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## Voting While Trans: How Voter ID Laws Unconstitutionally Compel the Speech of Trans Voters

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## NOTE

# VOTING WHILE TRANS: HOW VOTER ID LAWS UNCONSTITUTIONALLY COMPEL THE SPEECH OF TRANS VOTERS

*Emmy Maluf\**

*Thirty-five states currently request or require identification documents for in-person voting, and these requirements uniquely impact transgender voters. Of the more than 697,800 voting-eligible trans people living in states that conduct primarily in-person elections, almost half (43 percent) lack documents that correctly reflect their name or gender. When an ID does not align with a trans voter's gender presentation, the voter may be disenfranchised—either because a poll worker denies them the right to cast a ballot or because the voter ID requirement chills their participation in the first place. Further, when a trans voter presents an ID that does not align with their gender presentation, they effectively out themselves. For both nonpassing and cispassing trans voters, presenting an ID that does not align with their gender identity compels them to express a message about their identity that they do not personally believe. In response to these problems for trans voters, this Note offers a novel legal avenue through which to challenge voter ID laws, arguing that voter-ID requirements as applied to trans voters constitute compelled speech in violation of the First Amendment.*

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## INTRODUCTION

*Lawmakers pushed through voter ID reforms in my state, requiring every voter to present a photo ID with a gender marker. Since I was unable to do so, I was a victim of “de facto” disenfranchisement and voter intimidation tactics that are now, unfortunately, all too common.*

—Respondent to 2015 U.S. Transgender Survey<sup>1</sup>

Over the past decade, state legislatures have enacted a spate of new laws making it more difficult to vote.<sup>2</sup> In particular, states are instituting or strengthening voter ID requirements.<sup>3</sup> As of this writing, five states are considering stricter voter ID requirements mandating that voters present photo ID without exception.<sup>4</sup> And some states have already enacted more restrictive voter ID laws. In March 2023, for example, Idaho banned student ID cards as a form of voter identification, further restricting the ways in which voters may verify their identity.<sup>5</sup> In the 2022 midterm elections, Nebraska voters approved a ballot initiative to require voters to present photo ID.<sup>6</sup> Thirty-six states currently request or require voter ID for in-person voting.<sup>7</sup>

Much scholarship and media has explored how voter ID laws disproportionately impact minorities, especially people of color.<sup>8</sup> Such attention is necessary. But attention to the unique impacts of voter ID requirements on

1. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 235 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [perma.cc/KKJ9-WT9H].

2. *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america> [perma.cc/2YWK-QTVX]. For instance, in 2016, fourteen states had new voting restrictions in place for the first time during a presidential election. *Id.*

3. *Id.*

4. *No-Alternative Photo ID vs. Voter ID: Lessons from the First Election Law to Pass in 2023*, VOTING RTS. LAB (Jan. 31, 2023), <https://votingrightslab.org/no-alternative-photo-id-vs-voter-id-lessons-from-the-first-election-law-to-pass-in-2023> [perma.cc/A5H9-6T9D].

5. Neil Vigdor, *Republicans Face Setbacks in Push to Tighten Voting Laws on College Campuses*, N.Y. TIMES (Mar. 29, 2023), <https://www.nytimes.com/2023/03/29/us/politics/republicans-young-voters-college.html> [perma.cc/JLX9-7E7W].

6. *Voter ID Laws*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 2, 2024), <https://www.ncsl.org/elections-and-campaigns/voter-id#table1> [perma.cc/376C-KVRZ].

7. *Voter ID Laws*, *supra* note 6. “A total of 35 states have laws requesting or requiring voters to show some form of identification at the polls,” with Nebraska’s initiative listed as a forthcoming change. *See id.* The states that “request” ID are so labeled because, in theory, they have practices in place to enable voters to vote without ID, such as permitting the voter to verify their identity via an affidavit or by voting a provisional ballot and verifying their identity after the election. *Id.* But these alternatives still fail to guarantee access to the franchise for trans voters. *See infra* Sections I.A., I.C.

