

NOTE

THE TRANSGENDER MILITARY BAN: “SEX” AND “GENDER IDENTITY” UNDER UNITED STATES AND NEW ZEALAND LAW

*Matthew Treiber**

ABSTRACT

*In 2017, US President Donald Trump reinstated a previously overturned military ban, forcing transgender individuals to discharge from the US military and barring any new transgender recruits. In the wake of this announcement came four cases challenging the ban, invoking equal protection arguments under the Fifth Amendment, which are still awaiting an ultimate decision by the US Supreme Court. This Note analyzes the arguments raised in these cases and their use of “sex” and “gender” jurisprudence and compares them to similar arguments in New Zealand, whose national military is world-renowned for its LGBT+ inclusion. This Note argues that the United States should adopt New Zealand’s queer-friendly policies, as well as their reading of “sex-based” discrimination as including “gender identity.” This reading is more conducive to recognizing transgender rights, as they would subsequently fall under existing “sex-based” protections. Lastly, this Note addresses the legislative, executive, and judicial approaches in the United States that could lead to an end of the ban, incorporating the 2020 US Supreme Court decision in *Bostock v. Clayton County* as a point of analysis.*

* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2018, Dartmouth College; Business and Articles Editor, *Fordham International Law Journal*, Volume XLIV. I would like to thank the WREs of Volume XLIII for their guidance in writing and editing this Note, as well as the board and staff members of Volume XLIV who also assisted in editing this Note. I would especially like to thank my friends and my family for their consistent support. Please note that this Note does not consider events occurring beyond October 1, 2020.

ABSTRACT	261
I. INTRODUCTION TO TRANSGENDER MILITARY BANS	263
A. Defining Terminology and Issues of Gender	
Identity	266
1. “Gender” Versus “Sex”	266
2. “Gender Identity” Versus “Sexual Orientation”	267
II. THE UNITED STATES TRANSGENDER MILITARY BAN	268
A. Transgender Military Service History	268
1. The 2016 Obama Administration Announcement Allowing Transgender Service	268
2. The 2017 Trump Administration Transgender Military Ban	271
3. History of US Transgender Military Service Litigation	272
B. Bringing a Claim Against the Transgender Military Ban in the United States	274
1. Plaintiff Identification	274
2. The Standing Requirement	275
3. Alleging and Proving Injury	275
C. Fifth Amendment Equal Protection Claims	277
1. Assessing the Level of Scrutiny	279
2. Intermediate Scrutiny Analysis	280
3. Equal Protection Arguments are Likely to Succeed	282
III. THE INTERNATIONAL PERSPECTIVE	283
A. Global Model Standards	283
B. United Nations Mandates	285
C. New Zealand and The Human Rights Act	288
1. Amending the Human Rights Act	291
2. Finding Protection in Existing Legislation	292
3. New Zealand Military Service	295
IV. RECOMMENDATIONS FOR THE UNITED STATES	296
A. The Executive Approach: the Executive Order Privilege	296
B. The Legislative Approach: “Gender” and “Sex” in Title VII Jurisprudence and Future Legislation	297

C. The Judicial Approach: <i>Bostock v. Clayton County</i> and the Setup for Pending Litigations	299
1. <i>R.G. & G.R. Harris Funeral Homes Inc. and Bostock v. Clayton County, Georgia</i>	300
2. Refocusing Pending Litigations.....	301
V. CONCLUSION.....	304

I. INTRODUCTION TO TRANSGENDER MILITARY BANS

Of the 197 countries in the world, only 161 have an active military,¹ and only nineteen of those militaries allow transgender individuals to serve.² This leaves over 140 countries with restrictive policies against transgender individuals serving in the military, including the United States.³ While the United Nations has set forth various treaties that protect individuals from discrimination on the basis of sex, many countries struggle with defining “sex” and “gender” as biological or social classifications.⁴ However, a few progressive nations, including New Zealand, have expanded the definition of “sex” to include an individual’s gender

1. *16 countries that don't have an army*, TELEGRAPH (Sept. 21, 2017), <https://www.telegraph.co.uk/travel/galleries/16-countries-that-dont-have-an-army/> [<https://perma.cc/4DAJ-ZE9H>]; Amanda Macias, *From Aruba to Iceland, these 36 nations have no standing military*, CNBC (Apr. 3, 2018), <https://www.cnbc.com/2018/04/03/countries-that-do-not-have-a-standing-army-according-to-cia-world-factbook.html> [<https://perma.cc/BPX7-7VXT>]; Ellen Kershner, *How Many Countries Are There In The World?*, WORLD ATLAS (Aug. 26, 2020), <https://www.worldatlas.com/articles/how-many-countries-are-in-the-world.html> [<https://perma.cc/7HFN-C733>].

2. Shayanne Gal & Ashley Collman, *Just 19 countries would accept transgender soldiers if Trump's ban ends up going into place*, INSIDER, (Feb. 5, 2019), <https://www.insider.com/countries-that-let-transgender-soldiers-serve-2019-2> [<https://perma.cc/N3M8-DAEV>]; Paul LeBlanc, *The countries that allow transgender troops to serve in their armed forces*, CNN (Jul. 27, 2017), <https://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html> [<https://perma.cc/6DUA-8HX7>].

3. *Id.*

4. *Human Rights and Gender*, UNITED NATIONS, <https://www.un.org/ruleoflaw/thematic-areas/human-rights-and-gender/> [<https://perma.cc/RLR5-WZP9>] (last visited Aug. 30, 2020); *Gender and Genetics*, WORLD HEALTH ORG., <https://www.who.int/genomics/gender/en/index1.html> [<https://perma.cc/XN3V-Q9L9>] (last visited Oct. 17, 2020).

identity and additionally have transgender-inclusive armed forces.⁵ In the 2020 decision *Bostock v. Clayton County, Georgia*, the United States Supreme Court expanded “on the basis of sex” to include sexual orientation and gender identity with respect to Title VII of the Civil Rights Act of 1964, protecting individuals from federal employment discrimination.⁶ While this holding does not bind the US military, it may provide a framework for existing litigations challenging the restrictive policy and may in turn lead to the United States becoming more inclusive towards transgender troops.

The United States did not always ban transgender troops. In June of 2016, the US Department of Defense, following a year-long study,⁷ declared that the US military would allow transgender individuals to openly serve in the military.⁸ With this announcement, the US military took strides towards becoming more accepting and inclusive to the transgender community⁹ and made the United States the nineteenth country to officially welcome transgender troops in the military by allowing

5. *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUMAN RIGHTS WATCH 2019 WORLD REPORT, <https://www.hrw.org/video-photos/interactive/2019/09/23/sexual-orientation-gender-identity-country-profiles> [https://perma.cc/Y34T-B9YC] (last visited Oct. 5, 2020); *NZ Defence Force Proud to be Ranked First in Worldwide Diversity Study*, CMTY. SCOOP (Feb. 21, 2014), <http://community.scoop.co.nz/2014/02/nz-defence-force-proud-to-be-ranked-first-in-diversity-study/> [https://perma.cc/F7Z3-2DTQ].

6. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

7. *Stone v. Trump*, 280 F. Supp. 3d 747, 754 (D. Md. 2017).

8. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html> [https://perma.cc/QH3J-E9PR]; Press Release, U.S. Dep’t of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/> [https://perma.cc/3TDT-ES55].

9. Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html> [https://perma.cc/QH3J-E9PR]; Emma Margolin, *With Transgender Military Ban Lifted, Obama Cements Historic LGBT Rights Legacy*, NBC NEWS (June 30, 2016), <https://www.nbcnews.com/feature/nbc-out/transgender-military-ban-lifted-obama-cements-historic-lgbt-rights-legacy-n600541> [https://perma.cc/N2Z3-7444].

individuals to serve openly in their preferred gender identity.¹⁰ However, in 2017, President Donald Trump announced that transgender individuals would once again be barred from serving in the US military (the “transgender military ban”).¹¹ The transgender military ban is a blanket ban preventing transgender soldiers from enlisting or remaining in the US military, and as a consequence suggests that transgender individuals are unfit for military service.¹² After the transgender military ban went into effect, the United States left the list of progressive nations and reversed course by affirmatively banning transgender troops from serving in the armed forces.¹³

This Note will address the current constitutional challenges to the transgender military ban in the United States and the larger issues they present. Part II will analyze the four cases making their way through US courts, including their Fifth Amendment Equal Protection Clause arguments. Part III will examine international model standards of protections for gender identity and transgender status, and will analyze gender identity protections in New Zealand. Lastly, Part IV of this Note will recommend that in order to defeat the transgender military ban through the judicial branch, the United States should broadly define “sex” to include “gender identity” in one of the existing litigations to protect transgender individuals, and transgender troops more specifically, to the fullest extent of the law.

10. Gal & Colman, *supra* note 2; Paul LeBlanc, *The countries that allow transgender troops to serve in their armed forces*, CNN (Jul. 27, 2017), <https://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html> [<https://perma.cc/9AGM-GCHA>]; Tom O'Connor, *Trump's Transgender Military Ban Leaves Only 18 Countries With Full LGBT Rights in Armed Forces*, NEWSWEEK (Jul. 26, 2017), <https://www.newsweek.com/trump-transgender-military-ban-leaves-few-countries-lgbt-rights-642342> [<https://perma.cc/AFW9-SPGQ>].

11. Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41, 319 (Aug. 25, 2017).

12. See Steve Hendrix, *A History Lesson for Trump: Transgender Soldiers Served in the Civil War*, WASH. POST (Aug. 25, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/07/26/a-history-lesson-for-trump-transgender-soldiers-served-in-the-civil-war/> [<https://perma.cc/KY4R-YSGY>]; Ryan Thoreson, *President Trump's Despicable Move to Ban Transgender People from Military Service*, HUMAN RIGHTS WATCH (July 26, 2017, 3:50 PM), <https://www.hrw.org/news/2017/07/26/president-trumps-despicable-move-bar-transgender-people-military-service> [<https://perma.cc/DUR8-XLBU>].

13. *Id.*

A. Defining Terminology and Issues of Gender Identity

To properly analyze gender identity, and more specifically transgender identity, as a ground for discrimination, it is necessary to understand proper terminology. Therefore, it is essential to contextualize some background matters, with emphasis on the diverging vocabulary. While many of the below words and phrases are used interchangeably, they have separate and distinct legal and societal meanings.

1. “Gender” Versus “Sex”

While gender and sex are often used interchangeably in common vernacular, the two terms are distinct.¹⁴ In its most simplistic sense, sex is biologically determined and refers to an individual’s physical anatomy at birth (i.e., being born male or female) and includes genital, hormonal, and chromosomal distinctions,¹⁵ whereas gender is culturally determined and is a more complex and socially constructed identifier.¹⁶ Gender can be defined as the sum of the characteristics which are traditionally or culturally associated with an individual’s sex.¹⁷ It relates to those factors that are traditionally associated with being male or female, often conforming to gender stereotypes.¹⁸ This includes, for example, the way individuals wish to dress, their physical appearance, or even how they display traits that are associated with masculinity or femininity.¹⁹ While an individual’s biological

14. Britta N. Torgrimson, & Christopher T. Minson, *Sex and gender: what is the difference?*, J. APPLIED PHYSIOLOGY (Sept. 1, 2005), <https://doi.org/10.1152/jappphysiol.00376.2005> [<https://perma.cc/6AHC-JZEX>].

