner's marriage to her husband was invalid because she was still a male, regardless of the order amending her birth certificate to show her gender marker as female).

42. See Morshedi, *supra* note 16 (identifying this case as an important moment in transgender legal history in the United States); see also Tom Head, *A History of Transgender Rights in the United States*, THOUGHTCO., <https://www.thoughtco.com/transgender-rights-in-the-united-states-721319> [<https://perma.cc/G8PA-32KC>] (last updated Nov. 24, 2020) (pinpointing this case as a landmark moment in United States transgender legal history).

43. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Comcast Corp. v. Nat'l Ass'n. Of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020). (holding that sex stereotyping can form the basis of a Title VII discrimination claim); see also *Smith v. City of Salem, Ohio*, 378 F.3d 566, 571 (6th Cir. 2004) (relying on *Price Waterhouse* to show transgender plaintiff was discriminated against based on sex stereotypes, and thus discriminated against based on sex); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (identifying discrimination against transgender people as discrimination based on sex under the *Price Waterhouse* standard); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (citing *Price Waterhouse* as authority to state that discrimination against gay, lesbian, and transgender individuals is impermissible sex-based stereotyping).

44. See *Price Waterhouse*, 490 U.S. at 251 (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”).

45. See *Bostock*, 140 S. Ct. at 1740 (“The statute imposes liability on employers only when they ‘fail or refuse to hire,’ ‘discharge,’ ‘or otherwise . . . discriminate against’ someone because of a statutorily protected characteristic like sex.”) (noting when Title VII imposes liability upon an employer).

46. See *Smith*, 378 F.3d at 571 (pointing to *Price Waterhouse* as the basis for the court's decision to hold discrimination based on transgender status is discrimination based on sex for the purpose of Title VII); *Glenn*, 663 F.3d at 1316-17 (identifying discrimination based on transgender status as discrimination based on sex stereotypes and thus discrimination based on sex per *Price*

In 1993, Minnesota became the first state in the United States to pass statewide protections for LGBT individuals.⁴⁷ The 1993 amendment to the Minnesota Human Rights Act was aimed at prohibiting discrimination against lesbian and gay individuals, but transgender people also saw protection from the passage of the amendment.⁴⁸ This law, the first of its kind, protected LGBT individuals from discrimination with respect to employment, housing, public accommodations and services, education, credit, and business contracting.⁴⁹ This was an important step towards equal rights and legal recognition for transgender individuals.⁵⁰

In 2004, a transgender woman named Jimmie Smith sued her employer, the city of Salem, Ohio, alleging discrimination based on sex under Title VII.⁵¹ Smith was employed as a lieutenant at the Salem Fire Department.⁵² She began her employment at Salem Fire Department presenting outwardly as a man, but she was later diagnosed with Gender Identity Disorder and told by her doctors to begin presenting as a female in all aspects of her life to help alleviate the symptoms of the disorder.⁵³ Ms. Smith was taunted by her coworkers and told she was not “masculine enough,” so she notified her supervisor of her condition and treatment

Waterhouse); Bostock, 140 S. Ct. at 1741 (citing to *Price Waterhouse* in its decision to uphold transgender protections in the employment context).

47. See § 363A.03 (adopting the language of the Minneapolis ordinance discussed earlier in this comment); see also Margolin, *supra* note 34 (noting Minnesota’s policy barring transgender discrimination was the first of its kind to protect LGBT people in this nation).

48. See *Legal & Trans Justice: We Fight for Your Rights*, OUTFRONT MINN., <https://www.outfront.org/legal-trans-justice> [<https://perma.cc/6RXT-CFQL>] (articulating that the Minnesota Human Rights Act definition of “sexual orientation” was broad enough to include transgender individuals); see also § 363A.03 (identifying the categories of persons protected by this civil rights protection law).

49. See generally § 363A.03; see also Margolin, *supra* note 34 (explaining that Minnesota was the first to pass transgender protections); see also *Legal & Trans Justice: We Fight for Your Rights*, *supra* note 48 (listing the rights protected under the Minnesota Human Rights Act).

50. See Tom Head *A History of Transgender Rights in the United States*, THOUGHTCO., <https://www.thoughtco.com/transgender-rights-in-the-united-states-721319> [<https://perma.cc/G8PA-32KC>] (last updated Nov. 24, 2020) (listing the passing of the Minnesota Civil Rights Act as a monumental step in transgender legal history in the United States).

51. See generally *Smith v. City of Salem, Ohio*, 378 F.3d 566, 567-68 (6th Cir. 2004) (reciting the facts of the case).

52. *Id.* at 568.

53. See *id.* at 568 (“After being diagnosed with GID, Smith began ‘expressing a more feminine appearance on a full-time basis’ . . .”).

protocol.⁵⁴ The supervisor convened a meeting at which a plan was devised to get Ms. Smith to quit.⁵⁵ Ms. Smith was ultimately suspended from the fire department.⁵⁶ The Equal Employment Opportunity Commission upheld the suspension, so Ms. Smith filed a lawsuit in federal court.⁵⁷ Again the suspension was upheld at the district court level when the district court granted summary judgment to Salem, Ohio; however, the appellate court held that the suspension was based on discrimination under Title VII as applied in *Price Waterhouse* and reversed the summary judgment.⁵⁸ The court held that the holding in *Price Waterhouse* extended the definition of discrimination based on “sex” to include discrimination based on a failure to conform to sex stereotypes, such as Ms. Smith’s not being “masculine enough.”⁵⁹ This case is significant because this was the first time *Price Waterhouse* was applied to a transgender individual’s discrimination claim, and it laid the foundation for future courts to apply *Price Waterhouse* precedent to protect transgender individuals.⁶⁰

54. *See id.* (stating Ms. Smith was in accordance with international medical protocols for treating Gender Identity Disorder).

55. *See id.* at 569 (revealing the fire department’s plan to get Ms. Smith to quit by forcing her to undergo three separate psychological evaluations performed by doctors of the department’s choosing).

56. *See id.* (reasoning that they could terminate Ms. Smith for insubordination for failure to comply with the department’s requirement to undergo psychological evaluations).

57. *See id.* (discussing the county court’s decision to reverse the suspension because the regulation Smith was alleged to have violated was not effective and she therefore could not be charged with violating it).

58. *See id.* at 573 (“In this earlier jurisprudence, male-to-female transsexuals [who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*]—as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection by courts because they were considered victims of ‘gender’ rather than ‘sex’ discrimination. However, the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*.”).

59. *See id.* (“By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”).

60. *See generally id.* at 572 (applying precedent set in *Price Waterhouse* to discrimination based on one’s transgender status); *see* Glenn v. Brumby, 663 F.3d 1312, 1316–18 (11th Cir. 2011) (identifying *Price Waterhouse* as the precedential foundation upon which this court’s decision was based); *see also* R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n, 140 S. Ct. 1731, 1741 (2020) (applying precedent from *Price Waterhouse* to hold that discrimination based on sexuality or transgender status is discrimination based on sex).

In 2010, the State Department announced its policy for allowing individuals to amend their passports to reflect their gender.⁶¹ To obtain a passport that reflects one's current gender, an individual must apply for a new passport with a licensed physician's certification confirming they have had "appropriate clinical treatment for gender transition."⁶² Notably, there is no specific requirement for what medical treatment must be undergone.⁶³ This policy was a big improvement from the previous policy, which required transgender individuals to have undergone gender affirmation surgery to obtain a passport which matches their gender.⁶⁴

In 2010, the Obama administration added language to the federal jobs website that appeared to ban gender identity-based discrimination in federal jobs.⁶⁵ This small step led towards big action in 2014, when President Obama signed Executive Order 13672 which added "gender identity" and "sexual orientation" to the categories of discrimination

61. See *Selecting Your Gender Marker*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> [<https://perma.cc/JBU5-K6TJ>] (laying out new requirements to obtain a gender marker correction on a United States passport); see also *Know Your Rights | Passports*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/passports> [<https://perma.cc/AQV2-5QTB>] (informing the public about the updated policy).

62. See *Selecting Your Gender Marker*, *supra* note 61 (announcing further steps toward ensuring the fair treatment of LGBT citizens); see also *Know Your Rights | Passports*, *supra* note 61 (providing answers to questions frequently asked by those seeking to correct their gender markers on passports).

63. But see *Selecting Your Gender Marker*, *supra* note 61 (declaring an individual no longer needs to provide medical certification or a physician's letter when applying for a U.S. passport in a gender that does not match the gender on one's citizenship evidence or photo ID); see also *Know Your Rights | Passports*, *supra* note 61 ("In June 2021, the State Department announced that it would no longer require passport applicants to submit medical certification to change the gender marker on their passports. Under this policy, a transgender person can obtain a passport reflecting their gender by submitting an application with the chosen gender marker selected. This policy replaced the Department's old policy requiring certification by a physician . . .").

64. See *Know Your Rights | Passports*, *supra* note 61 (indicating the old policy required documentation of gender affirmation surgeries for obtaining a gender corrected passport).

65. See Brian Knowlton, *U.S. Job Site Bans Bias Over Gender Identity*, N.Y. TIMES (Jan. 6, 2010), <https://www.nytimes.com/2010/01/06/us/06gender.html> [<https://perma.cc/9QZS-GMEW>] ("The Obama administration has inserted language into the federal jobs Web site explicitly banning employment discrimination based on gender identity."); see also *Transgender Rights Legal Landscape*, SUBSCRIPT L., <https://www.subscriptlaw.com/transgender-rights> [<https://perma.cc/59QX-247E>] (reporting civil liberties and gender rights groups welcomed the change).

protected against in employment contexts for the federal civilian workforce and federal government contractors and subcontractors.⁶⁶

Finally, in 2020, the Supreme Court held that for purposes of Title VII complaints, discrimination against transgender individuals constitute discrimination based on sex.⁶⁷ This decision extended Title VII employment protection to transgender individuals across the United States, not just in states with anti-discrimination laws that encompass transgender people.⁶⁸

Understanding the history of the legal recognition of transgender people, particularly the recency of it, helps to understand the history of gender marker corrections in Texas.⁶⁹

B. Texas

The history of gender marker corrections in Texas is, like much of queer history, largely unwritten.⁷⁰ One of Texas' earliest transgender rights cases involved a transgender woman in Austin.⁷¹ In that case, the woman went to a Travis County court seeking a name and gender marker

66. See Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014) (depicting the various gender identity and sexual orientation amendments to Executive Order 11478); see also Morshedi, *supra* note 16 (listing important historic legal advances for transgender communities including President Obama's gender identity executive order).

67. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that discrimination against a person based on their sexual orientation or gender identity constitutes sex-based discrimination under Title VII).

68. See *id.* at 1754 (“An employer who fires an individual merely for being gay or transgender defies the law.”); see also Julie Moreau, *Supreme Court's LGBT Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020, 3:40 AM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779> [<https://perma.cc/3XG3-GUVS>] (emphasizing the legal and social significance of the landmark ruling in *Bostock v. Clayton County*).

69. See Kritika Argarwal, *What is Trans History?*, AM. HIST. AS (May 1, 2018), <https://www.historians.org/publications-and-directories/perspectives-on-history/may-2018/what-is-trans-history-from-activist-and-academic-roots-a-field-takes-shape> [<https://perma.cc/5ZBY-4JAG>] (discussing the importance and value of studying transgender history when transgender people are experiencing increased media visibility, hostile legislation, negative political rhetoric, and violence).