8. *See, e.g.*, BRENNAN CTR. FOR JUST., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006), [https://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf) [perma.cc/G9BX-U4T4]. The study found that Black citizens disproportionately lacked photo identification: of those surveyed, 25 percent of Black voting-age citizens had

transgender<sup>9</sup> voters is necessary too.<sup>10</sup> And, crucially, voter ID laws especially impact trans people of color. Trans people are more likely to be Black and Hispanic or Latinx than the general population.<sup>11</sup> At the same time, voter ID laws have a disproportionate impact on voters of color; for instance, strict voter ID laws exacerbate the racial turnout gap.<sup>12</sup> Voters of color are less likely to have qualifying IDs to vote in their states.<sup>13</sup> Voter ID laws are also often administered in a discriminatory manner—poll workers are more likely to ask voters of color for their IDs than they are white voters.<sup>14</sup>

Trans people of color are also more likely to live at or near the poverty line as compared to the general population.<sup>15</sup> People experiencing poverty are among those most impacted by voter ID laws.<sup>16</sup> Trans people, particularly

no current photo ID, compared to just 8 percent of white voting-age citizens. *Id.* at 3; *see also* Zoltan L. Hajnal, Nazita Lejevardi & Lindsay Nielson, *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research*, WASH. POST (Feb. 15, 2017, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research> [perma.cc/DG9J-927G] (showing voter ID laws lower minority turnout). The study also found that citizens with low incomes were less likely to possess photo ID. BRENNAN CTR. FOR JUST., *supra*, at 3.

9. “Transgender” is an “[e]ncompassing term of many gender identities of those who do not identify or exclusively identify with their sex assigned at birth.” *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RES., <https://transstudent.org/about/definitions> [perma.cc/DG8Z-DUBQ]. “Trans” is shorthand for transgender. *Glossary of Terms: Transgender*, GLAAD, <https://glaad.org/reference/trans-terms> [perma.cc/R4LH-KDDQ].

10. *See* Steve Kolbert, *The Nineteenth Amendment Enforcement Power (but First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 513–14 (2016) (stating that data suggests that trans voters are especially likely to lack the required documentation).

11. ANDREW R. FLORES, TAYLOR N.T. BROWN & JODY L. HERMAN, THE WILLIAMS INST., RACE AND ETHNICITY OF ADULTS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2–3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-Ethnicity-Trans-Adults-US-Oct-2016.pdf> [perma.cc/D93T-JTCG].

12. *E.g.*, *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [perma.cc/5FB7-MPXX].

13. *Id.*

14. Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 391–92 (2014). Ross discusses two surveys—one in Massachusetts and the other in New Mexico—that demonstrated that voters of color were more likely to be asked for their IDs than white voters. *Id.* at 391–94.

15. *See* KATHRYN K. O’NEILL, NATHAN CISNEROS, WILL TENTINDO & JODY L. HERMAN, THE WILLIAMS INST., THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2022 GENERAL ELECTION 10 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Sep-2022.pdf> [perma.cc/J32D-APDJ]; Katelyn Burns, *The Long History of Trans Voters’ Disenfranchisement, Explained*, VOX (Sept. 23, 2020, 8:30 AM), <https://www.vox.com/identities/21441200/history-of-trans-voters-disenfranchisement-explained> [perma.cc/L7BE-SW5E] (noting that 34 percent of Black trans women grapple with housing insecurity, versus 9 percent of non-Black trans people).

16. *See, e.g.*, FACT SHEET ON VOTER ID LAWS, ACLU 1 (2021), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_voter\\_id\\_fact\\_sheet\\_-\\_final\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_voter_id_fact_sheet_-_final_1.pdf) [perma.cc/KTT6-2D6A] (stating that a barrier to obtaining ID is cost).

trans people of color, are also disproportionately criminalized.<sup>17</sup> In many states, individuals incarcerated for felony convictions and returning citizens lose their right to vote.<sup>18</sup> Thus, in addition to the burdens they face due to their trans status, trans voters of color face added barriers due to the intersection of that status and their race.