15. *Id.*; Rachel L. Toker, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R. C.L. L. REV. 577, 580-81 (1999).

16. Torgrimson, *supra* note 14.

17. Paisley Currah & Shannon Minter, *Transgender Equality*, POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE, (2000) <https://www.nclrights.org/wp-content/uploads/2013/07/transeq.pdf> [<https://perma.cc/3BXZ-Z63H>]; *Defining Sex, Gender, and Sexuality: Child Development*, LUMEN LEARNING, <https://courses.lumenlearning.com/atd-hostos-childdevelopment/chapter/defining-sex-gender-and-sexuality/> [<https://perma.cc/Q7AX-TKNX>] (last visited Oct. 6, 2020).

18. *Defining Sex, Gender, and Sexuality: Child Development*, *supra* note 17.

19. *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> [<https://perma.cc/3ENC-CJXK>] (last visited Oct. 6, 2020); *Defining Sex, Gender, and Sexuality: Child Development*, LUMEN LEARNING, <https://courses.lumenlearning.com/atd->

sex often conforms to their gender identity, (i.e., most individuals born male identify as men), this is not always the case.²⁰

2. “Gender Identity” Versus “Sexual Orientation”

Gender identity and sexual orientation, although commonly and explicitly linked, are often mistakenly conflated. Gender identity refers to how an individual chooses to identify and perform their gender and how they express their internal feelings.²¹ In nearly all instances, gender identity is self-determined as a result of a “combination of inherent and extrinsic or environmental factors.”²² Gender identity at its core is about who you are—man, woman, or perhaps neither.²³ Being transgender is a type of gender identity and occurs when an individual’s assigned sex diverges from the gender with which they identify.²⁴ An individual’s gender identity is not the same as their sexual orientation, which indicates an individual’s preference in partners to whom they are attracted romantically, emotionally, or sexually,²⁵ and is often classified as gay, lesbian, bisexual or asexual.²⁶ However the list is constantly expanding to include new sexual orientations.²⁷

hostos-childdevelopment/chapter/defining-sex-gender-and-sexuality/
[https://perma.cc/E2Z9-T5JC] (last visited Aug. 30, 2020).

20. *Id.*

21. *Id.*

22. Dr. Shuvo Ghosh, *Gender Identity*, MEDSCAPE, (Mar. 16, 2015),
https://emedicine.medscape.com/article/917990-overview.

23. *Sexual Orientation, PLANNED PARENTHOOD*,
https://www.plannedparenthood.org/learn/sexual-orientation-2/sexual-orientation-1
[https://perma.cc/QW8F-JZH3] (last visited Oct. 6, 2020); see also *PFLAG National
Glossary of Terms*, PFLAG (Jul. 2019), https://pflag.org/glossary [https://perma.cc/MCQ5-
KL3Y].

24. *Id.*

25. *Id.*; *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN,
https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-
and-definitions [https://perma.cc/QE9M-7P46] (last visited Aug. 30, 2020).

26. *Id.*

27. *Id.*; Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018),
https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html
[https://perma.cc/9TEK-FZHZ].

II. THE UNITED STATES TRANSGENDER MILITARY BAN

A. Transgender Military Service History

The United States has struggled to provide consistent and stable protections that are now well engrained into the laws of other countries, exemplified by New Zealand. The United States briefly matched other progressive agendas, specifically during President Obama's administration when it was announced that transgender troops would be allowed to serve in the national military under their preferred gender identities.²⁸ This development, however, was short-lived, and the US military once again affirmatively banned transgender troop service under the Trump administration.²⁹

1. The 2016 Obama Administration Announcement Allowing Transgender Service

On June 30, 2016, then-US Secretary of Defense, Ash Carter, announced that for the first time in history, the US military would allow transgender servicepeople to serve in their preferred gender identity.³⁰ This added the United States to the list of nineteen countries that officially welcome transgender troops in the military, joining nations such as the Netherlands, Australia, New Zealand, Israel and Canada.³¹ This decision was the result of years

28. Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/> [<https://perma.cc/P5JX-ZQZG>].

29. Press Release, U.S. Dep't of Def., David L. Norquist, Performing the Duties of Deputy Secretary of Defense, Directive-type Memorandum, (DTM)-19-004 - Military Service by Transgender Persons and Persons with Gender Dysphoria (Mar. 12, 2019), <https://www.washingtonblade.com/content/files/2019/03/DTM-DRAFT-151-MILITARY-SERVICE-BY-TRANSGENDER-PERSONS-AND-PERSONS-WITH-GENDER-DYSPHORIA-OSD002299-19-RES-Final.pdf> [<https://perma.cc/6XA6-P4EK>].

30. Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/> [<https://perma.cc/P5JX-ZQZG>].

31. Shayanne Gal & Ashley Collman, *Just 19 countries would accept transgender soldiers if Trump's ban ends up going into place*, INSIDER, (Feb. 5, 2019),

of research and investigation into the implications of allowing transgender troop service.³² In 2016, the US Department of Defense published the RAND Corporation's report entitled "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Study").³³ The RAND Study was cited heavily by the Obama Administration in the announcement that the US military would allow transgender troops to serve,³⁴ giving factual and statistical rationales for the inclusion of transgender troops.³⁵

Among its other major findings, the RAND Study stated that the cost of health insurance for transgender troops would not increase significantly, directly refuting the government's main argument in support of the ban.³⁶ It estimated that as of 2016, there were between 1,300 and 6,600 transgender personnel serving in the active military.³⁷ The main types of gender-transition related treatments, which theoretically could impact the cost of health insurance, for this population are psychosocial, pharmacologic (primarily, but not exclusively, hormonal), and surgical.³⁸ However, the RAND Study found that not all military personnel will need or want any or all of these options.³⁹ As the range of the estimated population of transgender individuals in the military is wide, and because there are numerous healthcare options, the RAND Study established that allowing transgender troops would

<https://www.insider.com/countries-that-let-transgender-soldiers-serve-2019-2> [https://perma.cc/N3M8-DAEV]; Paul LeBlanc, *The countries that allow transgender troops to serve in their armed forces*, CNN (Jul. 27, 2017), <https://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html> [https://perma.cc/6DUA-8HX7].

32. Agnes Gereben Schaefer et al., RAND CORP., *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* (2016), www.rand.org/pubs/research_reports/RR1530.html [https://perma.cc/3SP2-7J2A].

33. *Id.*

34. Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/> [https://perma.cc/3TDT-ES55].

35. *Id.*

36. Schaefer et al., *supra* note 32.

37. *Id.* at 69.

38. *Id.* at 6.

39. *Id.* at 7.

not significantly impact the military's medical funding.⁴⁰ Specifically, the Study estimates that health care costs would increase by between \$2.4 million and \$8.4 million annually—"an amount that will have little impact on and represents an exceedingly small proportion of AC health care expenditures."⁴¹ Overall Department of Defense health care expenditures were \$49.3 million in 2014.⁴²

Furthermore, the RAND Study analyzed the effects of similar foreign military policies.⁴³ In this investigation, it found that there was little to no impact of transgender troop integration on unit cohesion, operation effectiveness or readiness.⁴⁴ The RAND Study uses foreign militaries as points of comparison to suggest that in order to effectively implement a policy allowing transgender service, military leadership needs to design a clear and explicit approach and also adopt a zero-tolerance stance toward the harassment of transgender soldiers.⁴⁵

Based on this data, the United States announced in June 2016 that it would allow for open transgender military service, allowing individuals in the military to serve in their preferred gender identity.⁴⁶ Although this was a victory for transgender rights, the success of this announcement was retracted one year later in July 2017 when President Trump announced that transgender individuals would no longer be permitted to serve in the US military.⁴⁷ This divisive decision was announced not from an

40. *Id.* at 9-10.

41. *Id.* at xi-xii.

42. *Id.* at 70.

43. *Id.* at 62.

44. *Id.* at 61.

45. *Id.* at 62-63.

46. Press Release, U.S. Dep't of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/>.

47. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/52P6-AD2N>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/U4ZS-MRYC>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369> [<https://perma.cc/V2DM-QJUP>].

official White House press statement, but rather from the President's personal Twitter account around 9:00 a.m. EST.⁴⁸

2. The 2017 Trump Administration Transgender Military Ban

Through a tweet on his personal Twitter account on July 26, 2017, President Trump changed the course of the US military and of transgender rights in the nation:

After consultation with my Generals and military experts, please be advised that the United States Governments will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.⁴⁹

This ban on transgender service, scheduled to take effect April 12, 2019,⁵⁰ would effectively strip away the right to serve in the military from current transgender troops, as well as bar any new transgender recruits from enlisting in the military as openly transgender, or in any gender identity that did not match their sex assigned at birth.⁵¹ Additionally, in a presidential memorandum addressed to the Secretary of Defense and the Secretary of Homeland Security on August 25, 2017, President Trump provided rationale for his abrupt announcement,⁵² stating:

[T]he previous Administration failed to identify a sufficient basis to conclude that [allowing open transgender service] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.⁵³

48. Trump (July 26, 2017, 8:55 AM), *supra* note 47.

49. *Id.*

50. *See* Norquist, *supra* note 29.

51. *Id.*

52. Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41,319 (Aug. 25, 2017).

53. *Id.*

On the tails of this announcement and subsequent codification as a Directive-type Memorandum,⁵⁴ multiple complaints were filed against President Trump seeking an injunction to halt, and an invalidation to void, the transgender military ban.⁵⁵

3. History of US Transgender Military Service Litigation

As a response to President Trump's announcement, four major claims were filed in federal court to challenge the constitutionality of the new transgender military ban.⁵⁶ The National Center for Lesbian Rights ("NCLR") and the GLBTQ Advocates and Defenders ("GLAD") filed *Doe 1 v. Trump* in the US District Court for the District of Columbia.⁵⁷ The American Civil Liberties Union (the "ACLU") filed *Stone v. Trump* in the US District Court for the District of Maryland.⁵⁸ Lastly, Lambda Legal filed *Karnoski v. Trump* in the US District Court for the District of Washington and GLAD filed *Stockman v. Trump* in the US District Court for the Central District of California.⁵⁹ Each of these cases (collectively, the "Transgender Military Cases") were filed between August 9, 2017 and September 5, 2017, in direct response to President Trump's ban on transgender troop service.⁶⁰

While each of the above four cases are distinct in their respective plaintiffs, they invoke the same legal arguments and constitutional claims. *Doe 1* consisted of two distinct classes of plaintiffs.⁶¹ The first was the pseudonym plaintiffs (unnamed due to their fear of being outed), Jane Doe 1-5 and John Doe 1, each of

54. See Norquist, *supra* note 29.

55. *Timeline*, GLAD & NCLR, <https://notransmilitaryban.org/timeline/> [<https://perma.cc/7THS-Q8XM>] (last visited Oct. 7, 2020); Russell Spivak, *From Tweet to Text: Trump Moves Forward on Military Transgender Ban*, LAWFARE (Aug. 28, 2017), <https://www.lawfareblog.com/tweet-text-trump-moves-forward-military-transgender-ban> [<https://perma.cc/95EG-HZUS>].