70. See Interview with Claire Bow, *supra* note 15 (mentioning the unwritten nature of LGBT history).

71. See *id.* (relaying the story of one transgender Texan who was able to obtain a name and gender marker correction early in the history of name and gender marker corrections in Texas).

correction but was denied.⁷² The woman was a student at the University of Texas, and one of the Texas Law professors took her case.⁷³ The professor successfully convinced the court to grant the order allowing the woman to obtain a name and gender marker correction.⁷⁴ Although this woman's case was decided nearly twenty years ago, it did not open the floodgates to allow name and gender marker corrections in Texas.⁷⁵

Phyllis Frye was one of the first attorneys to really start exploring the process of name and gender marker corrections and advancing their accessibility to the transgender public.⁷⁶ There were a few judges who understood name and gender marker corrections and believed them to be necessary for transgender individuals to lead normal lives. Phyllis Frye took name and gender marker correction cases and ensured they went to courts where they had a higher chance of approval.⁷⁷ Everything was very “hush, hush” at the time, meaning that procedures for name and gender marker corrections were often secretive and mostly unknown to the public.⁷⁸ The names of judges who would grant name and gender marker corrections were considered to be a trade secret within the transgender community.⁷⁹ Ms. Frye had her clients sign non-disclosure agreements to ensure these secrets were kept.⁸⁰

When transgender activist and attorney, Claire Bow, transitioned, she began seeking guidance on the name and gender marker correction

72. *See id.* (describing the facts of an early Texas name and gender marker case in Travis County).

73. *See id.* (recounting the history of one transgender person's struggle to obtain a name and gender marker correction in Texas and the assistance of a law professor during her legal struggle).

74. *See id.* (narrating the outcome of an early name and gender marker correction case in Texas).

75. *See id.* (examining the impact of an early name and gender marker correction case in Texas).

76. *See id.* (identifying Phyllis Frye, Karen Langsley, and Christine Andressen as the first people to really start bringing name and gender marker correction cases to the Texas courts).

77. *See id.* (relaying the secretive history of the early days of obtaining gender marker corrections in Texas and explaining how difficult it was to get name and gender marker corrections approved by the courts, and the lengths individual attorneys would go through for their clients to obtain them).

78. *See id.* (reflecting on the early days of acquiring name and gender marker corrections in Texas).

79. *See id.* (recognizing the importance of keeping the judges' information private).

80. *See id.* (acknowledging that lawyers and judges were both responsible for keeping gender marker corrections a secret, including the identities of the judges that were granting them).

process.⁸¹ She spent almost a year researching and trying to come up with a legal theory to support her name and gender marker correction.⁸² At the end of the year, she had an idea of how it could be done and found adequate legal support for it.⁸³ She filed her petition in Travis County.⁸⁴ The judge heard her case and looked at her pleadings for an extended period of time before ultimately granting the name and gender marker correction.⁸⁵ Through her research, Claire found there were a few attorneys besides Phyllis Frye who had been getting name and gender marker corrections quietly for their clients for some time.⁸⁶

Eventually, Claire Bow began speaking about the processes to obtain name and gender marker corrections, and judges asked her if she would do a presentation about the law and to discuss the authority they had to hear name and gender marker correction cases.⁸⁷ As a result, the courts saw an increasing number of name and gender marker correction cases being filed.⁸⁸

A student at Texas Law reached out to Claire Bow about starting a clinic to help transgender community members needing assistance with name and gender marker corrections.⁸⁹ The clinic is now well-established and has grown since its inception.⁹⁰ Travis County

81. *See id.* (relaying her own experience in obtaining a name and gender marker correction in Texas).

82. *See id.* (conveying the arduous process of researching and writing arguments for a gender marker correction).

83. *See id.* (mentioning how she looked for guidance on how to get her own name and gender marker corrected and how long and complicated the process turned out to be).

84. *See id.* (discussing her experience of formulating a legal argument to obtain a gender marker correction).

85. *See id.* (emphasizing the longevity of the process for a name and gender marker correction).

86. *See id.* (recalling how the judge considered her pleadings for a very long time to ensure that she granted Ms. Bow all the relief she could and how very few attorneys were known to have the same relief granted for their clients).

87. *See id.* (bringing gender marker corrections out of the shadows and into the forefront of the courtroom).

88. *See id.* (describing how one student created positive change to fill a need in the community by setting up a gender marker correction clinic).

89. *Id.* (exemplifying the need in the community for competent assistance obtaining gender marker corrections).

90. *See id.* (detailing the large strides the clinic has made since its inception and remarking on how the clinic continues to grow to this day, filling a void for the transgender communities that have been in the shadows for so long).

recognized the need as well, and Claire Bow began working with the county law library to develop a set of forms and instructions for people preparing to represent themselves in name and gender marker correction cases.⁹¹

Currently, Texas Vital Statistics will only issue a new birth certificate with a corrected gender marker if there is a court order for the change of sex.⁹² Currently, there is not a statute in place which directs legal gender correction.⁹³ The lack of a state statute, coupled with biases surrounding transgender individuals, leads many judges across Texas counties to refuse to grant orders which would allow transgender individuals to correct their birth certificates to match their gender.⁹⁴ Counties that do allow gender marker corrections do not have a uniform process or set of requirements for those petitioning the courts for a gender marker correction.⁹⁵

II. PART TWO: ANALYSIS

Widespread denial of and lack of uniformity in the process for obtaining a gender marker correction is unjust, illegal, and it violates public policy.⁹⁶

91. *See id.* (continuing to provide additional resources to transgender individuals so they have the ability to obtain a gender marker correction); *see generally* *Adult Gender Identifier Change Kit*, TRAVIS CNTY. L. LIBR., <https://lawlibrary.traviscountytx.gov/images/pdf/Gender/tc-fm-gil-kit-adult-gender-identifier-change-kit.pdf> [<https://perma.cc/8XU8-QBUA>] (last updated June 2019) (providing the community with instructions and forms for obtaining a gender marker correction in Travis County courts).

92. *See* Tex. Health & Safety Code Ann. § 192.011 (prescribing a form which describes the requirement of a court order for amending the sex on a birth certificate).

93. *See ID Documents Center Texas*, *supra* note 2 (explaining the process to get a gender marker correction in layman's terms and providing background information as to Texas' lack of a gender correction statute).

94. *See id.* (advising people to request gender marker corrections in Travis County, where judges are known to grant gender marker corrections).

95. *Cf. Gender Affirmation Project: Know Your Rights Info Session LIVE*, FACEBOOK (Aug. 10, 2020), <https://www.facebook.com/pridecentersa/videos/3404195716307095> [<https://perma.cc/A8PH-84M5>] (discussing how different judges in the same county do things differently at 26:00).

96. *See* Scott Skinner-Thompson, *Why Trans People Have a Constitutional Right to Change Their Birth Certificates*, SLATE (April 27, 2017, 9:02 AM), <https://slate.com/human-interest/2017/04/transgender-people-have-a-constitutional-right-to-change-their-birth-certificates.html> [<https://perma.cc/MXC3-27HP>] (expounding the reasons transgender people have a constitutional right to correct their gender markers); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105

A. Discrimination Based on Gender Stereotypes

The Supreme Court has ruled that discrimination based on a person's failure to comply with gender stereotypes is discrimination based on sex.⁹⁷ In *Price Waterhouse v. Hopkins*, Ann Hopkins brought suit against her employer after she was denied partnership at the firm, alleging she was discriminated against on the basis of her sex.⁹⁸ Hopkins was praised in her evaluations as “outstanding” and “virtually at the partner level.”⁹⁹ Unfortunately, Hopkins was also regarded as “macho” by the partners at Price Waterhouse, and one of the partners suggested that she needed to “take a course at charm school.”¹⁰⁰ The Supreme Court found that Price Waterhouse terminated Ms. Hopkins due to her failure to conform to gender stereotypes.¹⁰¹ The Supreme Court ruled her termination was impermissible and constituted discrimination based on sex, as prohibited by Title VII.¹⁰²

Stat. 1071, as recognized in *Comcast Corp. v. Nat'l Ass'n. Of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (identifying discrimination based on sex stereotypes as discrimination based on sex); *Arroyo v. Rossello*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018) (declaring forced disclosure of transgender status through a refusal to allow transgender people to correct their identity documents as a violation of transgender people's fundamental right to privacy); cf. Ayden I Scheim et al., *Gender Concordant Identity Documents and Mental Health Among Transgender Adults in the USA: A Cross-Sectional Study*, 5 LANCET PUB. HEALTH e196 (2020) (reporting gender concordant identification is correlated with positive mental health outcomes); Arjee Restar et al., *Legal Gender Marker and Name Change is Associated with Lower Negative Emotional Response to Gender-Based Mistreatment and Improve Mental Health Outcomes Among Trans Populations*, 11 SSM POPULATION HEALTH 100595 (2020) (identifying formal legal name and gender marker corrections as an indicator of positive mental health outcomes among transgender individuals).

97. See *Price Waterhouse*, 490 U.S. at 251 (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”).

98. See *id.* at 231–32 (reciting the facts of the case).

99. See *id.* at 233 (regarding Hopkins' successful two-year effort to secure a twenty-five million contract).

100. See *id.* at 235 (relaying that her bosses advised Hopkins to wear makeup, style her hair, wear jewelry, and walk, talk, and dress more femininely).

101. See *id.* at 250 (holding *Price Waterhouse's* decision not to promote Ms. Hopkins to partner was based, at least in part, on Ms. Hopkins' failure to comport with stereotypes about how a woman should look, dress, and behave.)

102. See *id.* at 251 (“[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”) (quoting *L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978)).

In the instant case, transgender people are being discriminated against based on their failure to conform to sex stereotypes.¹⁰³ Not allowing transgender people to correct their gender markers because of antiquated notions about genitals equaling gender is discriminatory.¹⁰⁴ That restriction amounts to the sort of gender stereotyping found impermissible in *Price Waterhouse*.¹⁰⁵

Furthermore, not allowing individuals to correct their gender marker on their identifying documents exposes them to discrimination based on gender stereotypes by other individuals and entities.¹⁰⁶ Individuals forced to reveal their transgender status by presenting identity documents that do not comport with the gender they present outwardly are often discriminated against and consequently humiliated.¹⁰⁷

The Supreme Court recently held that discrimination against transgender individuals for being transgender constitutes discrimination

103. *E.g.*, John Wright, *Texas Court Says Trans Man Can't be Listed as Male on His Driver's License*, TEX. OBSERVER (Aug. 11, 2016, 10:46 AM), <https://www.texasobserver.org/texas-appeals-court-says-trans-man-cant-be-listed-as-male-on-drivers-license/> [<https://perma.cc/K248-5DFW>] (providing an example of one person being denied access to a gender marker correction and describing the consequences of that denial including humiliation, loss of the funds used to attempt to obtain a gender marker correction, and other devastating consequences).

104. *See* *Price Waterhouse*, 490 U.S. at 251 (ruling discrimination based on sex stereotypes constitutes impermissible discrimination based on sex); *see also* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (finding legal protection for transgender individuals in the precedent set by *Price Waterhouse*); *see also* *Arroyo v. Rossello*, 305 F. Supp. 3d 327, 332–33 (D.P.R. 2018) (stating that denying transgender people the right to correct their gender markers forces them to disclose their transgender status, and holding that forced disclosure as an impermissible violation of the individual's right to privacy); *see also* *Skinner-Thompson*, *supra* note 96 (identifying ways in which not allowing transgender people to correct their gender markers violates the constitution); *see also* *Narayanan*, *supra* note 4 (“Many judges think it is not legal to change your sex. If you are a girl, you stay a girl,” said Claire Bow . . .”).

105. *See* *Bostock*, 140 S. Ct. at 1741 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)) (identifying discrimination based in any part on sex as discrimination in violation of Title VII); *see generally* *Price Waterhouse*, 490 U.S. at 251 (recognizing discrimination based on sex stereotypes, such as ideals about how women should look or act, is discrimination based on sex).

106. *E.g.*, *Narayanan*, *supra* note 4 (“Having accurate documents is ‘a prerequisite of everyday life in order to function in society, in order to maintain a job, in order to basically do anything’ . . .”) (quoting chief executive of Equality Texas, Chuck Smith).

107. *See id.* (describing how a cashier at a store loudly called their store manager to point out that a transgender individual was dressed like a girl but their ID said they were a boy causing other customers to overhear).