The franchise is especially at risk for trans voters in states where they must appear in person to vote. Forty-two states conduct their elections primarily in person, as opposed to allowing voters to vote fully by mail.<sup>19</sup> Of the more than 697,800 voting-eligible trans people who live in those in-person-voting states, almost half (43 percent) lack an ID that correctly reflects their name or gender.<sup>20</sup> To meet ID requirements, trans voters must either obtain an accurate voter ID in the first instance or go through the arduous process of updating existing documents with an accurate gender marker, photo, or name (and sometimes all three).<sup>21</sup> The administrative burden of either option may be challenging and costly.<sup>22</sup> But not doing so may cost trans voters their right to vote: If a mismatch occurs—between the voter’s name on the registration record and their ID, between the gender marker on the ID and the voter’s appearance, or both—poll workers may deny the voter the ability to cast a regular ballot.<sup>23</sup>

And more is at stake than the right to vote. When a trans voter presents an ID that does not align with their gender identity, the trans voter effectively

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17. See, e.g., CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE 1 (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf> [perma.cc/NX25-2U7V] (stating trans people are overrepresented among adults who have spent time in prison or jail); Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POLY INITIATIVE (Mar. 2, 2021), <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq> [perma.cc/YY98-KZHM] (noting that LGBTQ people are incarcerated at three times the rate of straight people).

18. *Felon Voting Rights*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 6, 2023), <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights> [perma.cc/NBL9-KXS9] (describing how, in twenty-three states, “felons lose their voting rights only while incarcerated”; in fourteen states, “felons lose their voting rights during incarceration, and for a period of time after”; and in eleven states, “felons lose their voting rights indefinitely for some crimes”).

19. O’NEILL ET AL., *supra* note 15, at 2.

20. *Id.*

21. *Id.* at 10. This Note uses the term “accurate” (when paired with gender marker, name, or photo) to mean reflecting the trans person’s understanding of their own identity.

22. *Id.*

23. *Id.* at 11; see also Kolbert, *supra* note 10, at 513–14 (stating that a voter whose outward appearance and ID gender marker do not align may face scrutiny by poll workers in states where voter ID laws require election officials to verify the voter’s identity based on their ID).

is forced to out themself.<sup>24</sup> “Outing” is defined as revealing the sexual orientation or gender identity of an LGBTQ+ person without their consent.<sup>25</sup> For nonpassing and cispassing trans voters alike, presenting an ID that does not align with their gender identity forces them to express a message they do not believe in—that they are someone they are not.<sup>26</sup> This, in addition to the expressive and emotional harm to the trans voter, puts them at risk of harassment, “stigmatization, discrimination, and sometimes, violence.”<sup>27</sup>

Despite the impact of voter ID laws on trans voters, little scholarship exists in this area. In this sparse field, however, scholars have recently suggested extending the holding of *Bostock v. Clayton County* to argue that voter ID laws—as applied to trans and nonbinary voters—are unconstitutional sex-based classifications under the Nineteenth Amendment.<sup>28</sup> This Note offers another legal avenue through which to challenge voter ID laws, arguing that such requirements as applied to trans voters constitute unconstitutional compelled speech under the First Amendment. Part I outlines the state of voter ID requirements and the outsized impact these requirements have on trans people. Part II explores the First Amendment’s compelled speech doctrine and its application to the expression of gender identity. Part III argues that requiring trans voters to present ID constitutes compelled speech that should fail strict scrutiny. The Note concludes by suggesting that states should address this problem by either expanding the currently accepted forms of voter ID or abolishing voter ID requirements entirely.