56. *Timeline*, *supra* note 55; Sarah Grant, *Litigation on the Transgender Service Member Ban: An Update*, LAWFARE (Aug. 20, 2018, 8:00 AM), <https://www.lawfareblog.com/litigation-transgender-service-member-ban-update> [<https://perma.cc/95EG-HZUS>].

57. *Timeline*, *supra* note 55.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 185-90 (D.D.C. 2017).

whom was enlisted in the US military at the time of the filing.⁶² The second class, Regan Kibby and Dylan Kohere, were both individuals in a pre-military program (a student at the Naval Academy, and an Army ROTC, respectively).⁶³

The plaintiffs initiated this suit seeking a preliminary injunction of the transgender military ban based on their injury if the ban should be allowed to continue to be in effect.⁶⁴ A plaintiff seeking a preliminary injunction “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”⁶⁵ Each of these four factors must be established by the plaintiffs in order to compel a court to grant a preliminary injunction against the transgender military ban.⁶⁶

President Trump and the US Government (“Defendants”), refuted these claims by citing the medical expenses that transgender military might incur.⁶⁷ Defendants argued that “at least some transgender individuals suffer from medical conditions that could impede the performance of their duties.”⁶⁸ Additionally, they argued that “there is room for the military to think” that certain medical conditions “may limit the deployability of transgender individuals as well as impose additional costs on the armed forces.”⁶⁹ The Defendants further maintained that “the President could reasonably conclude” that the presence of transgender individuals in the military would harm “unit cohesion.”⁷⁰ These reasons were provided by the Defendants with little evidence, and, in fact, went against RAND’s Study that concluded that prohibiting transgender service members would undermine military effectiveness and readiness.⁷¹ While the

62. *Id.* at 185-90.

63. *Id.* at 189-90.

64. *Id.* at 191.

65. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014).

66. *Doe 1*, 275 F. Supp. 3d at 191.

67. *Id.* at 211 (citing the Defs.’ Motion to Dismiss and Opposition to Plaintiff’s Application for Preliminary Injunction at 31-33).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 212-13. This was accepted and supported by the US Army, Air Force, and Navy. *Id.* at 213.

government laid forth these assertions, it is the role of the court to weigh the opposing arguments.⁷²

B. Bringing a Claim Against the Transgender Military Ban in the United States

Under US federal law, to successfully bring a claim challenging the constitutionality of the transgender military ban, a plaintiff must have a personal stake in the outcome and must also successfully allege that the ban has caused injury.⁷³ If these conditions are met, a court may have jurisdiction over the claim.⁷⁴ If the plaintiff is able to successfully show standing and injury, their case may proceed.⁷⁵ While the plaintiffs in the Transgender Military Cases each sought a preliminary injunction, because the transgender military ban is now in effect, this is no longer the appropriate relief.⁷⁶ While these cases proceed through the court system, the plaintiffs now seek to challenge the constitutionality of the ban itself.⁷⁷ If their arguments are successful, the transgender military ban may be struck down as unconstitutional.

1. Plaintiff Identification

Due to the nature of the transgender military ban, which both forces current transgender service members to discharge and also bars entry of new transgender troops, there are two classes of plaintiffs in these cases.⁷⁸ *Retention* addresses current service members while *accession* directives address potential recruits.⁷⁹ Based on their different military statuses, the two classes of plaintiffs have separate and distinct injury arguments;⁸⁰ however,

72. *Doe 1*, 275 F. Supp. 3d at 212.

73. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

74. *Id.*

75. *Doe 1*, 275 F. Supp. 3d at 192.

76. *Id.* at 191; *Stockman v. Trump*, No. EDCV171799JGBKX, 2017 WL 9732572, at *13 (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Stone v. Trump*, 280 F. Supp. 3d 747, 757 (D. Md. 2017).

77. *See Doe 1*, 275 F. Supp. 3d at 195. The court can and will adjudicate the constitutionality of the directives themselves.

78. Norquist, *supra* note 29.

79. *Doe 1 v. Trump*, 275 F. Supp. 3d at 180.

80. *Id.* at 198-99.

in *Doe 1*, the D.C. District Court found that both classes did, as a conclusion of fact, have actionable injury as a result of the ban.⁸¹

2. The Standing Requirement

To successfully bring a case alleging transgender discrimination, plaintiffs must show that the court is obligated to hear the case.⁸² Standing is an element of a court's subject-matter jurisdiction and requires that a plaintiff have "a personal stake in the outcome of the controversy."⁸³ Specifically, a plaintiff cannot be a mere bystander or interested third-party, they must show that the defendant's conduct has affected them in a "personal and individual way."⁸⁴ To demonstrate standing under Article III, there are three requirements: (1) that the plaintiff suffered an "injury in fact"; (2) that there is a "causal connection between the injury and the conduct complained of"; and (3) that it is likely . . . that the injury will be "redressed by a favorable decision."⁸⁵ Therefore, for a plaintiff to effectively challenge the ban, the plaintiff must sufficiently allege both an injury in fact that was caused by the conduct and demonstrate that the court is able to remedy the injury, for example, by injunction or by striking down the transgender military ban.⁸⁶

3. Alleging and Proving Injury

In order to show injury under the standing requirement, a plaintiff's injury must be "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."⁸⁷ In cases brought against the transgender military ban, such injury is often shown as open transgender troops being forced to discharge from service.⁸⁸

81. *Id.* at 202-03.

82. *Id.* at 176.

83. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

84. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992).

85. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

86. *See id.*

87. *See id.*

88. *Doe 1 v. Trump*, 275 F.Supp. 3d 167, 201-02 (D.D.C. 2017).

Stemming from the injury, a plaintiff experiences loss of employment and the benefits thereof.⁸⁹

The D.C. District Court held in *Doe 1* that plaintiffs were entitled to a preliminary injunction based on the court's analysis of the transgender military ban as an equal protection violation.⁹⁰ The US Supreme Court and the D.C. Circuit have made clear that the "injury in fact element of standing in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier."⁹¹ This is significant when the government imposes the barrier, because it triggers both the Fifth and Fourteenth Amendment.⁹² The ban is a barrier for purposes of this analysis as the government is imposing a restriction that had previously been removed, fully limiting a group of people from remaining, or enlisting, in the military.⁹³

With respect to the accession directive prohibiting new transgender troops from enlisting, the court in *Doe 1* found that the plaintiff, a nineteen-year-old midshipman at the US Naval Academy,⁹⁴ would suffer an injury in fact if he "(i) graduates from the [US] Naval Academy; (ii) applies for accession; and (iii) is denied accession due to his transgender status."⁹⁵ The court opined that the chain of causation is even shorter for active military, who are, in this case, pseudonym plaintiffs.⁹⁶ These service members who are already members of the military "will

89. *See id.*

90. *Id.* at 207.

91. *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 51 (D.C. Cir. 2016); *see also*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 657 (1993) (holding that "when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . the "injury in fact" is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . To establish standing, a party challenging a program . . . need only demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.").

92. *See Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (holding that Plaintiff had standing and injury-in-fact because the public university had denied him the opportunity to compete for admission on an equal basis.).

93. *See Norquist*, *supra* note 29.

94. *Doe 1*, 275 F.Supp. 3d at 189.

95. *Id.* at 202.

96. *Id.* at 186-89.

suffer an injury in fact if: (i) they remain in the military; and (ii) are discharged based on their transgender status.”⁹⁷

However, in the aforementioned cases, specifically *Doe 1*, such injury was harder to prove, as at the time of the case’s filing, the ban was not yet implemented.⁹⁸ Despite this, the D.C. District Court found that the plaintiffs had demonstrated a chain of causation “leading to concrete and particularized injuries in which there are few links and each link is substantially likely to occur.”⁹⁹ Although the transgender military ban was proposed and not yet codified as law, future injury may be alleged as injury-in-fact.¹⁰⁰ As explained by the US Supreme Court, “[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.”¹⁰¹ The D.C. Circuit has explained that “the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm . . . as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently imminent for standing purposes.”¹⁰² In cases alleging discrimination under the transgender military ban, this argument is fairly straightforward for individuals in active service.¹⁰³ The specificity of the ban makes injury certain for those transgender troops who choose not to discharge from the military,¹⁰⁴ and therefore, current transgender troops can prove injury-in-fact with relative simplicity.

C. Fifth Amendment Equal Protection Claims

As the Transgender Military Cases each make their way through the court system, the plaintiffs rely upon equal protection and the Fifth Amendment to substantiate their constitutional

97. *Id.* at 203.

98. *Id.* at 193.

99. *Id.* at 202.

100. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-60 (2014).

101. *Id.* at 158.

102. *Doe 1*, 275 F.Supp. 3d at 202 (citing *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017)).

103. *Id.*

104. *Id.*

challenges.¹⁰⁵ However, the cases against the transgender military ban lack an important principle—they do not elevate or identify “gender identity” as a specifically protected class; instead, the cases focus on discrimination against transgender individuals as discrimination based on sex-based stereotypes.¹⁰⁶ While these identifications may seem analogous, the distinction is crucial to note. For example, if gender identity were its own protected class, similar to that of sex, then there would be a stronger case for elevated scrutiny and less reliance on less controlling existing case law that simply analyzes those who do not conform to sex-based stereotypes. It is important to recognize that transgender rights are not specifically enunciated or codified into federal law and the existing Supreme Court case law that specifically address transgender rights does so only under Title VII analysis.¹⁰⁷

The Fifth Amendment of the US Constitution states that “no person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁰⁸ While the Fifth Amendment lacks an explicit equal protection clause, “in numerous decisions, [the Supreme Court] has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.”¹⁰⁹ Therefore, in cases brought against the military, a facet of the federal government, the proper claim arises under the Fifth Amendment as the military is denying transgender individuals their right to equal protection under the law.¹¹⁰

The Fifth Amendment is the strongest justification for challenges to the transgender military ban.¹¹¹ For example, the court in *Doe 1* was “convinced that [the plaintiffs were] likely to succeed in [their] lawsuit under the Fifth Amendment.”¹¹² Specifically, of all the arguments presented, the D.C. Circuit Court

105. See *Karnoski v. Trump*, 926 F.3d 1189 (9th Cir. 2019); *Doe 1*, 275 F.Supp. 3d at 207; *Stone v. Trump*, 280 F. Supp. 3d 747, 757 (D. Md. 2017); *Stockman v. Trump*, No. EDCV171799JGBKX, 2017 WL 9732572, at *1 (C.D. Cal. Dec. 22, 2017).