“because of sex.”¹⁰⁸ In *R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm’n*, R.G. and G.R. Harris Funeral Homes fired Aimee Stephens after she told her bosses she would begin living full time as a female.¹⁰⁹ Ms. Stephens sued alleging sex discrimination under Title VII.¹¹⁰ The Court held that it is impossible to discriminate against a person based on their transgender status without discriminating against them based upon sex.¹¹¹ Labeling the policy as discriminating based on transgender status rather than sex did not have an effect on the Court’s ruling; it held that no matter what the policy is called or what other additional intentions might be behind the discrimination, discrimination based on transgender status is discrimination based on sex.¹¹²

At present, transgender individuals being denied access to gender marker corrections based on their transgender status constitutes discrimination under *R.G. and G.R. Harris Funeral Homes*.¹¹³ While Texas does not outright ban transgender individuals from correcting their gender markers, the practice of courts not granting gender marker corrections for transgender individuals coupled with the list of documentation acceptable to the Department of State Health Services leaves many transgender people unable to have their birth certificates amended to match their gender.¹¹⁴ Without an amended birth certificate,

108. See *Bostock*, 140 S. Ct. at 1742–43 (“So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.”).

109. See *id.* at 1738 (explaining how Ms. Stephens presented herself as a male when she got the job but was recommended to begin living as a woman two years into her service with the company after being diagnosed with gender dysphoria by her clinicians. Ms. Stephens wrote a letter on her sixth year of service with the company explaining she was going to implement her plan upon returning from a vacation, but her employers fired her before she left.).

110. See *id.* (stating that this cause of action was brought by multiple employees from different companies who had similar experiences as Ms. Stephens).

111. See *id.* at 1741 (“That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

112. See *id.* (“Intentionally burning down a neighbor’s house is arson, even if the perpetrator’s ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer’s ultimate goal of discriminating against homosexual or transgender employees.”).

113. Cf. Narayanan, *supra* note 4 (“Many judges, specifically those that are very conservative, feel that they do not have the authority to do it because it has not been set out by the Legislature,” Sprinkle said.”).

114. See *Correcting a Birth Certificate*, *supra* note 114 (providing a list of documents that are accepted by the Department of State Health Services to obtain a gender marker correction);

transgender individuals may not be able to obtain a driver's license that matches their gender identity, leaving them with at least two identity documents that do not reflect their gender and exposing them to potential violations of privacy.¹¹⁵

B. Right to Privacy

“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹¹⁶ This freedom of expression, identified as a constitutional right in *Lawrence v. Texas*, can and should protect transgender individuals and their right to express their gender in any way they see fit.¹¹⁷ Likewise, autonomy of self should be extended to include the right to choose which gender is reflected by the gender marker on one's identity documents.¹¹⁸ This extension would allow transgender individuals to express their gender identity outwardly without being questioned, harassed, or humiliated for having identity documents which do not match their outward gender presentation.¹¹⁹

see also Narayanan, *supra* note 4 (referencing examples of transgender Texans who were denied gender marker corrections).

115. *See Identification Requirements*, TEX. DEP'T OF PUB. SAFETY, <https://www.dps.texas.gov/driverlicense/identificationrequirements.htm> [<https://perma.cc/MH6L-F2Q2>] (listing an original or certified copy of a revised birth certificate as an acceptable form of identification with which an individual can verify their identity and obtain a Texas driver's license or identification card); *see also* Narayanan, *supra* note 4 (providing an example of a transgender Texan being outed at a mall because her identification card did not match her gender presentation).

116. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (identifying liberty as an interest that stretches to cover freedom of expression. In this case, the plaintiffs were convicted of sodomy in violation of Texas law. The plaintiffs appealed, alleging an infringement of their due process rights under the Fourteenth Amendment. The court held that the statute under which the plaintiffs were convicted violated the plaintiffs' due process rights.).

117. *See generally* Emma Ferriola-Bruckenstein, *Policing Gender in Violation of the First Amendment*, FIRST AMEND. L. REV. (May 9, 2018), <https://firstamendmentlawreview.org/2018/05/09/policing-gender-in-violation-of-the-first-amendment/> [<https://perma.cc/D37Z-WVX6>] (pointing to case law that protects different forms of freedom of expression and applying it to gender expression).

118. *See generally id.* (describing how gender expression is a form of protected First Amendment expression).

119. *See* Narayanan, *supra* note 4 (“When the cashier noticed the difference, she called the store manager and said in a loud voice that other customers could hear, ‘I got a customer. It is dressed as a girl but its ID says it’s a boy.’”).

Furthermore, many Texas counties' practice of not allowing people to correct their gender marker is a violation of this fundamental right to privacy.¹²⁰ As it stands, many transgender people in Texas are forced to disclose their transgender status every time they must show their identification documents.¹²¹ At least one court has ruled that the government cannot force such a disclosure without a legitimate state interest.¹²²

While arguments against gender marker corrections are hard to come by, some have argued that states have a compelling interest in protecting national security and decreasing identity fraud in denying gender marker corrections to transgender individuals.¹²³ These arguments simply do not hold water.¹²⁴

The argument that correcting legal gender markers threatens national security is founded in the fear that individuals will change their gender marker to escape a criminal history.¹²⁵ In practice, however, identity vetting processes, such as background checks, require individuals to disclose their previous identities.¹²⁶ These screening processes can detect individuals with criminal backgrounds, just as it can for individuals who have changed their names.¹²⁷

120. *See* Arroyo v. Rossello, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (“Disclosing that one is transgender involves a deep personal choice which the government cannot compel, unless disclosure furthers a valid public interest.”).

121. *See* Narayanan, *supra* note 4 (providing several examples of transgender individuals being “outed” by their identity documents, such as Ms. Sprinkle’s experience, discussed at the outset of this comment).

122. *See* Arroyo, 305 F. Supp. 3d at 333 (indicating that forced disclosure of a person’s transgender status is a violation of their constitutional right to privacy and that such disclosure is not justified by any legitimate government interest).

123. *See* Lisa Skeen, *Gender Identity Recognition at the Border and Beyond*, OPEN SOC’Y FOUND. (April 5, 2017), <https://www.opensocietyfoundations.org/voices/gender-identity-recognition-border-and-beyond> [<https://perma.cc/8F7J-EDRY>] (identifying and refuting arguments regarding transgender friendly policies and identifying documents).

124. *See generally*, *License to be Yourself: Responding to National Security and Identity Fraud Arguments*, OPEN SOC’Y FOUND. (Apr. 2017), <https://www.opensocietyfoundations.org/uploads/e17198d5-a082-4747-b7e9-9ab1fb90347b/lgr-national-security-identity-fraud-2017-0202.pdf> [<https://perma.cc/QGB3-NY8R>] (responding to arguments opposing transgender friendly identity document policies based on national security and identity fraud).

125. *See id.* (acknowledging and rebutting arguments against allowing transgender people to correct their gender markers).

126. *See id.* (supporting the rebuttal of national security arguments by analogizing to name correction processes).

127. *See id.* (analogizing to individuals who have corrected their name).

In fact, not allowing individuals to correct their gender markers may even pose a more significant national security threat than allowing individuals to correct their gender markers.¹²⁸ Verifying individuals' identity whose gender presentation does not match the designated sex on their identity documents is difficult, especially given that we do not (and should not) examine an individual's genitals every time they present a piece of identification.¹²⁹ Further, individuals whose gender expression does not match their identifying documents may be subjected to unnecessarily heightened scrutiny at security checkpoints, diverting valuable time and resources from actual threats.¹³⁰ Allowing transgender individuals to correct their gender markers on identifying documents does not present a threat to national security; therefore, national security is not a relevant, compelling state interest in denying transgender people the right to correct their gender markers.¹³¹

There is also an argument that individuals may change their gender markers to assume a fraudulent identity; and therefore, denying marker corrections reflects a compelling governmental interest in preventing identity fraud.¹³² This argument, however, is baseless.¹³³ There is no evidence to support the argument that legal gender corrections lead to an increase in fraud.¹³⁴ Furthermore, any legal change to identifying documents can always be traced back to the original identity, thus eliminating the risk of fraud.¹³⁵

128. *See id.* ("Where trans individuals are unable to access recognition, it is more likely that they will present identification documents which do not reflect their presentation. This creates an environment where incongruent identity documents are normalized and authorities become desensitized to incongruent documentation.")

129. *See, e.g., id.* (confronting national security arguments for banning gender marker corrections).

130. *See generally id.* (discussing how transgender individuals are subjected to heightened scrutiny at airport security checkpoints and in other places).

131. *See id.* (addressing the argument that gender marker corrections pose a national security threat).

132. *See id.* (discussing and providing rebuttals to the identity fraud argument).

133. *See id.* ("There is no evidence that simplified legal gender recognition laws have resulted in greater levels of fraud.")

134. *See id.* (outlining the discussions surrounding identity fraud and the lack of empirical evidence confirming gender marker corrections increase, or even lead to, fraudulent activity).

135. *See id.* (pointing out that despite the argument that gender marker corrections could be used for fraudulent purposes, the process itself is traceable and individuals are easily identified through a legal paper trail).

As far as the implications for national security and identity fraud go, changing one's gender marker is similar to changing one's name.¹³⁶ When a person changes their name in Texas, they are required to provide a number of identifying and background information: (1) present name and place of residence; (2) full name; (3) reasons for name change; (4) details about their criminal history such as final felony convictions and whether registration is required pursuant to Chapter 62; (5) their social security number; (6) a list of driver's licenses issued to them in the past ten years; and (7) a copy of their fingerprints.¹³⁷ Fraud and security are less of a concern with name changes because individuals provide so much information connecting their past identity with the name they are requesting.¹³⁸ Gender marker corrections should not be any different.¹³⁹

The government cannot force people to disclose their transgender status without furthering a valid public interest.¹⁴⁰ Forcing disclosure of an individual's transgender status violates the right to privacy as established in *Lawrence v. Texas*.¹⁴¹ Texas needs to act now to rectify this injustice and implement a process that will allow transgender people the opportunity to correct their gender markers to match their gender expression.¹⁴²

136. *See id.* (analogizing changing one's gender marker to changing one's name).

137. *See* Tex. Fam. Code Ann. § 45.102 (listing the requirements for the change of name of an adult in the state of Texas).

138. *See License to be Yourself: Responding to National Security and Identity Fraud Arguments*, *supra* note 125 (asserting there has been little evidence to indicate that gender marker corrections and progressive gender recognition policies lead to fraud).

139. *See generally id.* (lending support for allowing progressive gender affirmation policies, including allowing individuals to correct their gender markers).

140. *See* *Arroyo v. Rossello*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (noting that identifying as transgender is a deeply personal choice that the government cannot compel unless it furthers a valid public interest).

141. *See* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (establishing an individual's right to privacy and autonomy of the self, including freedom of expression); *see also* *Arroyo*, 305 F. Supp. 3d at 333 (D.P.R. 2018) (holding that the Constitution protects persons from government intrusions to their autonomy of self, freedom of thought, belief, expression, and certain intimate conduct).

142. *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

C. Public Policy

Beyond the fact that not allowing transgender people to correct their gender markers is discriminatory and violative of the constitutional right to privacy, not allowing transgender people to correct their gender markers is also against public policy.¹⁴³ Generally, the State of Texas should want its citizens to be happy and healthy; including individuals whose identity documents are not concordant with their gender presentation as they are more likely to experience depression and suicidal ideation.¹⁴⁴ Conversely, people who can obtain legal name and gender marker corrections have more positive mental health outcomes.¹⁴⁵

Not allowing people to correct their legal gender marker is thus against the state's interest.¹⁴⁶

Furthermore, people whose identity documents do not match their outward gender presentation are likely to struggle finding employment and housing and therefore struggle to meet their basic needs.¹⁴⁷ This

143. See generally, Andrew Cray & Jack Harrison, *ID Accurately Reflecting One's Gender is a Human Right*, CTR. FOR AM. PROGRESS (Dec. 18, 2012, 4:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2012/12/18/48367/id-accurately-reflecting-ones-gender-id-entity-is-a-human-right/> [<https://perma.cc/XE54-HTAL>] (discussing how individuals without gender concordant identification documents are subject to discrimination in employment and housing); see Scheim et al., *supra* note 96 (identifying gender concordant identity documents as an indicator of mental health outcomes); see also Restar et al., *supra* note 96 (identifying legal name and gender marker corrections as a positive indicator of better mental health outcomes for transgender individuals).