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24. See, e.g., Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 752 (2008) (“For many transgender people, being unable to produce the basic ID . . . showing their current name and gender means being ‘outed’ in the job application process.”). The same, then, is true of the voting process.

25. *Glossary of Terms: LGBTQ+*, GLAAD, <https://glaad.org/reference/terms> [perma.cc/DXJ5-M3RL].

26. See Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 53–54, *Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021) (No. 18-cv-00091) [hereinafter Memorandum in Support of Plaintiffs’ Motion, *Corbitt*].

27. Spade, *supra* note 24, at 751; see Ellen D. Katz, *What the Marriage Equality Cases Tell Us About Voter ID*, U. CHI. LEGAL F., 2015, at 211, 240 (noting that rejection because the gender marker on a trans voter’s ID does not match their appearance may inflict dignitary harm); Edited by Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 478 (2021).

28. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. (19TH AMEND. ED.) 27, 69–70 (2020) (noting that the Nineteenth Amendment’s prohibition on abridging the right to vote “on account of sex” could refer to “burdens that fall on transgender or nonbinary individuals,” and that voter ID requirements may result in disenfranchisement of those individuals); see also Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After Bostock*, 24 U. PA. J.L. & SOC. CHANGE 323, 329–32 (2021) (building on the aforementioned article to argue that, because of the textual parallels between Title VII [at issue in *Bostock*] and the Nineteenth Amendment, abridgement or denial of the right to vote “on account of sex” may be a constitutional violation).

## I. VOTER ID REQUIREMENTS AND THE COST OF COMPLIANCE

This Part provides background information on state voter ID requirements. It also explores the obstacles trans voters face in acquiring IDs that accurately reflect their names and gender identities—and, in turn, the harm voter ID laws inflict on trans voters.

### A. *The Current Landscape of State Voter ID Requirements*

Thirty-six states request or require voters to show some form of ID at the polls.<sup>29</sup> The remaining states and Washington, D.C., use other methods to verify a voter's identity, including checking identifying information (such as a signature) against the voter's file.<sup>30</sup>

This has not always been the case—in fact, many of these voter ID laws are recent developments. For instance, in 2022, Missouri enacted a bill establishing a photo ID requirement, disenfranchising many voters unable to produce photo ID on Election Day.<sup>31</sup> The year before, in 2021, Wyoming enacted its first voter ID law,<sup>32</sup> and Arkansas removed the option of a sworn affidavit as an alternative to presenting a photo ID.<sup>33</sup> Also in 2021, Arkansas abolished its prior photo ID exemption for individuals with sincere religious beliefs that prevent them from taking a photograph.<sup>34</sup> And Montana enacted a bill that requires voters without state ID, military ID, tribal ID, or a passport to provide two alternate forms of ID, one of which must include a photograph.<sup>35</sup>

According to a taxonomy created by the National Conference of State Legislatures, voter ID requirements take one of four forms: (1) strict photo ID, (2) strict nonphoto ID, (3) nonstrict photo ID, or (4) nonstrict nonphoto ID.<sup>36</sup> These categories encompass the thirty-six states that have voter ID laws on the books.<sup>37</sup> The remaining thirteen states and Washington, D.C., verify voters' identities without presentation of identification documents.<sup>38</sup>

29. After Nebraska implemented its photo ID ballot initiative, it became the thirty-sixth state to request or require voter ID. See *Voter ID Laws*, *supra* note 6.

30. See *id.*

31. H.B. 1878, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); see *If You Are Registered to Vote, You Can Vote!*, MO. SEC'Y OF STATE, <https://www.sos.mo.gov/voterid> [perma.cc/FB2V-D2SV] (stating registered voters without photo ID may cast a provisional ballot, which will count if: "(1) you return to your polling place on Election Day with a photo ID; or (2) the signature on your provisional ballot envelope is determined by your local election authority to match the signature on your voter registration record").