106. *Stone*, 280 F.Supp. 3d at 768; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

107. See generally *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

108. U.S. CONST. amend. V.

109. *Davis v. Passman*, 442 U.S. 228, 234 (1979).

110. *Id.*

111. *Doe 1 v. Trump*, 275 F.Supp. 3d 167, 176 (D.D.C. 2017).

112. *Id.*

finds the framework applicable under the Due Process Clause's equal protection component to be the most relevant.¹¹³

1. Assessing the Level of Scrutiny

As the transgender military ban is a government action that classifies people based on their gender identity, and particularly their transgender status, “and disfavors a class of historically persecuted and politically powerless individuals,” the ban is subject to an elevated form of scrutiny.¹¹⁴ The level of scrutiny that a court applies gives different levels of deference to the governmental organization whose laws are being challenged.¹¹⁵ The question then becomes whether gender identity is constitutionally protected and, if it is, what level of scrutiny must a court apply to assess the government action? In *Karnoski*, the District Court concluded that the ban had to satisfy “strict scrutiny if it is to survive.”¹¹⁶ However, the Ninth Circuit Court of Appeals overturned this elevated level of scrutiny and found that “existing law does not support the application of a strict scrutiny standard of review” and instead applied intermediate scrutiny.¹¹⁷

Consistent with *Karnoski*, the District Court in *Doe 1* applied “an intermediate level of scrutiny to [the] Defendants’ exclusion of transgender individuals from the military, akin to the level of scrutiny applicable in gender [and sex] discrimination cases.”¹¹⁸ Although the District Court was aware of no binding precedent on this issue, it took “note of the findings and conclusions of a number of other courts from across the country” and found that discrimination on the basis of an individual’s transgender identity “is a quasi-suspect form of classification that triggers heightened

113. *Id.*

114. *Id.*

115. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 42 U. PA. J. CONST. L. 225, 228-29 (2002). For example, the court will inquire into the relationship between the statute’s means and how they advance the government ends. *Id.* at 227. Whether the government has a legitimate, compelling, or substantial interest in the means (the standard of review) depends on the protected class at issue. *Id.* at 229.

116. *Karnoski v. Trump*, 926 F.3d 1180, 1199 (9th Cir. 2019).

117. *Id.* at 1199-1201.

118. *Doe 1*, 275 F. Supp. 3d at 209.

scrutiny.”¹¹⁹ Throughout equal protection jurisprudence in this area, heightened scrutiny is significant for transgender rights because very few classes of individuals have been elevated above rational basis review.¹²⁰

In light of this analysis, the Ninth Circuit stated that a standard “that is more than rational basis but less than strict scrutiny” applies.¹²¹ As a “quasi-suspect class,” a court may accordingly elevate the level of scrutiny to intermediate scrutiny.¹²² This runs counter to the government’s argument in *Stone* that rational basis review should apply.¹²³ It is the government’s argument in *Stone* that rational basis review is normally applied with respect and deference to military decision-making and should therefore be applied here.¹²⁴ However, military decision-making is “only one factor to consider in the analysis.”¹²⁵

2. Intermediate Scrutiny Analysis

It is likely that President Trump’s directives cannot survive an intermediate level of scrutiny, as they are “not genuinely based on legitimate concerns regarding military effectiveness or budget[ary] constraints, but are instead driven by a desire to express disapproval of transgender people generally.”¹²⁶ The D.C.

119. *Id. See* *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that “all of the indicia for the application of the heightened intermediate scrutiny standard are present” for transgender individuals); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 872-74 (S.D. Ohio 2016) (finding that “transgender status is a quasi-suspect class under the Equal Protection Clause”).

120. Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, UMKC SCH. OF LAW (2019), <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> [<https://perma.cc/L5RF-KHE7>]. Specifically, strict scrutiny statuses include race and national origin while intermediate scrutiny includes gender.

121. *Karnoski*, 926 F.3d at 1201. *See Evancho*, 237 F. Supp. 3d at 288 (holding that “all of the indicia for the application of the heightened intermediate scrutiny standard are present” for transgender individuals).

122. *Doe 1*, 275 F. Supp. 3d at 209 (citing *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 872-74 (S.D. Ohio 2016) (finding that “transgender status is a quasi-suspect class under the Equal Protection Clause”)).

123. *Stone v. Trump*, 400 F. Supp. 3d 317, 353 (D. Md. 2019).

124. *Id. See also Doe 1 v. Trump*, 275 F. Supp. 3d at 212 (holding that deference is owed to military decision making).

125. *Stone*, 400 F. Supp. 3d at 353.

126. *Doe 1*, 275 F. Supp. 3d at 176.

Circuit Court found in *Doe 1*, that a “number of factors—including the sheer breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President’s announcement of them, the fact that the reasons given do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself—strongly suggest that [a Fifth Amendment equal protection claim] is meritorious.”¹²⁷ In fact, the Chiefs of Staff of each branch of the military testified that transgender integration has had no negative impact on troops readiness and that the cost of additional healthcare has been “miniscule.”¹²⁸ This is significant as it undermines the justifications that the president, and subsequently the government, has given for the implementation of the transgender military ban.¹²⁹

The burden of proof for an intermediate scrutiny equal protection test “is demanding and it rests entirely on” the government.¹³⁰ The government “must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹³¹ Additionally, it is well established that the Constitution’s guarantee of equality must “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹³²

As such, the government bears the burden in proving the existence of an important objective in enacting the transgender military ban.¹³³ While the government’s main arguments of financial conservation and troop unity are important objectives in creating military policy, complete transgender discrimination is likely not substantially related to the achievement of those

127. *Id.*

128. Transgender Military Service, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/transgender-military-service> [<https://perma.cc/UQX9-E79R>] (last visited Oct. 7, 2020).

129. *Id.*; *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 183 (D.D.C. 2017).

130. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

131. *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

132. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

133. *Virginia*, 518 U.S. at 533.

objectives.¹³⁴ The ban not only relies on generalizations in explaining its stated purpose, but it actually runs counter to all relevant and available data.¹³⁵ There is no government explanation for the decision to discharge and deny *all* transgender people, even those who meet the relevant physical, mental, and medical standards for service, opportunities to serve in the US military.¹³⁶ The transgender military ban is overbroad when considered in the light of the justifications provided.¹³⁷ Moreover, President Trump's sudden announcement of the ban provides insight into the likely animus surrounding the decision—targeted discrimination against a politically unpopular group.¹³⁸

3. Equal Protection Arguments are Likely to Succeed

The US Supreme Court often considers whether the group bringing an equal protection claim “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.”¹³⁹ This leads the Court to look at discrimination by the government with more skepticism, as is the case with active transgender military service.¹⁴⁰ Due to transgender individuals' immutable status and identity, and because many courts around the nation have elevated discrimination against them to an intermediate level of scrutiny, plaintiffs are likely to succeed in their equal protection arguments.¹⁴¹ However, it is important to note that the Supreme Court has never decided an *equal protection*

134. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 211 (D.D.C. 2017).

135. *Id.* at 179.

136. This is opposed to, say, discharging only those who seek extra healthcare coverage, who therefore increase costs. *Id.* at 212. Defendants argue “that ‘some’ transgender individuals ‘could’ suffer from medical conditions that impede their duties, and assert that ‘there is room for the military to think’ that transgender people may be limited in their deployability at times. As an initial matter, these hypothetical concerns could be raised about *any* service members. Moreover, these concerns do not explain the need to discharge and deny accession to *all* transgender people who meet the relevant physical, mental and medical standards for service.”

137. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that law’s “sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects”).

138. *Id.* at 634.

139. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

140. *Doe 1*, 275 F. Supp. 3d at 208-10.

141. *Id.* at 215.

case regarding transgender discrimination, so the Court might not necessarily elevate scrutiny: it is merely the most compelling approach based on circuit court precedent.¹⁴² Although the government may allege practical justifications for implementing this ban, these arguments will likely lack substantial evidence and likely will not survive a court's application of an intermediate scrutiny inquiry.¹⁴³

III. THE INTERNATIONAL PERSPECTIVE

With no international framework to mandate transgender military service, nations must take it upon themselves to do so at the national level.¹⁴⁴ While the United States grapples with the future of transgender military servicepeople, many nations have already welcomed and accepted transgender servicepeople into their armed forces.¹⁴⁵ Specifically, New Zealand, which openly allows for transgender military services, serves as a model example.¹⁴⁶

A. Global Model Standards

The International Commission of Jurists ("ICJ") and the International Service for Human Rights ("ISHR"), on behalf of a coalition of human rights organizations, undertook a project in 2007 to develop a set of international legal principles (the "Yogyakarta Principles") on "the application of international law to human rights violations based on sexual orientation and gender

142. Curt Guyette, *Inside the Supreme Court's First Transgender Rights Case*, ACLU MICH. (Dec. 9, 2019), <https://www.aclumich.org/en/news/inside-supreme-courts-first-transgender-rights-case> [<https://perma.cc/VTA4-D6QV>]; Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> [<https://perma.cc/VJW3-DZP7>].

143. *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019).

144. Very few countries have chosen to do so at the national level. *See, e.g., Countries that allow transgender members in the military*, CBC (July 26, 2017), <https://www.cbc.ca/news/world/countries-that-allow-transgender-members-in-the-military-1.4222205> [<https://perma.cc/PJ85-75KZ>].

145. Gal & Collman, *supra* note 2.

146. *NZ Defence Force Proud to be Ranked First in Worldwide Diversity Study*, CMTY. SCOOP (Feb. 21, 2014), <http://community.scoop.co.nz/2014/02/nz-defence-force-proud-to-be-ranked-first-in-diversity-study/> [<https://perma.cc/PGP7-6RLZ>].

identity to bring greater clarity and coherence to States' human rights obligations."¹⁴⁷ The Yogyakarta Principles articulate that "all human beings are born free and equal in dignity and rights [and] all human rights are universal, interdependent, indivisible[,] and interrelated."¹⁴⁸ Additionally, the Yogyakarta Principles state that sexual orientation and gender identity are "integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."¹⁴⁹

The Yogyakarta Principles were later amended to include protections for individuals with non-conforming sex characteristics.¹⁵⁰ This amendment recognizes that "the needs, characteristics[,] and human rights situations of persons and populations of diverse sexual orientations, gender identities, gender expressions[,] and sex characteristics distinct from each other."¹⁵¹ Moreover, these principals acknowledge that "discrimination and other harm on the basis of sexual orientation, gender identity, gender expression, or sex characteristics are an attack on human diversity and on the universality and indivisibility of human rights."¹⁵²

However, the Yogyakarta Principles are simply a model for how international human rights law could afford more equal protection.¹⁵³ It is critical to collate and clarify state obligations under existing international human rights law in order to promote and protect all human rights for all persons on the basis of equality and without discrimination, and further protections are

147. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, YOGYAKARTA PRINCIPLES 7 (Mar. 2007), <https://yogyakartaprinciples.org/> [<https://perma.cc/A89A-72VP>].