144. See Scheim et al., *supra* note 96 (discussing positive mental health outcomes associated with legal name and gender marker corrections for transgender individuals); see also Restar et al., *supra* note 96 (suggesting gender affirmation may be associated with lower reported rates of adverse psychological outcomes); see also Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 792 (2008) (emphasizing the importance of legal name and gender marker corrections for transgender individual and the positive mental health outcomes associated with them).

145. See Scheim et al., *supra* note 96 (indicating the positive impacts on mental health of transgender individuals who are able to receive gender marker corrections on identity documents); see also Restar et al., *supra* note 96 (illustrating the importance of having access to changing gender markers for transgender individuals and the impact it has on their mental health).

146. See Scheim et al., *supra* note 96 (describing the negative mental health outcomes of transgender individuals whose identity documents do not match their outward gender presentation); see also Restar et al., *supra* note 96 (identifying positive mental health outcomes as a result of legal gender marker and name corrections).

147. See generally Cray & Harrison, *supra* note 144 ("Furthermore, those respondents who were unable to update their driver's licenses reported much higher rates of discrimination in hiring and housing.").

could lead to transgender individuals being more dependent upon state assistance or falling through the cracks.¹⁴⁸ Neither of these possible outcomes are in the best interest of Texas or its citizens.¹⁴⁹

A uniform process to obtain gender markers is so important to human rights and the well-being of citizens that the Center for Disease Control (“CDC”) has released a model law that provides for the correction of gender markers on birth certificates for transgender people.¹⁵⁰

D. *The Model State Vital Statistics Act*

In 1907, the United States Census Bureau released a model law—the Model State Vital Statistics Act and Regulations (“MSVSA”)—which addressed, among other things, the amendment of birth certificates.¹⁵¹ The MSVSA has been updated five times since its 1907 release; the responsibility for drafting its amendments has shifted first from the United States Census Bureau to the Department of Health, Education, and Welfare, and finally to the Department of Health and Human Services, who issued the latest version through the CDC.¹⁵²

148. See generally *Issues | Housing & Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> [<https://perma.cc/3G4V-VS58>] (“Homelessness is also a critical issue for transgender people; one in five transgender individuals have experienced homelessness at some point in their lives.”) (discussing transgender issues for people experiencing homelessness in shelters).

149. Compare *id.* (providing information about the alarming rates of homelessness among transgender communities), with Cray & Harrison, *supra* note 144 (reporting on discrimination in employment and housing faced by transgender people without gender concordant identity documents).

150. See CTR. FOR DISEASE CONTROL & PREVENTION, MODEL STATE VITAL STAT. ACT & REGUL. 10 (1992) [hereinafter MODEL STATE VITAL STAT. ACT] (modeling a law that states can adopt to mandate the correction of birth certificates for transgender people).

151. See ALICE M. HETZEL, U.S. DEP’T OF HEALTH & HUM. SERV., U.S. VITAL STAT. SYS., 1950–95 5 (1997) (identifying the transition of responsibility from the United States Census Bureau to Department of Health, Education, and Welfare, to the Department of Health and Human Services); see CTR. FOR DISEASE CONTROL & PREVENTION, *Preface* to MODEL STATE VITAL STAT. ACT & REGUL. (1992) [hereinafter *Preface*] (discussing the history of the Model State Vital Statistics Act); see also Lisa Mottet, *Modernizing State Vital Stat. Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Accurate Gender Markers on Birth Certificates: A Good Gov’t Approach to Recognizing the Lives of Transgender Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 380 (2013) (recounting the history of the Model State Vital Statistics Act).

152. See HETZEL, *supra* note 152 (relating how responsibilities have shifted through different organizations over time); see also Mottet, *supra* note 152, at 380 (providing an overview of the history of the Model State Vital Statistics Act).

The latest version of the MSVSA was released in 1992.¹⁵³ The MSVSA was in the process of being revised and updated in 2011, but these updates were never released.¹⁵⁴ Because the latest updates were in 1992—almost thirty years before this comment—it is important to understand that the MSVSA reflects a dated understanding of sex and gender.¹⁵⁵

The MSVSA recommends states allow people to update their birth certificates to reflect their gender identity “[u]pon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure,”¹⁵⁶ and also recommends that amended birth certificates should indicate that they have been amended.¹⁵⁷ Both recommendations are problematic and could be harmful for transgender people seeking to follow these guidelines.¹⁵⁸ This comment addresses the issues raised by both requirements below.

1. *The Surgical Requirement*

The surgical requirement is problematic for many reasons: it is paternalistic, invasive, and impractical.¹⁵⁹ The surgical requirement restricts the freedoms of transgender individuals to choose how to express their gender identity by forcing them to medically transition in order to be legally seen as their gender.¹⁶⁰ It further restricts their freedom by

153. *Preface supra* note 152; *see also* Mottet, *supra* note 152, at 380 (emphasizing the outdatedness of the model regulations).

154. *See* Mottet, *supra* note 152, at 380 (noting that the revisions were not released because they were never agreed upon).

155. *See id.* (“The 1992 revision did not alter the language regarding gender markers; thus, today, the MSVSA reflects the best thinking of 1977 on gender corrections.”).

156. MODEL STATE VITAL STAT. ACT, *supra* note 151.

157. *See id.* (outlining recommendations for the amendment of gender markers on birth certificates and how to properly notify other agencies that the birth certificate has been amended).

158. *See* Mottet, *supra* note 152, at 405–13 (addressing the harm caused by the surgical requirement—namely, that surgery is often undesired and unattainable even when the transgender individual wishes to obtain gender affirmation surgery).

159. *See generally*, Harper Jean Tobin, *Against the Surgical Requirement for Chance of Legal Sex*, 28 CASE W. RESV. J. INT’L L. 393, 424–29 (2006) (asserting the surgical requirement is based on outdated medical science and goes against fundamental human rights such as the right to equal treatment, the right to gender recognition, the right to bodily integrity, and the right to religious observance).

160. *Cf. id.* at 425–26 (defining the right to gender recognition and explaining how the surgical requirement interferes with this right).

not allowing transgender people who do not have access to medical care or surgical procedures to correct their gender marker, forcing them to divulge their transgender status every time someone asks to see a piece of government issued identity verification.¹⁶¹ Furthermore, by imposing a surgical requirement on all transgender people, the government is making the incorrect assumption that all transgender people want to medically transition—that is, transition using hormone therapies, surgeries, and other medical procedures.¹⁶²

The surgical requirement is invasive and is a direct assault on the bodily autonomy of transgender people.¹⁶³ As previously alluded to, not all transgender people can or wish to medically transition or undergo surgeries to affirm their gender.¹⁶⁴ The surgical requirement takes away transgender peoples' right to choose; it forces them to give up one freedom, that of bodily autonomy, for the freedom to have identity documents which accurately reflect their identity.¹⁶⁵

The surgical requirement is also highly impractical. Twenty-nine percent of transgender people in the United States live in poverty.¹⁶⁶ In Texas, the percentage of transgender people living in poverty is even

161. *See id.* at 426 (“Surgical requirements make the enjoyment of this ‘basic’ right impossible for individuals with certain medical conditions, as well as those who cannot afford these expensive procedures. For others, gender recognition will remain out of reach for years before SRS can be obtained.”).

162. *See* German Lopez, *Myth #5: All Trans People Medically Transition*, VOX (Nov. 14, 2018, 4:08 PM), <https://www.vox.com/identities/2016/5/13/17938114/transgender-people-transitioning-surgery-medical> [<https://perma.cc/D9CF-T73R>] (“About 14 percent of trans women and 72 percent of trans men said they don’t ever want full genital construction surgery.”).

163. *See* Tobin, *supra* note 160, at 425–26 (noting how the surgical requirement takes away autonomy from transgender people and forces them to choose between the right to bodily autonomy or the right to have identity documents which comport with their gender identity); *see also* Mottet, *supra* note 152, at 407–09 (listing several reasons people are unable to, or choose not to, undergo surgery).

164. *See* Mottet, *supra* note 152, at 407–09 (providing a list of several reasons people cannot, or choose not to, undergo surgical procedures); *see also* Lopez, *supra* note 163 (debunking the myth that transgender people can all choose to undergo medical transition).

165. *See* Tobin, *supra* note 160, at 427–28 (2007) (challenging to the surgical requirement because it violates the bodily autonomy of transgender people).

166. *See* Lauren McGaughey, *Texas Leads the Nation in Transgender Murders. After the Latest Attack, the Dallas Trans Community Asks “Why?”*, DALL. MORNING NEWS (Sept. 30, 2019, 5:00 AM), <https://www.dallasnews.com/news/2019/09/30/texas-leads-nation-transgender-murders-according-national-lgbtq-organization/> [<https://perma.cc/6ER5-DBJH>] (“In Texas, some of these numbers are worse: 34% of trans Texans were living in poverty, compared to 29% nationwide.”).

higher.¹⁶⁷ Individuals living in poverty cannot afford the medical transition related treatments the MSVSA requires they get before they can obtain the correct identifying documents.¹⁶⁸

Finally, the surgical requirement violates human rights and serves no public policy interest.¹⁶⁹ The few arguments that exist for the surgical requirement are based on heteronormative, cisgender-centric thinking that we, as a society, have moved past.¹⁷⁰ Much of the concern over whether transgender people had completed surgical treatment was based on reserving marriage for heterosexuals.¹⁷¹ Assuming *arguendo* this is a valid reason to force someone to undergo a surgical procedure they may not want or be able to afford, it is no longer a concern since the ban on the restriction of same sex marriage across the United States with the decision in *Obergefell*.¹⁷² Other concerns over the surgical treatment of transgender people had to do with sexual reproduction and its purpose in a heterosexual marriage; again, with the decision in *Obergefell*, this point is moot.¹⁷³

The surgical requirement clearly harms transgender people.¹⁷⁴ Those who cannot, or choose not to, obtain surgery do not get to exercise the

167. *See id.* (comparing the rate of poverty among transgender individuals in Texas to the rate of poverty among transgender individuals outside of Texas).

168. *See Mottet, supra* note 152, at 407 (“Some individuals cannot afford the surgery they desire, especially given that a large majority of private and public health insurance plans do not currently cover sex reassignment surgeries.”).

169. *See generally, Tobin, supra* note 160 (addressing the arguments for surgical requirements and presenting the cases against them).

170. *E.g., M.T. v. J.T.*, 355 A.2d 204, 21011 (N.J. Super. Ct. App. Div. 1976) (“If . . . the . . . transsexual is . . . thereby possessed of the full capacity to function sexually as a male or female . . . we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification[,] at least for purposes of marriage[,] to the sex finally indicated.”).

171. *E.g., id.* at 211 (recognizing the marriage between a transgender woman and a man as legally valid because the woman had undergone surgical treatment to transition, lived as a woman, and functioned sexually as a woman).

172. *See Tobin, supra* note 160, at 417 (“[C]oncern over enabling ‘same-sex’ marriages permeates these discussions . . . ”); *see generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding same sex couples have a fundamental right to marry).

173. *See Tobin, supra* note 160, at 417 (pointing to concern over same sex marriage as a reason for the surgical requirement for legal gender transition); *see generally* *Obergefell*, 576 U.S. at 644 (holding there is no lawful basis for a state to refuse to recognize same sex marriage).