32. H.B. 0075, 66th Leg., Gen. Sess. (Wyo. 2021); *Voter ID Laws*, *supra* note 6.

33. H.B. 1112, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

34. H.B. 1244, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

35. S.B. 169, 67th Leg., Reg. Sess. (Mont. 2021).

36. *Voter ID Laws*, *supra* note 6.

37. *Id.*

38. *Id.*



### 1. Strict Photo ID

In strict photo ID states, individuals must present a valid form of *photo* ID to cast a ballot.<sup>39</sup> Examples of accepted forms of photo ID include driver's licenses, state-issued ID cards, military IDs, and tribal IDs.<sup>40</sup> Voters who fail to present photo ID must vote by provisional ballot on Election Day.<sup>41</sup> After the voter fills out the provisional ballot, it is placed in a secrecy envelope rather than in the ballot box.<sup>42</sup> The voter must then take additional steps after Election Day to confirm their identity and ensure their vote will be counted.<sup>43</sup> Typically, a voter without an acceptable form of ID on Election Day must return to the election office within a few days and present an acceptable form of ID.<sup>44</sup> If they cannot do so, the office does not count their provisional ballot.<sup>45</sup> In practice, strict photo ID laws disenfranchise nearly every voter who seeks to vote in person without the requisite ID, as those voters will likely be unable to obtain the proper documentation within days of the election.<sup>46</sup> And half of strict photo ID states take their already-stringent strict photo ID laws a step further: they do not offer no-excuse absentee voting, meaning voters must provide a state-approved excuse (like “out of county on Election Day” or “illness or disability”) to vote by mail.<sup>47</sup> Being trans would not qualify. Thus, these strict photo ID states completely disenfranchise trans voters without accurate photo ID.

Currently, ten states are strict photo ID states.<sup>48</sup>

### 2. Strict Nonphoto ID

In strict nonphoto ID states, valid voter ID may be—in addition to the forms of photo ID acceptable in strict photo ID states—a bank statement with

39. *Id.*

40. *Id.*

41. *Id.*

42. *Provisional Ballots*, MIT ELECTION DATA + SCI. LAB, <https://electionlab.mit.edu/research/provisional-ballots> [perma.cc/GSC4-AXAD].

43. *Voter ID Laws*, *supra* note 6.

44. *Id.*; see also *Voter Identification Requirements for In-Person Voting*, MOVEMENT ADVANCEMENT PROJECT [hereinafter *Democracy Maps*], [https://www.mapresearch.org/democracy-maps/in\\_person\\_voting](https://www.mapresearch.org/democracy-maps/in_person_voting) [perma.cc/ZH9Y-SWRD].

45. *Voter ID Laws*, *supra* note 6; *Provisional Ballots*, *supra* note 42.

46. See, e.g., Milov-Cordoba & Stack, *supra* note 28, at 346.

47. *Table 1: States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting> [perma.cc/7DM3-TLU9]. Of the strict photo ID states, Georgia, Kansas, Ohio, and Wisconsin offer no-excuse absentee voting. *Id.* Nebraska does as well. *Id.*; *Table 2: Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee> [perma.cc/8E6S-WZS4].

48. Those states are: Arkansas, Georgia, Indiana, Kansas, Mississippi, Missouri, North Carolina, Ohio, Tennessee, and Wisconsin. *Voter ID Laws*, *supra* note 6.

the voter's name and address or another document without a photo.<sup>49</sup> Strict nonphoto ID states follow similar election processes to strict photo ID states: voters without an acceptable document must vote by provisional ballot on Election Day.<sup>50</sup> As in strict photo ID states, a voter without an acceptable form of nonphoto ID generally must return to the election office within a few days of the election and present an acceptable form of ID.<sup>51</sup> If they cannot do so, the office does not count their provisional ballot.<sup>52</sup>