148. *Id.* at 6.

149. *Id.*

150. *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, YOGYAKARTA PRINCIPLES 4 (Nov. 2017), <https://yogyakartaprinciples.org/principles-en/yp10/> [<https://perma.cc/AU9X-PLHL>].

151. *Id.* at 7.

152. *Id.*

153. *An Activist's Guide to The Yogyakarta Principles*, OUTRIGHT INT'L 30, https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf [<https://perma.cc/S6ED-DFHW>] (last visited Oct. 21, 2020).

necessary.¹⁵⁴ The current treaties under which a majority of countries operate are insufficient to protect gender identity as a class of peoples.¹⁵⁵ Of the nine core international human rights treaties, not one explicitly mentions sexual orientation or gender identity, or the rights of gay, lesbian, bisexual, or transgender individuals.¹⁵⁶ This includes the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women, which are the treaties where LGBT+ protections could most likely be found, especially the ICCPR.¹⁵⁷

B. United Nations Mandates

The original Yogyakarta Principles were launched as a global charter in March of 2007 at the UN Human Rights

154. See generally Pratima Narayan, *Somewhere Over the Rainbow...International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT’L L.J. 313, 347 (2006) (concluding that human rights organizations must demand greater human rights protections for sexual minorities, who have no guiding principles or treaties on which to base their arguments for equality).

155. *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUMAN RIGHTS WATCH, <https://www.hrw.org/video-photos/interactive/2018/04/16/sexual-orientation-gender-identity-country-profiles> [<https://perma.cc/PFG8-8Z8H>] (last visited Oct. 7, 2020); Gemma MacArthur, *Securing Sexual Orientation and Gender Identity Rights within the United Nations Framework and System: Past, Present and Future*, 15 EQUAL RTS. REV. 25, 29 (stating: “following the lack of explicit inclusion of SOGI [sexual orientation and gender identity] rights in treaties, the development of relevant law that has ensued has been both patchy and slow. Limited progress has been made within relevant treaty bodies and political forums; and these are considered the foremost authoritative sources in determining the status of these rights.”).

156. Kseniya Kirichenko, *UN treaty bodies advance LGBTI rights*, OPENGLOBALRIGHTS (Oct. 22, 2019), <https://www.openglobalrights.org/treaty-bodies-advance-LGBTI-rights/> [<https://perma.cc/8VU9-SGK5>]; U.N. Human Rights, Office of the High Comm’r, *The Core International Human Rights Instruments and their monitoring bodies*, UN, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [<https://perma.cc/E3YJ-4X84>] (last visited Oct. 5, 2020).

157. U.N. Human Rights, Office of the High Comm’r, *The Core International Human Rights Instruments and their monitoring bodies*, UN, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [<https://perma.cc/E3YJ-4X84>] (last visited Oct. 5, 2020); Narayan, *supra* note 154 (the “ICCPR serves as the most effective instrument for GLBT activists in the struggle for human rights.”)

Council in Geneva.¹⁵⁸ The Yogyakarta Principles were then presented at a UN event in New York City on November 7, 2007, co-sponsored by Argentina, Brazil, and Uruguay.¹⁵⁹ The international NGO, Human Rights Watch, explained that the first step towards the application of these principles would be decriminalizing homosexuality in the at least seventy countries that still had legal penalties for individuals in same-sex relationships, and repealing the death penalty in the at least nine countries that still imposed it for such sexual practices.¹⁶⁰ The Yogyakarta Principles have never been adopted by the United Nations and the attempt to make gender identity and sexual orientation new protected categories has not yet been done by the General Assembly, the UN Human Rights Council, and other UN bodies.¹⁶¹ Therefore, as the United Nations is unlikely to support a treaty protecting gender identity from discrimination on a global scale, it becomes a nation's individual responsibility to draft and codify the protections laid out in the Yogyakarta Principles at the national level.

In 2010, Kishore Singh, UN Special Rapporteur on the Right to Education, presented an interim report on the human right to

158. *The Yogyakarta Principles to be launched on 26 March in Geneva*, ILGA EUROPE (Mar. 19, 2007), https://web.archive.org/web/20121103032010/http://ilga-europeilgaeurope.org/home/news/latest_news/the_yogyakarta_principles_to_be_launched_on_26_march_in_geneva [<https://perma.cc/MSY6-DMLC>]; *'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights*, HUMAN RIGHTS WATCH (Mar. 26, 2007), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights#> [<https://perma.cc/WD74-ABW8>].

159. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles, Health and Human Rights in a Changing World*, 8 OXFORD HUM. RTS. L. REV. 207, 237 (2008).

160. *Type of Anti-LGBT Laws: State and Country Profiles*, HUMAN RIGHTS WATCH, (last visited Feb. 12, 2020), http://internap.hrw.org/features/features/lgbt_laws/ [<https://perma.cc/D6UG-PTKE>]; Hristina Byrnes, *13 countries where being gay is legally punishable by death*, USA TODAY (June 14, 2019), <https://www.usatoday.com/story/money/2019/06/14/countries-where-being-gay-is-legally-punishable-by-death/39574685/> [<https://perma.cc/RJ4J-XJJW>].

161. See U.N. Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Rep. of the U.N. High Comm'r for Human Rights* (Nov. 17, 2011), https://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf [<https://perma.cc/KW39-SEQ9>].

comprehensive sexual education to the UN General Assembly.¹⁶² Although not adopted as a formal international rule, the report cited to the Yogyakarta Principles, to the dismay of some conservative nations.¹⁶³ While the Yogyakarta Principles and the identities they seek to protect may not be codified as law, some nations have taken the recommendations and adopted them nationally to ensure equal protection on the basis of gender identity.¹⁶⁴

The Yogyakarta Principles state that transgender individuals have human rights relating to privacy and equal protection.¹⁶⁵ Although not “specifically mentioned in broad international human rights treaties, transgender issues have been specifically addressed in [modern] case law.”¹⁶⁶ Specifically, “most frequently, these cases have raised violations of Article 8 of the European Convention on Human Rights, which provides individuals within treaty-body nations with the right” to a “private and family life.”¹⁶⁷ Notably, queer plaintiffs in the United States have relied on a right to privacy in their attempts to find equality under US law.¹⁶⁸ Thus,

162. *Majority of GA Third Committee unable to accept report on the human right to sexual education*, INT’L SERV. FOR HUMAN RIGHTS (Nov. 1, 2010), <https://web.archive.org/web/20130515111556/http://www.ishr.ch/archive-general-assembly/933-majority-of-ga-third-committee-unable-to-accept-report-on-the-human-right-to-sexual-education> [<https://perma.cc/F5NK-EXYF>]; *General Assembly, Human Rights Council Texts Declaring Water, Sanitation Human Right ‘Breakthrough’; Challenge Now to Turn Right ‘into a Reality’, Third Committee Told*, UNITED NATIONS (Oct. 25, 2010), <https://www.un.org/press/en/2010/gashc3987.doc.htm> [<https://perma.cc/6FJD-DQMZ>].

163. *General Assembly*, *supra* note 162. Russia, for example, opposed the references to the Principles, which had not been agreed to at the inter-governmental level.

164. *Id.*

165. *The Yogyakarta Principles plus 10*, *supra* note 150 at 18 (stating that States must “[e]nsure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons’ right to self-determination of gender,” and that there are obligations for States “relating to the rights to equality and non-discrimination”); Cindy K. Suh, *Reviewing a Ban on Transgender Troops from an international Perspective*, 25 SW. INT’L L.J. 155, 165.

166. Suh, *supra* note 165, at 165.

167. *Id.*; European Convention on Human Rights art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

168. *The Rights Of Lesbian, Gay, Bisexual And Transgender People*, ACLU, <https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people> [<https://perma.cc/T6V6-V4UV>] (last visited Oct. 5, 2020); *see generally* Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711 (2010).

the canonical privacy cases, analyzing an implicit right to privacy as a substantive due process right under the Fourteenth Amendment, is where much queer jurisprudence finds its foothold.¹⁶⁹ Specifically, the rights of homosexual activity, and the right to same-sex marriage have been associated with the right to privacy.¹⁷⁰

C. New Zealand and The Human Rights Act

In New Zealand, the prohibition of discrimination on the basis of sex under the Human Rights Act 1993 (the “Human Rights Act”), a landmark piece of national legislation, likely includes forms of gender identity.¹⁷¹ Consequently, the Human Rights Act likely protects transgender people from unlawful discrimination on the grounds of gender identity in areas of employment, housing, and education.¹⁷² However, this expansion has neither been tested in New Zealand courts, nor has it been further defined by New Zealand’s national legislature.¹⁷³ Instead, this expansion occurred through societal recognition that gender was included under sex.¹⁷⁴ Moreover, the 1993 Human Rights Act criminalized discrimination on the basis of sexual orientation.¹⁷⁵ From the Human Rights Act, New Zealand’s Solicitor General held that protection for transgender individuals comes from federal law under the sex and/or sexual orientation discrimination provisions.¹⁷⁶ In 2006, the Solicitor General stated that “there is

169. *The Rights Of Lesbian, Gay, Bisexual And Transgender People*, *supra* note 168; *see generally* Allen, *supra* note 168.

170. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003); *see also* Obergefell v. Hodges, 135 U.S. 644, 666 (2015).

171. *Discrimination against transgender people*, EMP’T N.Z., <https://www.employment.govt.nz/resolving-problems/types-of-problems/bullying-harassment-and-discrimination/discrimination-against-transgender-people/> [https://perma.cc/ZQM6-GLKR] (last visited Oct. 6, 2020).

172. Human Rights Act 1993, pt. II, s 21, subss (a), (m) (N.Z.).

173. Samuel Campbell, *Gender Trouble in the Human Rights Act 1993*, 3 PUB. INT. L.J. N.Z. 17, 18-25 (2016).

174. *Id.* at 18.

175. Cheryl Gwyn, Acting Solicitor-General, *Human Rights (Gender Identity) Amendment Bill*, CROWN LAW (Aug. 2, 2006), <https://web.archive.org/web/20100525201054/http://www.beehive.govt.nz/Documents/Files/SG%20Opinion%20%20Aug%202006.pdf> [https://perma.cc/M5L7-LG3L].