174. *See generally, Tobin, supra* note 160, at 424 (considering harm the surgical requirement causes, because it is based in outdated medical science and goes against fundamental human rights).

right to legally correct their gender markers.¹⁷⁵ This, in turn, opens transgender individuals up to discrimination based on gender stereotypes, violates their right to privacy, and goes against public policy.¹⁷⁶ The surgical requirement suggested by the CDC stems from a dated understanding of sex, gender, and what it means to be transgender.¹⁷⁷ For this reason, Texas should not impose a surgical requirement on transgender individuals seeking to correct their gender markers.¹⁷⁸

2. Amendment Indication

The MSVSA recommends amended birth certificates show they have been amended.¹⁷⁹ This guideline forces transgender people to reveal their transgender status every time they show their birth certificate.¹⁸⁰ This would violate their fundamental right to privacy and opens them up to discrimination based on sex stereotypes as well as other forms of discrimination, harassment, and even violence. Requiring amended birth

175. See MODEL STATE VITAL STAT. ACT, *supra* note 151 (requiring transgender individuals undergo surgery before their birth certificates can be amended).

176. *E.g.*, Cray & Harrison, *supra* note 144 (identifying employment and housing as areas where transgender people without gender concordant identity documents are discriminated against based on their transgender status); see also Narayanan, *supra* note 4 (providing examples of transgender Texans being outed through their identity documents and discriminated against based on stereotypes of what a woman or man “should” look like, thus violating their right to privacy); see also Restar et al., *supra* note 96 (showing a positive association between positive mental health outcomes and legal name and gender marker corrections); Scheim et al., *supra* note 96 (discussing the positive correlation between gender concordant identity documents and positive mental health outcomes).

177. See, *e.g.*, M.T. v. J.T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) (basing the court’s decision on whether the transgender woman, the subject of the suit, functioned socially and sexually as a woman to determine if her marriage to a cisgender man was a valid, heterosexual marriage); see MODEL STATE VITAL STAT. ACT, *supra* note 151 (requiring transgender people to undergo surgery prior to obtaining corrected birth certificates).

178. See generally Mottet, *supra* note 152, at 413 (opposing a surgical requirement for legal gender marker correction); Tobin, *supra* note 160, at 434 (concluding surgical requirements are based on faulty assumptions).

179. See MODEL STATE VITAL STAT. ACT, *supra* note 151 (“A certificate or report that is amended under this section shall indicate that it has been amended, except as otherwise provided in this section or by regulation.”).

180. *Cf.* Narayanan, *supra* note 4 (describing an incident in which one transgender Texan was humiliated and harassed in a Texas mall because her gender presentation did not match her identification card. Analogously, a person whose birth certificate says that it has been amended or shows its amendment is now outed as being transgender by their identifying document in the same way and will likely suffer the same fate.).

certificates is no better, and still leads to the same result.¹⁸¹ This guideline should not be followed in Texas or anywhere.¹⁸² Instead, Texas should look to other jurisdictions to see which laws, policies, and practices work best to streamline the process for transgender people to obtain gender marker corrections and ensure the rights of transgender people.¹⁸³

E. Other Jurisdictions

Several jurisdictions have a uniform process through which transgender individuals can correct their name and gender marker.¹⁸⁴ The requirements in these jurisdictions vary, but the outcome is the same: transgender individuals are able to have identity documents which comport with their gender;¹⁸⁵ they are more comfortable and safer

181. *See* Arroyo v. Rossello, 305 F. Supp. 3d 327, 332–33 (D.P.R. 2018) (acknowledging amended birth certificates which reveal the transgender status of the individual would expose an individual to discrimination, distress, harassment, and violence).

182. *Cf. id.* at 334 (banning the use of strikeouts on birth certificates for transgender people in Puerto Rico).

183. *E.g.*, CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (prescribing that California correct transgender people's birth certificates upon their request); *see also* VT. STAT. ANN. tit. 18 § 5112(a) (2019) (requiring Vermont to correct birth certificates for transgender people); Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (listing the requirements for transgender Argentineans to obtain gender marker corrections and government obligations related to such changes); *see generally*, CAOIMHE STAFFORD, TRINITY FREE LEGAL ADVICE CTR., A COMPARATIVE ANALYSIS OF GENDER RECOGNITION LAWS (2015) (comparing the gender identity laws in Argentina, Denmark, and Ireland).

184. *See Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL: KNOW YOUR RTS., <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/6QTV-9SQK>] (last updated Sept. 17, 2018) (listing each state in the U.S.'s requirement to correct one's gender marker on one's birth certificate); *The Legality of Gender Change*, NAT'L GEOGRAPHIC (Jan. 2017), <https://www.nationalgeographic.com/magazine/2017/01/gender-identity-map-where-you-can-change-your-gender-on-legal-documents/> [<https://perma.cc/B32M-2W2R>] (showing where individuals can legally correct their gender markers around the world).

185. *See Changing Birth Certificate Sex Designations: State-By-State Guidelines*, *supra* note 184 (providing information regarding the requirement to correct gender markers on birth certificates in each state in the United States); *Legal Gender Recognition: Change of Gender*, TRANSRESPECT (2020), <https://transrespect.org/en/map/pathologization-requirement/#> [<https://perma.cc/4G5H-LMSN>] (providing an interactive map allowing viewers to see which jurisdictions allow legal gender marker corrections and what the requirements are to obtain one); *The Legality of Gender Change*, *supra* note 184 (showing where legal gender marker corrections can occur around the globe).

because of these policies.¹⁸⁶ To better understand the benefits and drawbacks of these processes, it is important to examine a few examples from other jurisdictions.¹⁸⁷

1. Argentina

In 2012, Argentina made history by implementing a noninvasive, comprehensive law that allowed transgender individuals to correct their gender markers on their identifying documents.¹⁸⁸ The Argentina law provides:

All persons have the right, a) to recognition of their gender identity; b) to the free development of their person according to their gender identity; c) to be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.¹⁸⁹

To ensure all are guaranteed these rights, the law requires the governmental agency in charge of identifying documents to, upon the request of the individual, correct the gender marker reflected on the identifying document.¹⁹⁰ The law does not require a diagnosis of gender

186. See Restar et al., *supra* note 96 (discussing how legal gender recognition through concordant identity documents is associated with more positive mental health outcomes); see also Scheim et al., *supra* note 96 (providing gender concordant identity documents are associated with more positive mental health outcomes); see also Cray & Harrison, *supra* note 143 (identifying identity documents that do not match a person's outward gender presentation as a trigger for gender-based discrimination against transgender individuals).

187. E.g., CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (enforcing gender marker corrections for transgender people in California); see VT. STAT. ANN. Tit. 18 § 5112(a) (2019) (listing the requirements to obtain a corrected birth certificate in Vermont); see also Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (requiring Argentina to allow transgender individuals to obtain correct identity documents and gender affirming treatment in Argentinean healthcare facilities); see generally, see also STAFFORD, *supra* note 183 (detailing the gender identity laws in Argentina, Denmark, and Ireland).

188. See Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (recognizing the right to identity documents that match one's gender presentation and requiring the administering agency to correct individuals' gender markers based on the individual's affidavit, without any additional documentation from medical providers. Further, this law also requires healthcare providers to provide free gender affirming healthcare to transgender patients.); see also *Argentina Gender Identity Law*, TGEU (Sept. 12, 2013), <https://tgeu.org/argentina-gender-identity-law/> [<https://perma.cc/2M4K-TD2D>] (translating the law to English).

189. *Argentina Gender Identity Law*, *supra* note 188.

190. See Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (requiring all healthcare providers to provide free gender affirming healthcare, such as hormone replacement therapy,

dysphoria, medical intervention, or forced divorce from a spouse—making this one of the most progressive pieces of legislation regarding gender affirmation for transgender individuals in the world.¹⁹¹ The passing of this law marked a major victory for transgender individuals.¹⁹²

This law, known as the Gender Identity and Health Comprehensive Care for Trans People Act (“GIHCCTPA”), was only passed due to the diligent work of many activists in Argentina.¹⁹³ These activists proposed various iterations of GIHCCTPA before it was approved by Congress.¹⁹⁴ Activists took to the courts, the legislature, and the court of public opinion to gain allies and ensure GIHCCTPA’s passage.¹⁹⁵

In the courts, the activists asked judges to grant gender marker corrections without the need for medical documentation or intervention, and some judges obliged.¹⁹⁶ This allowed activists to propose a much more liberal standard—gender marker corrections without medical documentation or intervention—to the legislature because the courts had already agreed that this was the right pathway to legal gender recognition.¹⁹⁷

to transgender patients); *see also* *Argentina Gender Identity Law*, *supra* note 189 (providing an English translation of the law).

191. *See* Gender Identity Act, 2012 (Act No. 26.743) (requiring only an application to correct one’s gender marker—not medical diagnoses or treatments); *see also* *The Legality of Gender Change*, *supra* note 184 (showing which countries allow legal gender marker corrections); *see also* *Legal Gender Recognition: Change of Gender*, *supra* note 185 (providing users an interactive map to compare requirements for legal gender marker corrections in different countries across the world).

192. *See* Alejandro Nasif Salum, *Argentina Has Passed the Most Progressive Gender Identity Legislation in Existence*, OUTRIGHT ACTION INT’L (May 13, 2012), <https://outrightinternational.org/content/argentina-has-passed-most-progressive-gender-identity-legislation-existence> [<https://perma.cc/UH68-HDWV>] (“We understand that while some of these features are present in other legislation in the world, the law in Argentina is really the only one with all these advances at the same time and in a single act that deals comprehensively with the rights of trans people.”).

193. *See generally id.* (describing the work activists put in to ensure this law’s passage).

194. *See generally id.* (discussing how the law developed and how previous versions did not pass).

195. *See generally id.* (explaining how activists joined forces and attempted to form allyships in the courts, legislature, and public in order to successfully pass the law).

196. *See id.* (describing the 2010 campaign to end invasive medical examination and treatment of transgender individuals as a requirement for name and gender marker corrections).

197. *See id.* (“[R]epeated recognition of identity in these terms by the Courts represented a strong pressure for Congress: it is very difficult to pass a law that is much more conservative than

Within the legislature, activists tried to gain allies that would advocate for policies such as GIHCCTPA which protect the rights of transgender individuals.¹⁹⁸ Activists spoke to legislators and introduced and discussed policies that were easier to understand.¹⁹⁹ The Equal Marriage Act, and policies similar to it, got the conversation started and allowed activists to segue into more progressive polices like GIHCCTPA.²⁰⁰

The activists also worked to gain the general public's support.²⁰¹ The activists did this by using media attention garnered by the passage of the Equal Marriage Act and the early gender marker corrections that were approved without medical documentation or intervention.²⁰² The media frenzy surrounding these landmark moments in LGBT history allowed activists to start the conversation with the general public and gain support.²⁰³ In turn, the public support helped the activists put more pressure on the legislature to pass GIHCCTPA.²⁰⁴ Together, with the support from the courts, the legislature, and the public, GIHCCTPA passed and became one of the most comprehensive, progressive laws regarding gender affirmation in the world.²⁰⁵

what the judges themselves are already acknowledging and affirming that the Constitution guarantees.”).

198. *See id.* (“While the laws were presented again and again in Congress, we sought for allies between legislators in the Senate and House of Representatives who were really committed to the cause and worked hard for this result.”).

199. *See id.* (“The parliamentary, social, and media discussion of the Equal Marriage Act set in the society the issue of LGBT rights as something that should be recognized and protected.”); *see generally Argentina Legalizes Same-Sex Marriages*, NPR (July 15, 2010, 1:30 PM), <https://www.npr.org/templates/story/story.php?storyId=128536587> [<https://perma.cc/7RJD-9GB2>] (reviewing the hard-won battle to pass the Equal Marriage Act. The Equal Marriage Act legalized same-sex marriage across Argentina.).

200. *See Salum, supra* note 192 (“Since then, the activists of the FALGBT, in each intervention to defend equal marriage, used the media and social networks to insist on the importance of Congress also passing a law on gender identity.”).

201. *See id.* (discussing the importance of strategically gathering public support to pass this law).

202. *See id.* (highlighting the importance of media attention).

203. *See id.* (recalling how media attention helped activists gain public support).