Currently, there are three strict nonphoto ID states: Arizona, North Dakota, and Wyoming.<sup>53</sup> However, Wyoming accepts only Medicaid and Medicare ID cards in lieu of photo ID;<sup>54</sup> accordingly, because many voters do not have either Medicare or Medicaid plans, some consider Wyoming a strict photo ID state.<sup>55</sup>

### 3. Nonstrict Photo ID

In nonstrict photo ID states, at least some voters without an acceptable form of ID may cast a ballot on or before Election Day without needing to take further action after Election Day.<sup>56</sup> For instance, although photo ID is technically required in these states, a voter may be allowed to sign an affidavit of identity on the spot, or a poll worker may vouch for the voter's identity.<sup>57</sup> Troublingly, in the latter scenario, the voter's ability to cast their ballot is at the discretion of the poll worker(s).

Currently, eleven states are nonstrict photo ID states.<sup>58</sup> Notably, Alabama is considered to be in this group, but the state's requirements are so stringent that some view them as strict.<sup>59</sup>

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49. *Voter ID Laws*, *supra* note 6.

50. *Id.*

51. *Id.*; see also *Democracy Maps*, *supra* note 44.

52. *Voter ID Laws*, *supra* note 6.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. These eleven states are: Alabama, Florida, Idaho, Louisiana, Michigan, Montana, Nebraska, Rhode Island, South Carolina, South Dakota, and Texas. *Id.*

59. *Id.* If an Alabama voter does not have the correct form of photo ID, in order to vote a regular ballot: (1) two election officials must positively identify the voter, and (2) the officials must sign a sworn affidavit stating they have done so. Alternatively, the Alabama voter may cast a provisional ballot by (1) completing a Provisional Verification Statement and signing a Sworn Affirmation, and (2) submitting a "valid photo ID to the county board of registrar's office by 5:00 p.m. on the Friday after an election." *Alabama ID Requirements for Voting in Person*, VOTERIDERS, <https://www.voteriders.org/states/alabama> [perma.cc/Z4ZT-4TU8].

#### 4. Nonstrict Nonphoto ID

Nonstrict nonphoto ID states function similarly to nonstrict photo ID states, with the difference being that the requested form of ID need not contain a photo of the voter.<sup>60</sup> As in nonstrict photo ID states, some voters without acceptable ID may cast a ballot without further action after Election Day.<sup>61</sup> Currently, thirteen states are nonstrict nonphoto ID states.<sup>62</sup>

##### B. *Trans Voters' Obstacles to Obtaining Correct Identification Documents*

While having an identification document that conforms with one's gender identity is not officially a prerequisite to voting, it may be in practice.<sup>63</sup> Election officials and poll workers exercise broad discretion over whether voters meet the requirements to cast a ballot.<sup>64</sup> If the name on a trans voter's ID differs from that on their registration record, or the gender marker on a trans voter's ID does not align with how the poll worker perceives them, that poll worker or another election official could decide that the voter does not meet ID requirements and deny them a ballot.<sup>65</sup> As a result, the voter may experience discrimination, disenfranchisement, or even violence due to their trans status at the hands of poll workers, other election officials, or nearby voters.<sup>66</sup>

60. *Voter ID Laws*, *supra* note 6.

61. *Id.*

62. These thirteen states are: Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, New Hampshire, Oklahoma, Utah, Virginia, Washington, and West Virginia. *Id.*

63. Scottie Andrew, *Why Some Transgender Voters Have an Even Bigger Challenge to Casting Their Ballots*, CNN: POLITICS (Oct. 13, 2020, 12:31 PM), <https://www.cnn.com/2020/10/13/politics/transgender-voter-suppression-2020-election-trnd/index.html> [perma.cc/R7YN-2RVG] (“[P]oorly trained poll workers may not provide a voter with a provisional ballot . . . [and] [i]f that voter doesn’t know to ask for one, they may not end up voting at all.”); *see also* Jay Michaelson, *The GOP Voter Suppression Machine Has a New Target: Trans People*, ROLLING STONE (Oct. 20, 2022), <https://www.rollingstone.com/politics/political-commentary/transgender-rights-voter-id-republicans-voting-1234615400> [perma.cc/C9ML-LCRX] (“Poll workers have enormous discretion; if they want to disqualify someone they think is trans or non-binary, they often have the power to do so.”).