176. *Id.*

currently no reason to suppose that ‘sex discrimination’ would be construed narrowly to deprive transgender people of protection under the [Human Rights Act].” Thus, through this Act and the Solicitor General’s statement, there is no reason to believe that transgender rights would not be protected by federal legislation in New Zealand.¹⁷⁷

In a nation where gender identity is protected as an anti-discrimination right, New Zealand’s military is inclusive to those whose gender identities do not match their born sexes.¹⁷⁸ New Zealand’s national military, the New Zealand Defence Force, has been lauded as a world leader in diversity and for support of the LGBT+ community.¹⁷⁹ In fact, the Hague Centre for Strategic Studies, a Netherlands think-tank, has ranked the New Zealand Defence Force as number one in the world for integration of transgender personnel into the national military.¹⁸⁰ Additionally, the New Zealand Defence Force has been awarded a Rainbow Tick for LGBT+ inclusion, an accolade and accreditation that measures whether an organization accepts and values LGBT+ people in the workplace.¹⁸¹ This is the first military in the world to be given the independent accreditation.¹⁸² As those who identify as transgender in the military have, in theory, enjoyed legal employment protections for almost three decades, New Zealand is at the apex of transgender rights.¹⁸³

In New Zealand, the Human Rights Act is aimed at providing all individuals with equal opportunities and preventing unfair

177. *Id.*

178. *NZ Defence Force Proud to be Ranked First in Worldwide Diversity Study*, CMTY. SCOOP (Feb. 21, 2014), <http://community.scoop.co.nz/2014/02/nz-defence-force-proud-to-be-ranked-first-in-diversity-study/> [<https://perma.cc/RV5G-QR6H>]; Lily Wakefield, *While Trump’s military bans trans people, New Zealand Defence Force earns Rainbow Tick for LGBT inclusion*, PINK NEWS (Nov. 26, 2019), <https://www.pinknews.co.uk/2019/11/26/rainbow-tick-lgbt-inclusion-new-zealand-defence-force-trump-military-ban-trans/> [<https://perma.cc/MD8W-YSSH>]; see generally Heike Polster, *Gender Identity as a New Prohibited Ground of Discrimination*, 1 N.Z. J. PUB. & INT’L L. 157, 179 (2003).

179. *NZ Defence Force*, *supra* note 178.

180. *Id.*

181. Wakefield, *supra* note 181; *NZDF first military to get Rainbow Tick*, MEDIUM (Nov. 26, 2019), <https://medium.com/@nzdefenceforce/nzdf-first-military-to-get-rainbow-tick-e9ae326994fa> [<https://perma.cc/678N-BYD3>].

182. Wakefield, *supra* note 181.

183. *NZ Defence Force*, *supra* note 178.

treatment on the basis of personal characteristics.¹⁸⁴ Part II of the Human Rights Act sets out the non-discrimination standard, which deals with discrimination by those in both private and public sectors in relation to employment, sexual harassment, racial disharmony, racial harassment, and victimization.¹⁸⁵ The Human Rights Act sets out the prohibited grounds of discrimination, “the areas of life in which such discrimination is prohibited, and various exceptions where discrimination is lawful.”¹⁸⁶ For the purposes of the Human Rights Act, the prohibited bases of discrimination are “sex, which includes [discrimination against] pregnancy and childbirth” and “sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.”¹⁸⁷ The non-discrimination standard applies to “the legislative, executive, and judicial branches of the Government of New Zealand” and “every person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”¹⁸⁸ The Human Rights Act does not, however, explicitly protect gender identity.¹⁸⁹

While § 21(1) of the Human Rights Act expressly protects sex, it does not protect either “gender” or “gender identity.”¹⁹⁰ Accordingly, when enacted, the Human Rights Act was at risk of failing to adequately protect gender diverse individuals from discrimination.¹⁹¹ Following the Human Rights Act, in order to most fully and thoroughly protect gender identity under law, New Zealand’s courts would need to interpret sex to include gender identity and Parliament would need to amend the Human Rights Act so that gender is expressly included in § 21(1).¹⁹² Such approaches would ensure broad and guaranteed protection for gender diverse individuals from discrimination and provide a

184. *Human rights legislation – New Zealand*, N.Z. HUMAN RIGHTS COMM’N, <https://www.hrc.co.nz/your-rights/human-rights-legislation-new-zealand/> [<https://perma.cc/525W-G38Q>] (last visited Sept. 4, 2020).

185. *Id.*

186. *Id.*

187. Human Rights Act 1993, pt. II, s 21, subss (1)(a), (m) (N.Z.).

188. *Id.* at pt. II, s 21A, subss (2)(a)-(b).

189. *Id.* at pt. II, s 21, subss (1)(a), (m).

190. Campbell, *supra* note 173, at 22-23.

191. *Id.*

192. *Id.*

strong symbolic message that New Zealand both recognizes and respects the human rights of all diverse gender identities.¹⁹³

New Zealand's Human Rights Act prohibits both direct and indirect discrimination.¹⁹⁴ Although the Human Rights Act does not define direct discrimination, it has been established that direct discrimination occurs "when a policy or legislation treats someone less favourably than others in the same or a similar situation, and this happens based on a personal characteristic that is a ground of discrimination under the [Human Rights] Act in an area covered by it."¹⁹⁵ This distinction must lead to an actual disadvantage.¹⁹⁶ According to § 65 of the Human Rights Act, indirect discrimination occurs "when an action, conduct, practice, requirement, or condition is not obviously discriminatory on any of the grounds in the [Human Rights] Act, but has a discriminatory effect that would be unlawful under the legislation on a group of people."¹⁹⁷

1. Amending the Human Rights Act

In August 2006, the Honorable Georgina Beyer, a member of parliament at the time, "withdrew her Human Rights (Gender Identity) Amendment Bill 2004 after it had been held over prior to the previous election and had yet to receive its first reading."¹⁹⁸ The bill proposed to amend Section 21 of the Human Rights Act to include a new prohibited ground of discrimination: "gender identity, which refers to the identification by a person with a gender that is different from the birth gender of that person, or the gender assigned to that person at birth, and may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description."¹⁹⁹ This amendment would have

193. *Id.*

194. Heike Polster, *Gender Identity as a New Prohibited Ground of Discrimination*, 1 N.Z. J. PUB. & INT'L L. 157, 179 (2003).

195. *Id.* (citing Ministry of Justice, *The Human Rights Act 1993: Guidelines for Government Policy Advisers*, MINISTRY OF JUSTICE, WELLINGTON (2000), <https://www.justice.govt.nz/assets/Documents/Publications/Non-discrimination-standards-for-government-guidelines.pdf>).

196. *Id.*

197. *Id.* (citing Human Rights Act 1993, pt. II, s 65 (N.Z.)).

198. Elisabeth McDonald, *Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993*, 5 N.Z. J. PUB. & INT'L L. 301, 301-02 (2007).

199. *Id.*

been significant in that the existing protection, “sex” in Section 21 of the Human Rights Act, is not unequivocally broad enough to “accommodate all the types of discrimination suffered on the ground of gender identity—specifically, the discrimination currently faced by the transgender community of New Zealand.”²⁰⁰ Further protection was needed, and it is seemingly adopted through a broader reading of the current legislation.²⁰¹

A major argument against the proposed amendment was that legal means “cannot change attitudes, and that education rather than legislation is needed to eliminate discrimination.”²⁰² Opponents to the amendment argued that because discrimination is mainly a social issue, a social remedy should be preferable.²⁰³ However, this line of reasoning neglected to understand the social implications of legal protections—hoping that there will be a shift in social attitudes is not a legal strategy, and is certainly not as strong as one seeking legal freedom for his/her gender identity.

2. Finding Protection in Existing Legislation

While New Zealand has no *explicit* legislative protection for transgender individuals under the Human Rights Act, transgender rights in the nation arise by interpreting the Human Rights Act.²⁰⁴ Not only are they seen as being encompassed in other legislation (by reading the Human Rights Act together with the 1994 Bill of Rights Act), but the protections for sex and sexual orientation have been extended to transgender individuals in the Canadian and UK jurisprudence as well.²⁰⁵ Specifically, unequal treatment of transgender people has been identified as “sex” discrimination by the UK national court, the House of Lords, which New Zealand refers to as “Crown Law.”²⁰⁶ While these protections are

200. *Id.*

201. *Id.* at 305.

202. Polster, *supra* note 194, at 184.

203. *Id.*

204. Campbell, *supra* note 173, at 23.

205. McDonald, *supra* note 198, at 305.

206. See McDonald, *supra* note 198, at 304-05. Crown Law does not bind New Zealand courts, but as an international comparison, it may serve as persuasive precedent. *The Impact of Foreign Law on Domestic Judgments: New Zealand*, LIBR. OF CONG. (June 9, 2015), <https://www.loc.gov/law/help/domestic-judgment/newzealand.php> [https://perma.cc/7XXB-BLXU].

interpreted as such, they are not specifically codified in the text of the Human Rights Act itself.²⁰⁷

However, transgender individuals are afforded many explicit rights under New Zealand law.²⁰⁸ Regarding employment, there are protections available for transgender individuals, and it is solely the individual's decision whether they wish to disclose that they are transgender, when their sex or gender identity has no bearing on their ability to do a specific job.²⁰⁹ Furthermore, asking a transgender individual for their previous name or gender details is discriminatory unless the employer requires previous name details from all employees.²¹⁰ Additionally, in New Zealand individuals are permitted to change their sex and their legal gender on official documents, including their birth certificate, if they can provide medical evidence that they have "acquired a physical conformation that accords with their gender identity."²¹¹ While originally this requirement was restricted to only those individuals who had undergone genital-reconstruction surgery, as of June 2008, the national Family Court "ruled that full sex reassignment surgeries are not always necessary to meet this legal threshold."²¹²

The New Zealand Human Rights Commission has acknowledged that transgender and non-binary people in New Zealand face discrimination in several aspects of their lives.²¹³

207. Human Rights Act 1993, pt. II, s 21(1)(a)(m) (N.Z.).

208. See *Getting a job: An A to Z for employers and employees: Pre-employment guidelines*, HUMAN RTS. COMM'N 1, 32-33 (Jul. 2008), https://www.hrc.co.nz/files/3014/2360/3784/HRC_A-Z_Pre-employment_Guide.pdf [<https://perma.cc/5XVR-FUVM>]. There are, however, a few listed exceptions where biological differentiation is necessary. *Id.*

209. *Id.*

210. See *Sexual Orientation, Gender Identity, and Sex Characteristics FAQs*, N.Z. HUMAN RIGHTS COMM'N, <https://www.hrc.co.nz/our-work/sogiesc/resources/faqs/> (last visited Sept. 9, 2020) [<https://perma.cc/7ZNZ-9U4B>].

211. Johanna Schmidt, *Gender diversity – Human Rights and Discrimination*, TE ARA ENCYCLOPEDIA OF N.Z. (May 5, 2011), <https://teara.govt.nz/en/gender-diversity/page-6>.