204. *See id.* (“The particularly vulnerable position that trans groups face in Argentina added urgency to the question, but basically I think we convinced society, the Congress, Justice and Government that what was at stake was the right to identity, to be who you actually are, and receive a comprehensive health care.”).

205. *See id.* (“It is the first time that the Argentinean Congress fully recognizes the rights of trans people, and the rule is probably the most advanced in the world in this regard.”).

However, it is important to note, that Argentina's progressive policy has not solved all the problems transgender Argentines face.²⁰⁶ Transgender individuals in Argentina still face violence.²⁰⁷ Despite laws in place that should protect transgender individuals from discrimination based on transgender status, transgender individuals experience exclusion from the workforce, leaving them economically disadvantaged and more susceptible to violence.²⁰⁸ Despite laws like GIHCCTPA, which purport to ensure transgender individuals' access to gender affirming care, transgender individuals still report experiencing discrimination in healthcare, which leads to many transgender people receiving inadequate healthcare, if they receive healthcare at all.²⁰⁹ Transgender individuals also report experiencing hate crimes and physical and sexual assault at high rates.²¹⁰ All this together leaves transgender individuals in Argentina with a life expectancy of around thirty-five years.²¹¹ This is bleak in comparison to their cisgender counterparts, who have a life expectancy averaging around seventy-six

206. See Allie Pitchon, *Transgender Rights in Argentina: A Story of Progress, Turbulence, and Contradictions*, THE BUBBLE (June 27, 2018, 1:43 PM), <https://www.thebubble.com/transgender-rights-in-argentina-a-story-of-progress-turbulence-and-contradictions> [https://perma.cc/SCP6-7REQ] (“Across the country, transgender people face immense socio-cultural stigma and prejudice, which translates into economic and political discrimination, as well as physical violence.”).

207. See Jonathan Gilbert, *Transgender Argentines Confront Continued Murder and Discrimination*, N.Y. TIMES (Nov. 28, 2015), <https://www.nytimes.com/2015/11/29/world/americas/transgender-argentina-confront-continued-murder-and-discrimination.html> [https://perma.cc/XY73-V6ES] (contrasting the progress made in transgender rights on paper with the actual harm and violence experienced by transgender Argentines); see also Pitchon, *supra* note 207 (providing examples of violence transgender individuals face in Argentina).

208. See Pitchon, *supra* note 206 (“In spite of laws passed to prevent employment discrimination, just under ninety percent of trans women in Argentina have never been able to attain a formal job.”).

209. See *id.* (“Frequent exclusion of transgender people from the healthcare system ensures that transgender women are continuously—and increasingly—affected by high rates of HIV.”).

210. See *id.* (“Meanwhile, according to ATTTA, Argentina’s Association for Transvesti, Transexual, and Transgender rights, transgender Argentines continue to experience hate crimes, as well as physical and sexual assault, at alarming rates.”).

211. See *id.* (comparing Argentina’s national average life expectancy of seventy-six years to the life expectancy of transgender women which remains at thirty-five years); see also Gilbert, *supra* note 207 (highlighting the life expectancy disparity amongst transgender individuals as compared to others. Men have a life expectancy of seventy-three years, women who have a life expectancy of eighty years, and transgender individuals have a life expectancy of thirty-five years.).

years.²¹² It comes down to this: the most progressive policy in the world can only help so much.²¹³ Resources are needed to implement the policies and educate the public in order to change attitudes and behaviors surrounding transgender individuals.²¹⁴

Texas has much to learn from Argentina, both from its successes and its failures.²¹⁵ Texas should adopt a similar policy for gender marker corrections, allowing transgender individuals to determine their own identity without the demand of medical recognition or intervention.²¹⁶ Texas can learn from Argentina's failure to protect transgender individuals by providing more social support for transgender individuals and bringing transgender issues to the public eye to challenge hostile attitudes.²¹⁷ Argentina is just one example that Texas can choose to follow and learn from.²¹⁸

212. See Pitchon, *supra* note 206 (“[T]he national average life expectancy in Argentina is roughly 76.3 years . . .”).

213. See *id.* (highlighting the obstacles and injustices faced by transgender Argentineans); see also Gilbert, *supra* note 207 (providing several examples of violence faced by transgender Argentineans); see generally Salum, *supra* note 192 (identifying Argentina's gender law as probably the most advanced and progressive in the world).

214. See Emily Shmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES (May 24, 2012), <https://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html> [<https://perma.cc/97KA-RFTY>] (observing transgender individuals were wary of the new law, noting that transphobic attitudes would not “change overnight”); see generally Gilbert, *supra* note 208 (demonstrating the pervasiveness of transphobia and discrimination against transgender people).

215. *C.f.* STAFFORD, *supra* note 183 (suggesting Ireland look to Argentina's approach to gender marker corrections in modeling their own laws).

216. See *id.* (“This law has been hailed as the ‘most progressive gender identity law in history’ and contains many positive aspects for the Argentine transgender community such as: the self-determination aspect; the absence of a surgery requirement; the provisions made for transgender people under the age of 18; the right to personal development and dignified treatments for trans people; and the right to gender identity itself . . . [T]his means that transgender people in Argentina must always be treated with the same respect given to a non-transgender person and their chosen first name will be used on any official documents, clearly respecting the right of the people to live as transgender and to be treated as their desired gender.”).

217. See Pitchon, *supra* note 206 (emphasizing that despite the implementation of progressive laws to support transgender people, Argentines still held hostile, uninformed, and discriminatory attitudes towards transgender individuals); see also Gilbert, *supra* note 208 (explaining that while Argentina is lauded for its progressive policies for transgender rights, transgender individuals in Argentina still experience discrimination and harassment).

218. See generally STAFFORD, *supra* note 183 (including various gender recognition laws from Ireland, Denmark, and Argentina).

2. Denmark

In 2014, Denmark made history by being the first European country to allow individuals to correct the gender marker on their identifying documents without medical affirmation or intervention.²¹⁹ In Denmark, a person simply needs to apply for an amended identity document to the relevant governmental agency, wait six months, and then confirm the application before being allowed to update their identification documents.²²⁰ There is no need to visit a doctor, get diagnosed with gender dysphoria, or receive medical or psychological treatment to “confirm” the transness of the individual.²²¹ This noninvasive approach to gender marker corrections allows transgender individuals the freedom to be who they are without pathologizing them.²²²

While Denmark’s approach to gender marker corrections has eliminated some obstacles that transgender individuals face, it is not perfect.²²³ Transgender people in Denmark report Denmark’s self-determination approach to gender marker corrections, while welcome, has only been effective in restricted ways.²²⁴ For example, unlike Argentina’s law, Denmark’s law did not come with an assurance of medical treatment to help those who wish to medically transition, it only

219. *See Denmark the First European Country to Allow Legal Change of Gender Without Diagnosis*, ILGA EUR. (June 1, 2014), <https://www.ilga-europe.org/resources/news/latest-news/denmark-first-european-country-allow-legal-change-gender-without> [https://perma.cc/KX6T-78F7] (reporting the change in law from requiring a diagnosis of gender identity disorder, to a policy of self-determination).

220. *See id.* (“[A]n application for legal change of gender is submitted to a relevant authority and after 6 months the applicant simply needs to confirm their application.”).

221. *See id.* (listing the various medical procedures that the Danish parliament excluded for the gender of transgender individuals to be confirmed “The Danish parliament also removed such requirements as medical intervention, compulsory surgical intervention and compulsory sterilisation.”).

222. *Cf.* STAFFORD, *supra* note 183, at 18–21 (describing Argentina’s approach towards removing medicalization of transgender identities, since the medicalization of transness suggests that transgender individuals are incapable of making their own decisions. Denmark’s new law is similar because individuals do not need to be “diagnose[d]” before being recognized as transgender, and all individuals need to do is self-certify.).

223. *See id.* at 21 (pointing out the flaws and contradictions in Denmark’s system including the “reflection period” and age requirement).

224. *See* CHRIS DIETZ, UNIV. LEEDS, SCH. L., SELF-DECLARATION OF LEGAL GENDER STATUS IN DENMARK 4 (2018) (discussing that while improvements and strides have been made in the self-declaration of legal gender status in Denmark, more work remains, including acknowledging the fact that Denmark’s law fails to address the difficulties transgender individuals experience in healthcare).

helps transgender individuals transition “on paper.”²²⁵ In Denmark, when this gender marker correction law was passed, a person must have received a diagnosis of gender dysphoria before they could receive treatment such as gender affirmation surgery or hormone therapy to transition medically, even though the gender marker correction law does not require such a diagnosis to correct identity documents to have the appropriate gender.²²⁶ Many transgender people do not update identity documents before transitioning medically for fear of being outed as transgender; thus, for many transgender individuals, the requirement of a diagnosis is still a de facto requirement to transition “on paper.”²²⁷

While Denmark is not perfect, Texas would do well to learn from its successes and failures.²²⁸ Denmark’s stand-alone gender correction policy, without the reinforcement of other policies to support and protect transgender people, fails to properly address the needs of Denmark’s transgender citizens.²²⁹ Thankfully, the United States already has some protections for transgender people, such as protection from employment discrimination per *R.G. & G.R. Harris Funeral Homes*.²³⁰ Also, due to the nature of the United States medical care system, transgender Texans may not run into the same problem of needing a diagnosis of gender dysphoria before receiving any medical treatment for transition they may desire or require.²³¹ However, because the United States healthcare

225. *See id.* at 3 (discussing how transitioning in Denmark is complicated by the civil system’s disconnect from the medical system).

226. *See id.* (“So, although the Danish Parliament has since moved ‘transsexualism’ out of the section of the Danish diagnostic code covering mental disorders . . . access to hormonal and surgical body modification technologies remains dependent upon being granted this diagnosis at the Sexological Clinic.”).

227. *See id.* (describing an incident in which one transgender person was outed to their boss when they corrected their identity documents to reflect their gender).

228. *C.f.* STAFFORD, *supra* note 183, at 20 (suggesting Ireland should learn from Denmark’s failure to adequately support its transgender population through policies that are effective and functional).

229. *See generally* DIETZ, *supra* note 224, at 2–4 (portraying several ways in which the Danish system has failed transgender Danes through excerpts from interviews with transgender individuals); *see also* STAFFORD, *supra* note 183, at 21–23 (calling out the shortcomings of the Danish law).

230. *E.g.*, *R.G. and G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n*, 140 S. Ct. 1731, 1761 (2020) (holding, for the first time, that discrimination based on transgender status is discrimination based on sex as proscribed by Title VII).

231. *See* STAFFORD, *supra* note 183, at 21 (mentioning Denmark’s previous law requiring that an individual needed to be diagnosed with a disorder before being recognized as another gender); *see also* *Gender Affirming Care*, UT PHYSICIANS: TRANSGENDER MED. & SURGERY

system is pay-to-play and gender affirming treatments may not be fully or adequately covered by insurance, transgender Texans may still not be able to reap the full benefits of a gender marker correction law that makes the process simple.²³²

3. *Netherlands*

Netherlands took a different approach to rectify the wrongs faced by transgender individuals who are unable to correct their gender markers.²³³ In 2020, Netherlands passed a law which would remove gender markers from identifying documents for everyone altogether.²³⁴ Gender markers will be removed from all government issued identification cards within five years of the law's passing.²³⁵

PROGRAM, <https://www.utphysicians.com/transgender-medicine-and-surgery-program/> [<https://perma.cc/D76P-P7CX>] (stating that individuals who wish to seek certain gender affirming surgeries must provide at least one letter from a licensed mental health professional).