64. *See, e.g.*, KATHRYN O’NEILL & JODY L. HERMAN, THE WILLIAMS INST., THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS IN THE 2020 GENERAL ELECTION 5 (2020), <https://www.democracymachine.com/wp-content/uploads/2021/06/Trans-Voter-ID-Feb-2020.pdf> [perma.cc/K376-GH7C]; *see also* Milov-Cordoba & Stack, *supra* note 28, at 346 (describing how poll workers have asked for ID and turned away voters because their faces haven’t matched their names).

65. O’NEILL ET AL., *supra* note 15, at 11; O’NEILL & HERMAN, *supra* note 64, at 5; Milov-Cordoba & Stack, *supra* note 28, at 345–46 (noting that, in some states, poll workers have been “actively encouraged” to turn away trans voters).

66. O’NEILL & HERMAN, *supra* note 64, at 9; *FAQ About Identity Documents*, LAMBDA LEGAL, <https://legacy.lambdalegal.org/know-your-rights/article/trans-identity-document-faq> [perma.cc/4Q7L-JVA5]; JAMES ET AL., *supra* note 1, at 89–90 (“Further, results suggest that respondents who presented IDs that did not correspond with the gender they presented in were put at risk of harassment, assault, and other forms of negative treatment.”).

At the same time, many trans voters who *want* to update the name or gender marker on their ID are unable to do so.<sup>67</sup> The many barriers to obtaining accurate ID include the complexity and cost of the process.<sup>68</sup> And these barriers are impactful: of respondents to the 2015 U.S. Transgender Survey who wanted to change the name or gender marker on their driver's license or state ID, fewer than half (44 percent) were able to change their name and fewer than one third (29 percent) were able to change their gender marker.<sup>69</sup> The rest of this Section provides a brief overview of the varying state processes for obtaining a name or gender marker change.

### 1. Name Change Process

Trans people in nearly every state must obtain a court order legalizing a name change before updating their name on official IDs, such as driver's licenses.<sup>70</sup> Obtaining a court order usually entails paying filing fees, which can range from under \$100 to nearly \$500.<sup>71</sup> Accordingly, the name change process can be cost prohibitive for many trans people who are more likely to report living at or near the poverty line as compared to the general population.<sup>72</sup> A Williams Institute study conducted in 2021 found that about 21 percent of trans people were experiencing poverty (compared to about 12 percent of straight cisgender people).<sup>73</sup> In 2022, the Federal Reserve reported that 32 percent of adults could not afford an unexpected \$400 expense without incurring credit card debt, borrowing, or selling something.<sup>74</sup> The study further reported that half of adults with family incomes under \$25,000 were unable to pay their

67. O'NEILL ET AL., *supra* note 15, at 10.

68. Gilroy et al., *supra* note 27, at 478. The process for correcting ID documents varies from state to state. *Id.* at 480.

69. JAMES ET AL., *supra* note 1, at 82.

70. *Id.*; *Identification Documents and Transgender People: An Overview of the Name and Gender Marker Change Process in the United States*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sites/default/files/docs/resources/ID-Documents-Overview.pdf> [perma.cc/ZBC4-GMYR].

71. Julia DiPrete, *How to Legally Change Your Name (2023 Guide)*, FORBES (July 12, 2023, 11:58 AM), <https://www.forbes.com/advisor/legal/how-legally-change-name> [perma.cc/2Y9P-6UAD]. For instance, the filing fee for a decree of change of name or gender in California is as high as \$435, while in D.C. the fee is \$60. *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents> [perma.cc/8JFL-FHFT] (last updated July 2023); *see also* JAMES ET AL., *supra* note 1, at 82 (stating that 34 percent of respondents who were granted a legal name change reported they had spent over \$250, while 11 percent had spent over \$500).