212. *Id.*

213. *LGBT Rights in New Zealand*, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_rights_in_New_Zealand#:~:text=After%20recognising%20gender%20neutral%20civil,has%20been%20banned%20since%201993 [<https://perma.cc/EF6X-T7EU>] (last visited Sept. 6, 2020); *Rights of Sexual and Gender Minorities*, NZ HUMAN RIGHTS 304, 306 (last visited Oct. 9, 2020),

Although the Human Rights Act does not explicitly prohibit discrimination on the basis of gender, some people believe that gender identity is “protected under the laws preventing discrimination on the basis of either sex or sexual orientation.”²¹⁴ New Zealand also looks abroad to multiple foreign courts that have determined that transgender individuals are covered by prohibitions on discrimination on the basis of sex.²¹⁵ In a Supreme Court of Canada case concerning the termination of a post-operative transsexual street worker,²¹⁶ the Quebec Human Rights Tribunal held that discrimination based on transsexualism is discrimination based on sex.²¹⁷ The Tribunal argued that the word “sex” had “much more than a taxonomic value.”²¹⁸ Here, the court held that discrimination on the basis of transgender identity could hardly be anything *other* than discrimination based on sex.²¹⁹ This interpretation is neither extreme nor outrageous and is becoming an international trend.²²⁰

Though the expansion is not codified as law, the Human Rights Act is viewed in New Zealand as meaning that “it is unlawful to discriminate against anyone in New Zealand because of their sexual orientation or sex/gender identity.”²²¹ Therefore, individuals may not be discriminated against because of their gender identity, sex or sexual orientation due to this flexible

https://www.hrc.co.nz/files/1914/2388/0525/HRNZ_10_rights_of_sexual_and_gender_minorities.pdf [<https://perma.cc/6X7Z-UTDN>].

214. *LGBT Rights in New Zealand*, *supra* note 213; *see also Rights of Sexual and Gender Minorities*, NZ HUMAN RIGHTS 304, 305 (last visited Oct. 9, 2020), https://www.hrc.co.nz/files/1914/2388/0525/HRNZ_10_rights_of_sexual_and_gender_minorities.pdf; Human Rights Act 1993, pt. II, s 21, subs (1)(m) (N.Z.).

215. Polster, *supra* note 194, at 180-81; *Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes* (1998). CanLII 28 (Can. QC TDP). This includes Canadian rulings.

216. Polster, *supra* note 194, at 180-81; *Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes* (1998) CanLII 28 (Can. QC TDP).

217. *Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes* (1998) CanLII 39 (Can. QC TDP).

218. *Id.* at 29.

219. *Id.* at 30. Here, the court was concerned with “transsexual” identity.

220. *See id.* at 21-22.

221. *See Sexual Orientation, Gender Identity, and Sex Characteristics “Your Rights”*, N.Z. HUMAN RIGHTS COMM’N, <https://www.hrc.co.nz/our-work/sogiesc/> (last visited Aug. 25, 2020) [<https://perma.cc/ZBJ3-KRQM>].

reading of the Human Rights Act.²²² Moreover, this prohibition on discrimination applies in the context of applying for a job, at work, in education and health care, in government agencies' policies and practice, and when buying goods or paying for services. Equaldex, an international comparison tool analyzing nations' LGBT+ rights framework, holds that there are also protections for gender identity (as well as sex and sexual orientation) in both housing and employment contexts.²²³

3. New Zealand Military Service

New Zealand's military, which protects against discrimination based on gender identity, is inclusive to people of all gender identities.²²⁴ Before the Human Rights Act came into effect in the 1990s, the New Zealand military banned anyone who was gay, lesbian or transgender from serving.²²⁵ For queer people interested in joining the military, this meant living their military life in the closet.²²⁶ However, in 2019, New Zealanders celebrated the twenty-fifth anniversary of the Defence Force lifting the ban on LGBT+ personnel being able to serve openly.²²⁷ Now, the New Zealand Defence Force has been lauded as a world leader and as the gold-standard in queer diversity and for support of the LGBT+ community.²²⁸ Following the passage of the Human Rights Act in 1993, the New Zealand Defence Force moved swiftly to incorporate the Act into its policies, and by early 1994 "openly homosexual men and women were able to join and serve" in the military.²²⁹ Although explicit national protection for transgender individuals did not follow under the Human Rights Act, the New Zealand

222. *Id.*

223. *LGBT Rights in New Zealand*, EQUALDEX, <https://www.equaldex.com/region/new-zealand> (last visited Aug. 25, 2020).

224. See *NZ Defence Force*, *supra* note 178; Wakefield, *supra* note 178.

225. Jonathan Mitchell, *Has the NZ Military Shaken Off its Anti-LGBTQI History?*, RZN (May 26, 2019), <https://www.rnz.co.nz/national/programmes/insight/audio/2018696447/has-the-nz-military-shaken-off-its-anti-lgbtqi-history> [<https://perma.cc/9LGQ-9STC>].

226. *See id.*

227. *See id.*

228. *LGBT Rights in New Zealand*, *supra* note 214.

229. *NZDF Celebrates 25 Years of Open LGBT+ Service*, SCOOP INDEP. NEWS (Feb. 7, 2019), <https://www.scoop.co.nz/stories/AK1902/S00160/nzdf-celebrates-25-years-of-open-lgbt-service.htm> [<https://perma.cc/A9LD-D6JU>].

Defence Force extended inclusion to allow transgender individuals to serve in the national armed forces with the announcement that that the LGBT+ ban would be lifted on the heels of sexual orientation legislation.²³⁰ In this sense, the New Zealand Defence Force implicitly protected gender identity under sex, or even under sexual orientation.

IV. RECOMMENDATIONS FOR THE UNITED STATES

There is an ongoing debate in the United States surrounding the definitions of “gender identity” and “sex” under anti-discrimination law.²³¹ *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, was consolidated with and decided under *Bostock v. Clayton County, Georgia* on June 15, 2020.²³² This case decided that “gender identity” and “sexual orientation” are covered under “sex” in Title VII of the Civil Rights Act of 1964 (“Title VII”).²³³ Even though this progressive decision gave workplace protections to transgender and gay employees, it does not necessarily impact the transgender military ban.²³⁴ Due to the unique operation of the military, it is probable that Title VII protections do not extend to the armed forces.²³⁵ Therefore, it is imperative to address all of the possible routes that might lead to the end of the transgender military ban.

A. *The Executive Approach: the Executive Order Privilege*

It is entirely possible that President Trump, or any subsequent president, may choose to invoke the Executive Order

230. See Mitchell, *supra* note 225.

231. See *U.S. Supreme Court to Decide Whether “Sex” Includes “Sexual Orientation” and “Gender Identity”*, *CTR. ARIZ. POL’Y* (Apr. 26, 2019), <https://www.azpolicy.org/2019/04/26/gender-identity> [<https://perma.cc/74WK-ZC8L>].

232. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1734 (2020).

233. See generally *id.*

234. Elaine Donnelly, *Bostock Ruling Shouldn’t Make The Military A Transgender Free-For-All*, *FEDERALIST* (July 20, 2020), <https://thefederalist.com/2020/07/20/bostock-ruling-shouldnt-make-the-military-a-transgender-free-for-all> [<https://perma.cc/TH62-A8NH>]; Jennifer Mittelstadt & Ronit Y. Stahl, *The Supreme Court has invited the military to rethink excluding transgender people*, *WASH. POST* (July 26, 2020, 10:27 AM), <https://www.washingtonpost.com/outlook/2020/07/26/supreme-court-has-invited-military-rethink-excluding-transgender-people> [<https://perma.cc/7G8U-NEUA>].

235. See *Roper v. Dep’t of Army*, 832 F.2d 247, 248 (2d Cir. 1987).

Privilege to rescind and replace the transgender military ban with a more inclusive policy, evidenced by President Trump's abrupt overturning of President Obama's more transgender-inclusive policy.²³⁶ By doing so, the president would be making a statement that transgender Americans are capable and integrated into societal and governmental establishments. However, based on how quickly the original inclusion came and went, obtaining a more inclusive policy through the executive branch is perhaps the least stable way to recognize transgender rights in military service. Therefore, it is likely that a legislative or judicial route to ending the transgender military ban would promote greater, longer-lasting strength.

*B. The Legislative Approach: "Gender" and "Sex" in Title VII
Jurisprudence and Future Legislation*

While it is clear that "gender" and "sex" are distinct and distinguished identifiers biologically and socially, it is far more complex under existing US law.²³⁷ While most of the Transgender Military Cases utilize the term "gender" in relation to discrimination, under legislative and codified law, "sex" is the legally protected class.²³⁸ Title VII, for example and perhaps most importantly, provides protections for individuals "on the basis of sex."²³⁹ Although Title VII uses only the term sex, the Equal Employment Opportunity Commission (the "EEOC") states that

236. Press Release, U.S. DEP'T OF DEF., *Secretary of Defense Ash Carter Announces Policy for Transgender Service Members* (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members> [<https://perma.cc/38P5-FG3Z>]; Trump (July 26, 2017, 8:55 AM), *supra* note 47; Trump (July 26, 2017, 9:04 AM), *supra* note 47.

237. *U.S. Supreme Court to Decide Whether "Sex" Includes "Sexual Orientation" and "Gender Identity"*, CTR. ARIZ. POL'Y (Apr. 26, 2019), <https://www.azpolicy.org/2019/04/26/gender-identity> [<https://perma.cc/F926-AJXR>].

238. 42 U.S.C.A. § 2000e (k); *see, e.g.*, *Doe 1 v. Trump*, 275 F.Supp. 3d 167, 209-10 (D.D.C. 2017).

239. *Id.* 42 U.S.C. § 2000e (k) provides that: "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

“discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII.”²⁴⁰ The question of whether sex includes sexual orientation and gender identity was decided in *Bostock v. Clayton County*.²⁴¹ The Supreme Court found, based on statutory interpretation, that under Title VII, “Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee . . . An employer who fires an individual merely for being gay or transgender defies the law.”²⁴²

While this reading of Title VII is the controlling definition, this is unlikely to be helpful in the present case. Historically, Title VII has not applied to the military.²⁴³ For example, Gary L. Jackson served in the United States Marines for 30 years before being discharged.²⁴⁴ Upon honorable discharge he brought suit with complaints based on his experience with racial discrimination, harassment and retaliation.²⁴⁵ In 2020, the D.C. Circuit Court found, however, that Title VII does not extend its anti-discrimination protections to uniformed members of the armed forces, as they are *not* considered employees of the federal government under Title VII.²⁴⁶ Therefore, while *Bostock* may provide promising language regarding the expansion of LGBT+ rights, it does not, in and of itself, control the question of the transgender military ban.

Without Title VII protections, transgender military plaintiffs do not have federal legislation that protects their rights in the military. However, in 2017, a group of senators, including Senator John McCain, a veteran Captain of the US Navy,²⁴⁷ and Senator

240. *Sexed-Based Discrimination: Laws, Regulations & Guidance*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/sex.cfm> [<https://perma.cc/8XDG-XGGL>] (last visited Oct. 7, 2020).

241. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020).

242. *Id.* at 1754.

243. *Roper v. Dep’t of Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Jackson v. Modly*, 949 F.3d 763, 767-68 (D.C. Cir. 2020).

244. *Modly*, 949 F.3d at 765.

245. *Id.* at 767.

246. *Id.* at 775; 42 U.S.C. §2000e-16(a) (differentiating the structure and nature of the military from normal employer-employee relationship).

247. *John S. McCain, III, Veterans History Project*, LIBRARY OF CONG. (Nov. 6, 2019), <https://memory.loc.gov/diglib/vhp/bib/loc.natlib.afc2001001.07736> [<https://perma.cc/3V4D-5SQW>].