232. See *Gender Affirming Surgery*, AETNA, http://www.aetna.com/cpb/medical/data/600_699/0615.html [<https://perma.cc/K895-9QQV>] (last updated Jan. 12, 2021) (establishing that Aetna insurance covers gender affirming surgeries, but certain requirements must be met); see also *Blue Cross Blue Shield of Texas: Gender Assignment Surgery and Gender Reassignment Surgery with Related Services*, TRANSGENDER LEGAL DEF. & EDUC. FUND, <https://transhealthproject.org/resources/health-insurance-medical-policies/blue-cross-blue-shield-of-texas-gender-assignment-surgery-and-gender-reassignment-surgery-with-related-services/voice-therapy-and-surgery/> [<https://perma.cc/52JX-V7E6>] (last updated May 1, 2019) (confirming gender affirming surgeries are covered under Blue Cross Blue Shield insurance, but certain requirement must be met); cf. DIETZ, *supra* note 225, at 3 (describing how self-declaration gender laws positively impact individuals).

233. See Neela Ghoshal & Kyle Knight, *Netherlands Sees No Role for Gender Marker on ID Documents*, HUM. RTS. WATCH (July 8, 2020, 1:53 PM), <https://www.hrw.org/news/2020/07/08/netherlands-sees-no-role-gender-marker-id-documents> [<https://perma.cc/XWS4-52QN>] (reporting Netherlands's historical decision to remove gender markers from identifying documents); but see Jamie Wareham, *Dutch ID Cards to Become Gender Free—Could More of Europe Follow?*, FORBES (July 7, 2020, 11:09 AM), <https://www.forbes.com/sites/jamiewareham/2020/07/07/dutch-id-cards-to-become-gender-free—could-more-of-europe-follow/?sh=64b04f633207> [<https://perma.cc/4PWH-C6ZB>] (clarifying the government is only removing gender from ID cards but that passports and birth certificates will continue to report gender).

234. See Ghoshal & Knight, *supra* note 233 (discussing the removal of gender markers on identification documents in the Netherlands); see also Wareham, *supra* note 233 (contemplating the long-term widespread use of gender marker free identification throughout Europe).

235. See Ghoshal & Knight, *supra* note 233 (confirming Netherlands's new law will be completely implemented within five years); see also Wareham, *supra* note 233 (providing clarification as to which identifying documents will not have gender markers and what the government's reason is for not removing gender markers from passports).

Previously, individuals were required to apply to correct their gender marker with the municipal authority, wait four weeks, and then confirm the application in person at the municipal authority's desk.²³⁶ People under sixteen years old were required to lodge an application with the court to have their gender marker corrected.²³⁷

This new law takes the onus from transgender individuals to correct their identity documents and allows people to move freely through the world without being questioned, harassed, discriminated against, or harmed because their identity documents do not comport with their gender presentation.²³⁸ While Texas may not be ready for this monumental step quite yet, Texans can still learn from Netherland's new law and the policy considerations that lead to its implementation.²³⁹

In considering whether gender markers were a necessity on identifying documents, the Netherlands government weighed the potential for harm for transgender individuals against the potential benefits of publishing individuals' genders on their identifying documents, namely prevention of identity fraud.²⁴⁰ The government ultimately concluded that the harm that could be done—discrimination, harassment, and violence—outweighed the little good that could be done and passed the law removing gender markers from identity documents.²⁴¹ Likewise, Texas should consider the harm that exists by not having a uniform process by which transgender individuals can obtain gender marker corrections on their identifying documents and whether the benefits to society of preventing these gender marker corrections really outweigh the costs to

236. See *Change of Gender Registration Made Easier for Transgenders*, GOV'T OF THE NETH. (Apr. 10, 2019, 2:46 PM), <https://www.government.nl/latest/news/2019/04/10/change-of-gender-registration-made-easier-for-transgenders> [<https://perma.cc/VEM8-RU8Z>] (reporting what was then considered an easy two-step process for correction of gender registration).

237. See *id.* (explaining individuals under sixteen years of age require extra care when correcting their gender).

238. See Ghoshal & Knight, *supra* note 233 (“[T]he move means citizens will no longer be required to carry documents displaying unnecessary information that for some could invite harm.”); see also Wareham, *supra* note 233 (“[T]he move aims to remove obstacles that prevent transgender and intersex people from ‘fully participating in the society.’”).

239. See Ghoshal & Knight, *supra* note 233 (mentioning that global experts recommend other nations should end the registration of sex and gender markers).

240. See *id.* (describing how the government weighed these factors and why Netherlands's government decided to remove gender markers on identifying documents).

241. See *id.* (“The primary purpose of an identity document is to ensure that the person presenting the ID is who they say they are. Race or gender markers do not create additional clarity.”).

transgender people.²⁴² In weighing these considerations, Texas is likely to find, as the Netherlands did, that the costs to transgender people outweigh the small benefit to society.²⁴³

4. Vermont

There are also examples of just and effective policies regarding gender marker corrections here in the United States that Texas can follow.²⁴⁴ Vermont has a streamlined, uniform process by which transgender individuals may obtain identity documents with corrected gender markers.²⁴⁵ In Vermont, a person need only fill out the applicable application with the corrected information to obtain a gender marker correction on a state issued identification card or driver's license.²⁴⁶ No documentation is required to confirm the self-designated gender

242. See generally McGaughy, *supra* note 167 (detailing the horrific conditions for transgender Texans. According to this article, Texas leads the nation in murders of transgender people—having even more murders than more populous locales such as California. This article also reports that transgender Texans are less likely to have identity documents that match their outward gender presentation, less likely to feel safe to contact the police in the event of an emergency, and more likely to be impoverished as well as more likely to be sexually assaulted than transgender individuals in other states. This article reports that many transgender individuals believe these staggering statistics are due, at least in part, to the fact that Texas does not have laws that protect transgender people.).

243. Cf. Ghoshal & Knight, *supra* note 233 (explaining Netherlands decided to remove gender markers because of the harm they were causing the transgender population).

244. E.g., *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, *supra* note 184 (listing the policies regarding gender marker corrections on birth certificates of each state in the United States. Notably, the only state which outright bans gender marker corrections is Tennessee. Other states have practices like Texas which are not codified but found in the common law practice of granting gender marker corrections with appropriate documentation. Still, others, like Vermont and California, have codified the process for obtaining name and gender marker corrections in those states.).

245. See VT. STAT. ANN. tit. 18 § 5112 (2019) (outlining the process by which a person may obtain an amended birth certificate with an updated gender marker); see also *Self-Designated Descriptors*, VT. AGENCY OF TRANSP., <https://dmv.vermont.gov/licenses/identity-documents/self-designated-descriptors> [<https://perma.cc/KQX8-FHRA>] (identifying sex as a self-designated category for driver's licenses and identification cards and stating documentation for such categories is not required under federal and state law).

246. See *Self-Designated Descriptors*, *supra* note 245 (stating that “applicants” can self-designate certain descriptors, including gender, for a driver's license or identification card); see also *ID Documents Center: Vermont*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/vermont> [<https://perma.cc/5BMZ-D4GF>] (last updated July 2021) (explaining the process to update an individual's gender on a driver's license or identification card).

marker.²⁴⁷ This is very progressive for the United States, where many states require a court order, physician’s letter, or both before a transgender person can receive an identification card with the correct gender.²⁴⁸ This is a commendable policy and one that Texas should look to when designing its own gender marker correction law.²⁴⁹

Looking now to birth certificates in Vermont, to obtain a gender marker correction, an individual must fill out the appropriate form and provide an affidavit from a licensed physician, “who has treated or evaluated the individual stating that the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition shall constitute sufficient evidence to determine that sexual reassignment has been completed.”²⁵⁰ The phrasing of the physician’s letter requirement is important to note because of the various possibilities of the requirement.²⁵¹ Transgender individuals are required to receive “treatment appropriate for that individual” for the purposes of their transition.²⁵² This could be surgery, hormone therapy, or other treatments, but it could also mean no treatment.²⁵³ The Vermont statute gives transgender people and their physicians room to decide what treatments they wish to obtain and allows them to move forward with a legal transition without inquiring as to the

247. See *Self-Designated Descriptors*, *supra* note 245 (“Applicants are not required under Vermont or federal law to present documentation that confirms the information they submit for these entries.”).

248. See 2015 Conn. Acts No. 15-132 (Reg. Sess.) (requiring individuals in Connecticut to submit a written request and notarized affidavit from a physician in order to receive a new birth certificate to reflect the corrected gender); see also D.C. CODE ANN. § 7-210.01 (West 2018) (repealed 2013) (stating that in D.C., an individual is required to submit a written request and a statement from a licensed healthcare professional to correct their gender); see also *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/QD8E-MU3H>] (last updated Oct. 13, 2021) (listing all the states’ requirements in order for an individual to correct their gender marker).

249. See Restar et al., *supra* note 96 (showing how other states such as Massachusetts and Rhode Island have created new gender marker laws which are modeled similar to Vermont’s self-identifying process and were implemented to make the process easier for transgender residents).

250. VT. STAT. ANN. tit. 18 § 5112 (2019).

251. See *id.* (noting that the letter must include information to support the requirement of the statute.) (“[T]he individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition . . .”).

252. *Id.*

253. *Cf. id.* (leaving a caveat that individuals may choose not to undergo certain types of treatment by use of the word “or”).

invasiveness of that treatment.²⁵⁴ This respects the transgender individual's bodily autonomy and right to privacy.²⁵⁵ Texas should model the Vermont statute if lawmakers impose a physician's letter requirement for gender marker corrections.

5. California

California also has an impressive gender marker correction policy.²⁵⁶ In 2014, California amended its Health and Safety Code, allowing individuals to obtain a new birth certificate reflecting their gender identity without a court order.²⁵⁷ The amended law mandates the state of California issue a new birth certificate upon receipt of an affidavit from the individual declaring that the purpose of the gender marker correction is to reflect the individual's gender identity and a payment for the issuance of a new birth certificate.²⁵⁸ It is important to note that California does not require medical intervention or acknowledgement before issuing the new birth certificate.²⁵⁹ It is also noteworthy that California issues a new birth certificate to individuals who request a corrected gender marker, not a modified birth certificate with a line through the old gender marker.²⁶⁰

254. *See id.* (requiring a physician provide a letter stating that the individual at issue has undergone clinically appropriate treatment, and not inquiring as to the specifics of that treatment).

255. *See id.* (compelling an affidavit by a licensed physician stating appropriate treatment has been made and stating the new certificate shall be confidential and exempt from public inspection).

256. *See generally* CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (stating a person must apply for a gender marker correction and include an affidavit attesting the person is not doing so for a fraudulent purpose).

257. *See id.* (providing a new procedure for obtaining a modified birth certificate).

258. *See id.* (requiring issuance of a new birth certificate after transgender individuals have followed the application process which only requires an affidavit).

259. *Compare id.* (noting no requirement for medical intervention), *with* IOWA CODE ANN. § 144.23(3) (West 2004) (necessitating documentation from a healthcare provider indicating that gender affirmation surgery or other medical treatments have been done to confirm the gender of the person requesting the gender marker correction).

260. *Compare* CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (requiring the issuance of a new birth certificate), *with* CONN. GEN. STAT. ANN. § 19a-41-6 (West 2005) (ordering amended birth certificates to have a strikethrough on the original incorrect data, and the new correct data to be added to the original certificate).

California has been recognized as the safest state in the United States for transgender people to live in.²⁶¹ This is attributed to many important policies regarding transgender individuals, including the gender marker correction laws that make it easier for transgender Californians to live life without being outed as transgender every time they reach for their identification documents.²⁶²

Like Argentina, California also has other laws designed to protect transgender people in medical, housing, and employment contexts.²⁶³ However, unlike Argentina, these laws are backed with the funds and resources necessary to enforce them.²⁶⁴ This, combined with legal gender recognition, makes California a safer place for transgender individuals to live.²⁶⁵ It is worth acknowledging that California is not a perfect example.²⁶⁶ Despite its progressive policies, transgender individuals in California still suffer from discrimination, humiliation, intimidation, and harassment.²⁶⁷ To address this, society needs to begin

261. See *How Does Your State Rank On "The Civil Rights Issue of Our Time?"*, REFINERY29 (Mar. 9, 2015, 3:50 PM), <https://www.refinery29.com/en-us/2015/03/83531/transgender-rights-by-state> [<https://perma.cc/M22T-SMTB>] (ranking California as the number one safest place for transgender individuals to live in the United States).