Kirsten Gillibrand, a member of the Senate Armed Services Committee and Ranking Member of the Subcommittee on Personnel, introduced legislation into the Senate that would block military leaders from discharging transgender troops.²⁴⁸ This bipartisan legislation was not passed, but it did show a potential route to the end of the transgender military ban.²⁴⁹

C. The Judicial Approach: Bostock v. Clayton County and the Setup for Pending Litigations

As Title VII is unlikely to aid transgender military plaintiffs alleging employment discrimination in the “workplace,” these plaintiffs must consequently rely on the Court’s ruling on the existing Transgender Military Cases to provide protections. The June 2020, 6-3, Supreme Court decision in *Bostock* is not directly controlling on the transgender military ban, but it is nonetheless a helpful lens through which to look at transgender rights as they could be enunciated by the current composition of the Supreme Court.

248. Leo Shane III, *Senators introduce new legislation to stop military transgender ban*, MILITARY TIMES (Sept. 15, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/09/15/senators-introduce-new-legislation-to-stop-military-transgender-ban> [<https://perma.cc/8BTB-BP7J>]; *Senators McCain, Gillibrand, Collins, Reed Introduce Bipartisan Legislation To Protect Transgender Service Members*, GILLIBRAND SENATE (Sept. 15, 2017), <https://www.gillibrand.senate.gov/news/press/release/senators-mccain-gillibrand-collins-reed-introduce-bipartisan-legislation-to-protect-transgender-service-members> [<https://perma.cc/7435-39KU>].

249. *Senators McCain, Gillibrand, Collins, Reed Introduce Bipartisan Legislation To Protect Transgender Service Members*, *supra* note 248. A similar piece of bi-partisan legislation was again introduced by Senator Gillibrand in February 2019. *Gillibrand, Collins, Reed Introduce New Bipartisan Legislation To Protect Transgender Service Members*, GILLIBRAND SENATE (Feb. 7, 2019), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-collins-reed-introduce-new-bipartisan-legislation-to-protect-transgender-service-members> [<https://perma.cc/7435-39KU>]. Senator Gillibrand questioned The Chiefs of the Army, Navy, and Air Force and the Commandant of the Marine Corps at four Senate Armed Services Committee hearings, and thusly was aware “that open transgender service has had no negative effect on unit cohesion, discipline, or morale.” *Id.*

1. *R.G. & G.R. Harris Funeral Homes Inc. and Bostock v. Clayton County, Georgia*

R.G. & G.R. Harris Funeral Homes Inc. was heard before the Supreme Court in 2019.²⁵⁰ Aimee Stephens, a transgender woman who was “assigned male at birth,” sued the Funeral Home after her termination in August 2013.²⁵¹ The case is focused on the legality of the employer’s decision to fire a transgender employee solely because of his/her transgender status.²⁵²

The Sixth Circuit Court held that the dismissal of this employee was based on gender stereotyping in violation of Title VII, where the employer fired the employee because she was “no longer going to represent himself as a man” and “wanted to dress as a woman,” and the employer admitted that the employee was not fired for any performance-related issues.²⁵³ In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that sex stereotype discrimination violated Title VII.²⁵⁴ The Sixth Circuit Court used and expanded this precedent to determine that “discrimination based on a failure to conform to stereotypical gender norms was no less prohibited under Title VII than discrimination based on the biological differences between men and women.”²⁵⁵ Furthermore, the Court held that discrimination on the basis of transgender status violates Title VII.²⁵⁶ This case is on appeal as the district court held that “transgender or transsexual status is currently not a protected class under Title VII.”²⁵⁷

250. *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp’t Opportunity Comm’n*, 139 S. Ct. 1599 (2019).

251. *R.G. & G.R. Harris Funeral Homes*, at 567-68.

252. *Id.* at 567.

253. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 572, 593; Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1).

254. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B), *as recognized in Comcast Corp. v. Nat’l Ass’n of African American-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

255. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 572 (citing *Price Waterhouse*, 490 U.S. at 240).

256. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020).

257. *Id.*

The EEOC argued, and the Sixth Circuit accepted, that “Title VII protects against sex stereotyping and transgender discrimination is based on the non-conformance of an individual’s gender identity and appearance with sex-based norms or expectations, therefore, discrimination because of an individual’s transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth.”²⁵⁸

In *Bostock*, the Supreme Court stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁵⁹ Furthermore, the Court continued “that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”²⁶⁰ This expansion of the concept of sex, here with regards to Title VII employment protections, may not be so limited. It is possible that the current Supreme Court justices, or at least the six who joined the majority opinion in *Bostock*, would find that gender identity, specifically transgender status, are implicit under “sex” in other areas of the law, just as they did in *Bostock*.²⁶¹ Specifically, one hopes that the Supreme Court would expand equal protection heightened scrutiny to elevate transgender status to the same analysis as “sex.” If this were done, the Transgender Military Cases would have even stronger equal protection arguments.

2. Refocusing Pending Litigations

While there are ways to overturn the transgender military ban outlined above, the most realistic of all the available options, especially should President Trump win reelection in 2020, is through the judicial branch. Transgender plaintiffs do not need new legal protection, they need their gender identity protected

258. *Equal Emp’t Opportunity Comm’n*, 884 F.3d at 574-75.

259. *Bostock*, 140 S. Ct. at 1741.

260. *Id.* at 1742.

261. *Id.*

under “sex,” so that elevated scrutiny applies to their equal protection claims currently pending. While *Doe 1*, for example, is aiming to elevate gender identity to be a protected class equal to “sex,” the D.C. Circuit Court has not yet identified “gender identity” as a suspect class.²⁶² However, if they were to do so, protections for transgender individuals would be maximized.

In *Doe 1*, the D.C. District Court applies “an intermediate level of scrutiny to [the] Defendants’ exclusion of transgender individuals from the military, akin to the level of scrutiny applicable in gender discrimination cases.”²⁶³ The Court does so as it is persuaded that the transgender military ban is a form of discrimination on the “basis of gender,” which is itself subject to intermediate scrutiny.²⁶⁴ Furthermore, the Court continued that “it is well-established that gender-based discrimination includes discrimination based on non-conformity with gender stereotypes.”²⁶⁵ In this, the Court is assuming that “sex discrimination” and “gender-based discrimination” are legally parallel, which provides for further protection for transgender military.²⁶⁶ While the Court does not invoke the specific language of gender identity and does not specifically label transgender plaintiffs as a protected class, the protection through the application of *Price Waterhouse* holds that gender may in fact, and in all of its many forms, be protected under “on the basis of sex.”²⁶⁷ This would additionally be consistent with the Court’s ruling in *Bostock*.²⁶⁸

The Supreme Court, if confronted with the decision of whether to provide transgender individual protection under gender-based discrimination, will have the ultimate say. If the Supreme Court *does* allow a transgender protection under gender-based discrimination, in an area other than Title VII, the existing gender-based jurisprudence would provide a fortified framework.²⁶⁹ In *United States v. Virginia*, the Supreme Court held

262. *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (2017).

263. *Id.* at 210.

264. *Id.* at 209; *see also Price Waterhouse*, 490 U.S. at 239-40.

265. *Doe 1*, 275 F. Supp. 3d at 209; *see also Price Waterhouse*, 490 U.S. at 228.

266. *Doe 1*, 275 F. Supp. 3d at 209.

267. *Id.* at 209.

268. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020).

269. *See Price Waterhouse*, 490 U.S. at 228.

that for “cases of official classification based on gender . . . the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’”²⁷⁰ The justification “must be genuine, not hypothesized or invented *post hoc* in response to litigation, and must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²⁷¹

In *Glenn v. Brumby*, a transgender woman brought a claim alleging unlawful discrimination based on sex in violation of the Equal Protection Clause when she was terminated because she was transitioning from male to female.²⁷² The Eleventh Circuit stated that a person is considered transgender “precisely because of the perception that his or her behavior transgresses gender stereotypes.”²⁷³ As a result, there is “congruence” between discriminating against transgender individuals and discrimination on the basis of “gender-based behavioral norms.”²⁷⁴ As everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals.²⁷⁵ “The nature of the discrimination is the same; it may differ in degree but not in kind.”²⁷⁶ The court further concluded that discrimination based on sex stereotypes is subject to heightened scrutiny under the Equal Protection Clause, and government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination.²⁷⁷

The elevated scrutiny attached to sex-based discrimination is founded in both transgender and gender-stereotyping jurisprudence.²⁷⁸ A combination of these two distinct areas of law indeed creates a home for “gender identity” equal protection claims. Should the Transgender Military Cases make it to the Supreme Court, the Supreme Court’s precedent of Title VII protections in *R.G. & G.R. Harris Funeral Homes Inc.* will be of

270. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

271. *Id.* at 1200.

272. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

273. *Id.* at 1316.

274. *Id.*

275. *Id.* at 1318.

276. *Id.* at 1319.

277. *Id.* at 1320.

278. *Doe 1*, 275 F. Supp. 3d at 209.

paramount importance.²⁷⁹ Gender identity must be a protected class since there are thousands of transgender military servicepeople who were forced to discharge and denied entry into the military. If transgender individuals are given the legal protection they need based on their gender identity, either under an expansion of Title VII or by Fifth Amendment equal protection jurisprudence, the United States would be progressing in the right direction, instead of backwards.

V. CONCLUSION

While debate continues to surround the perceptions of sex, gender, and gender identity, the rights and liberties of over a million individuals in the United States remain indeterminate.²⁸⁰ Although US jurisprudence continues to expand, it has yet to do so at a level that guarantees the freedom of gender identity to transgender individuals in areas of healthcare, housing, and even in the military. Across the world, although New Zealand holds the gold-standard in queer military inclusion, the nation also struggles to codify the legal rights to and of gender identity. While New Zealand has held that such right is embedded in existing legislation, such expansion is merely implied and implicit. Both New Zealand and the United States would benefit from a judicial, if not a legislative, redefinition of gender identity rights. Both nations would benefit from the explicit equal protection of transgender identity. In New Zealand, this would likely come in explicitly enumerating the rights of transgender people in an amendment to the Human Rights Act. In the United States, each branch of the federal government has the opportunity to articulate and codify these rights. The president may do so through executive order, Congress through legislation, and the Supreme Court through deciding the Transgender Military Cases and by elevating gender

279. *See id.* at 191; *see generally* Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

280. Tijen Butler, *What percentage of the US population is transgender?*, PINK NEWS (Apr. 2, 2019), <https://www.pinknews.co.uk/2019/04/02/percentage-us-population-transgender-statistics/> [<https://perma.cc/ZVB4-DA6F>]; Andrew R. Flores, Jody L. Herman, Gary J. Gates, & Taylor N. T. Brown, *How many Adults Identify as Transgender in the United States?*, WILLIAMS INST. (Jun. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/B4KN-2PZ4>].

identity to a protected class under Equal Protection. With so many routes, one hopes that transgender individuals in the United States will be granted equal protection under the law.