262. See *id.* (describing why California is ranked number one in the United States for safest places transgender people to live, by noting the state's nondiscrimination laws and strength of the transgender communities within the state).

263. See CAL. GOV'T CODE § 12920 (West 2020) (reinforcing existing laws protecting people based on their gender and clarifying the definition of gender to include gender identity and expression).

264. E.g., CAL. EDUC. CODE § 66270 (West 2019) (reflecting the legislative intent to provide resources for California schools by implementing and enforcing the law through education of students).

265. See *How Does Your State Rank On "The Civil Rights Issue of Our Time?"*, *supra* note 261 ("The state also won points for the strength of its trans communities, especially in the big cities; San Francisco and LA are home to some of the safest and most accommodating enclaves of gender-nonconforming people in the country.").

266. See, Ethan Ward, *Number of Transgender Crime Victims Spikes in L.A.*, CROSSTOWN (Feb. 19, 2020) <https://xtown.la/2020/02/19/number-of-transgender-crime-victims-spikes-in-la/> [<https://perma.cc/7E3E-YMNG>] ("The number of transgender people who were crime victims in Los Angeles jumped 49%, to 67, in 2019, highlighting the vulnerability this marginalized group faces.").

267. See, e.g., *id.* (describing the alarming rate at which crime against transgender individuals is growing, particularly violent crime); see also LeahAnn Mitchell, *I Was Harassed at an In-N-Out Bathroom for Being a Black Trans Woman*, THE GUARDIAN (Oct. 7, 2019, 1:00 AM), <https://www.theguardian.com/society/2019/oct/07/innout-trans-woman-harassment-california> [<https://perma.cc/2GRA-UERG>] (detailing one transgender woman's experience of harassment and humiliation in a California dining establishment washroom); see also Dion Lim, *'You look like a*

to address its cisgender-centric, heteronormative standards.²⁶⁸ California has made an impressive start at this by addressing the discrimination faced by transgender people through resource-backed policy.²⁶⁹

The laws, policies, and practices in place in the United States and around the world show there is a resolution to the violations of human rights and public policy currently faced by transgender Texans who presently face difficulty obtaining gender marker corrections.²⁷⁰

III. PART THREE: SOLUTION

The solution to the injustices faced by transgender Texans currently unable to correct their identifying documents is to formulate and implement a statewide process for transgender individuals to obtain gender marker corrections.²⁷¹ As exemplified above, there are a myriad of ways that this process could be implemented, some easier and more palatable to the diverse tastes of lawmakers than others.²⁷²

One solution could be to remove gender markers from identifying documents entirely.²⁷³ Some scholars argue that the use of gender on identification documents is unnecessary and that the benefits of including

female!': Transgender Teen Harassed After Stopping Couple Heckling Black Lives Matter Bake Sale, ABC 11 EYEWITNESS NEWS (June 23, 2020), <https://abc11.com/lgbtq-pride-black-lives-matter-blm-hate-crime/6261800/> [<https://perma.cc/Z8G2-HYVL>] (“‘They kept calling me lady and sweetheart even though I said “look I’m a man”—she continued to laugh and point at my crotch and laugh at me,’ Lauter said.”).

268. Cf. Jessica King, *The Violence of Heteronormative Language Towards the Queer Community*, 7 AISTHESIS HONORS J. 17, 17–18 (2016) (providing context for how cisgender-centric, heteronormative language is inherently violent towards the queer community and breeds violence in forms ranging from exclusion from normative practices to physical violence such as sexual assault).

269. See, e.g., CAL. EDUC. CODE § 41480 (West 2021) (showcasing an example of how California has addressed a broad range of discrimination towards transgender people through laws which are supported by appropriate supplemental resources).

270. See generally STAFFORD, *supra* note 184 (noting examples of gender recognition policies implemented in Ireland, Argentina, and Denmark).

271. See *Arroyo v. Rossello*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018) (ordering the implementation of a system for transgender Puerto Ricans to obtain gender marker corrections).

272. See Interview with Claire Bow, *supra* note 15 (discussing possible processes that may be implemented state-wide to obtain gender marker corrections).

273. See Spade, *supra* note 144, at 805–08 (arguing that gender on identifying documents is unnecessary).

gender do not outweigh the harm the inclusion causes.²⁷⁴ This may not be the most accessible solution, as some still argue that the use of gender markers on government issued identifying documents is important for national security and data collection.²⁷⁵ While scholars have addressed these arguments, the public's strong opposition could pose a barrier to removing gender markers from government issued identifying documents.²⁷⁶

An alternative solution is to model a statewide system after a system that is already functioning here in Texas.²⁷⁷ In Travis County, for example, individuals obtain the requisite court order for a gender marker correction in a fairly straightforward manner.²⁷⁸ A person seeking to have their gender marker corrected in Travis County need only file a petition and proposed order with the court along with a copy of their fingerprints, a letter from a medical doctor, and, if they have a criminal background, discharge paperwork.²⁷⁹

If Texas implements this system, the petition required should be simple and straightforward; it should not be invasive, should not ask for any information beyond that which is necessary to identify the petitioner, should inquire as to the relief sought, and should inquire as to any past criminal history with the petitioner's updated identity.²⁸⁰ The petition should ask for the petitioner's name, the gender on their birth certificate, any gender correction, and information about any criminal history.²⁸¹

Short of removing gender from identifying documents, an option that Texas is far from ready to accept, the best option would be to implement on a statewide level what the federal government has implemented for

274. *See id.* (discussing the inclusion of gender on social security cards, drivers' licenses, passports, and birth certificates).

275. *See id.* (rebutting the arguments that oppose the removal of gender markers from government issued identification documents).

276. *See generally id.* (addressing arguments made by those opposing the removal of gender markers from government issued identifying documents).

277. *See, e.g., Adult Gender Identifier Change Kit, supra* note 91 (outlining the process to change sex/gender markers on Texas state records in Travis County).

278. *See id.* (detailing the steps required to obtain a court order for a gender marker correction in Travis County).

279. *See id.* (indicating what paperwork is needed when filing a petition for a gender identifier correction).

280. *See id.* (requiring limited paperwork when filing a petition for a gender identifier correction).

281. *See, e.g., id.* (providing a sample petition and proposed order).

gender marker corrections on passports.²⁸² A court order is not required when applying for a gender marker correction on a passport.²⁸³ Instead, a person need only fill out a specific form, provide an identification card and passport photo that resembles their current appearance, and a medical certification that they had “appropriate clinical treatment for transition” from one gender to another.²⁸⁴ What constitutes “appropriate clinical treatment” is not, and should not be defined by the government, and is to be decided by the person and their physician.²⁸⁵ This could be applied to updating birth certificates, driver’s licenses, and identification cards at the state level.²⁸⁶ Texas could require individuals seeking a gender marker correction to apply for a replacement identifying document correcting an original document by providing a physician’s letter stating they are receiving “appropriate clinical treatment for transition.”²⁸⁷ This would simplify the gender marker change process by process by unifying it with the existing federal process and remove courts from the process, freeing up time and resources for the courts to deal with other matters.²⁸⁸

282. *See generally* Interview with Claire Bow, *supra* note 15 (discussing the options for creating a uniform system for gender marker corrections in Texas); *see also* *Selecting Your Gender Marker*, *supra* note 61 (defining the process to correct gender markers on a United States passport).

283. *See* *Selecting Your Gender Marker*, *supra* note 61 (listing the requirements for gender marker corrections on United States passports).

284. *See* *Change of Sex Marker*, U.S. DEP’T OF STATE—BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> [<https://perma.cc/JBU5-K6TJ>] (indicating that there is no need for a court order to correct a gender marker on a passport, only a signed and sworn affidavit that indicates proper clinical treatment has been received prior to the request for gender marker correction).

285. *See id.* (“Your physician determines what appropriate clinical treatment is according to acceptable medical practices, standards and guidelines . . .”).

286. *See, e.g.,* *Correcting a Birth Certificate*, *supra* note 114 (providing a list of potential birth certificate corrections and supporting documents needed for each correction. States could look to Vermont for a model of how to apply the affidavit standard in their respective jurisdictions).

287. *See, e.g., id.* (giving a list of birth certificate corrections and supporting documents needed for each correction); *see also* *Change of Sex Marker*, *supra* note 285 (listing a medical certification as one of the requirements for gender marker corrections on a United States passport).

288. *See, e.g.,* *Correcting a Birth Certificate*, *supra* note 114 (enumerating a list of birth certificate corrections and supporting documents needed for each); *see also* *Change of Sex Marker*, *supra* note 285 (determining that medical certification is a requirement for a gender marker correction on a United States passport but that surgery is not).

CONCLUSION

The widespread denial of and lack of access to gender marker corrections in Texas is inhumane and violates the rights of transgender Texans.²⁸⁹ Without a process to correct birth certificates and other identifying documents in place, transgender Texans are put at risk in terms of discrimination, harassment, and forced disclosure of private information.²⁹⁰ There are many solutions to this unjust practice, some of which are already in practice in the United States and abroad.²⁹¹ Implementing a uniform process to allow transgender Texans to correct their gender markers will help remedy the inhumane and unjust wrongs currently faced by these individuals who have been, or would be, denied gender marker corrections by Texas courts.²⁹²

The implementation of such a process is just one step on the road to justice for transgender Texans.²⁹³ Additional policies and practices will need to be put in place to ensure transgender Texans are able to reap the full benefits of a gender marker correction process; such practices might include enforcing existing employment protections and ensuring coverage of gender affirming medical treatments by state sponsored

289. See Skinner-Thompson, *supra* note 96 (describing the constitutional implications of not allowing transgender people to correct their gender marker).

290. See *id.* (explaining how having gender non-concordant identifying documents constitutes constitutional violations).

291. *E.g.*, Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (requiring that transgender Argentineans be able to correct their gender markers without medical affirmation or intervention); *e.g.*, VT. STAT. ANN. tit. 18, § 5112 (2019) (listing Vermont's requirements for changing a gender marker on identifying documents); *e.g.*, CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (stating California's requirements for changing the gender marker on one's birth certificate); see *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, *supra* note 184 (providing a state-by-state guide to changing gender markers).

292. See McGaughy, *supra* note 166 (reporting Texas is leading the nation in murders of transgender individuals and highlighting the many injustices transgender Texans face); *cf.* *How Does Your State Rank On "The Civil Rights Issue of Our Time?"*, *supra* note 261 (establishing California as the best place for transgender people to live due to its transgender friendly policies and strong transgender communities and listing Vermont as the second-best place for transgender people to live due to its transgender friendly policies which include its gender marker correction policy).

293. *Cf.* Pitchon, *supra* note 206 (noting while Argentina's gender identity law was helpful for transgender Argentineans, there is still much work to be done to ensure the safety and security of rights of transgender Argentines).

healthcare plans.²⁹⁴ With the Biden administration's quick action to protect transgender people across the nation, there is hope that such laws and policies will come to fruition across the United States.²⁹⁵ Until then, a codified uniform gender marker correction process, like one of the many proposed in this comment, is a good first step.²⁹⁶

294. Cf. DIETZ, *supra* note 224, at 1 (furnishing an example of how the self-determination laws of Denmark are not fully accessible to many due to the inability of many transgender people in Denmark to receive healthcare necessary to medically transition).

295. See Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (requiring governmental agencies to review their policies and practices within one hundred days of the date the order was signed and develop a plan to ensure those policies and practices do not discriminate on the basis of gender identity or sexual orientation).

296. See, e.g., Gender Identity Law, 2012 (Act No. 26.743) (Arg.) (exemplifying a uniform gender marker correction process established in Argentinean law); see also VT. STAT. ANN. tit. 18, § 5112 (2019) (providing an example of this first step already in practice in the United States); see also CAL. HEALTH & SAFETY CODE § 103426 (West 2018) (offering another example of a solution that is in play in the United States).