72. O'NEILL ET AL., *supra* note 15, at 10.

73. BIANCA D.M. WILSON, LAUREN J.A. BOUTON, M.V. LEE BADGETT & MORIAH L. MACKLIN, *THE WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: TRENDS AT THE ONSET OF COVID-19* 8 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf> [perma.cc/27ER-AD57].

74. *Economic Well-Being of U.S. Households (SHED)*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm> [perma.cc/55DV-3TNL] (last updated Aug. 22, 2022).

bills or were less than one \$400 financial setback away from being unable to pay their bills.

Even those who can afford to change their legal name navigate an often-times complex procedural process to do so.<sup>75</sup> Many states require name change applicants to both obtain a court order and change their name with the Social Security Administration before they may change their name on a driver's license.<sup>76</sup> Some states also require an individual to publicly post or publish their legal name change request, often in a local newspaper, prior to obtaining a court order.<sup>77</sup> This publication requirement poses a financial obstacle for individuals seeking a name change.<sup>78</sup> It also forces an individual to publicize their status as trans, putting them "at risk of potential harm, harassment, or discrimination."<sup>79</sup>

## 2. Gender Marker Change Process

Updating the gender marker on a license is a distinct process from updating the name, and it often comes with significant costs.<sup>80</sup> A majority of states require certification from a medical provider to change the gender marker on a driver's license.<sup>81</sup> Alternatively, many of those states accept proof of gender-affirming surgery, a court order, or an amended birth certificate to change the gender marker on a driver's license.<sup>82</sup> Several states require at least two of the aforementioned forms of documentation.<sup>83</sup> And all of these options come with

75. O'NEILL & HERMAN, *supra* note 64, at 5 (stating that the "administrative burden" of changing the name and gender marker on an ID "can be challenging and costly").

76. *ID Documents Center*, *supra* note 71.

77. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT [hereinafter *ID Document Laws*], [https://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](https://www.lgbtmap.org/equality-maps/identity_document_laws) [perma.cc/FW5B-NH5H]; see also *ID Documents Center*, *supra* note 71. At least twenty-six states and four territories have some form of publication requirement, with a few of those states permitting waiver under certain relevant circumstances (such as if the applicant is only changing their first name). *ID Document Laws*, *supra*; e.g., *ID Documents Center | Massachusetts*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/massachusetts> [perma.cc/J6C2-X9GS]; *ID Documents Center | North Dakota*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/north-dakota> [perma.cc/KR62-E4F7].

78. *ID Document Laws*, *supra* note 77.

79. *Id.*

80. JAMES ET AL., *supra* note 1, at 87.

81. *How Trans Friendly Is the Driver's License Gender Marker Change Policy in Your State?*, NAT'L CTR. FOR TRANSGENDER EQUAL. [hereinafter *License Gender Marker Change*], [https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021\\_a\\_0.pdf](https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021_a_0.pdf) [perma.cc/XL6D-S6PQ]. Twenty-one states and D.C. do not require certification from a medical provider to change the gender marker. *Id.*; see also JAMES ET AL., *supra* note 1, at 81.

82. *ID Document Laws*, *supra* note 77; see also *ID Documents Center*, *supra* note 71.

83. See, e.g., *South Carolina*, VOTERIDERS (June 2022), <https://www.voteriders.org/pride/south-carolina/#marker> [perma.cc/CY8Z-CCXM] (stating South Carolina requires medical documentation *and* an additional document, such as an amended birth certificate or a court order, to update one's gender marker); *Mississippi*, VOTERIDERS (June 2022),

costs attached. For instance, gender-affirming surgery can cost between \$53,645 (total cost for vaginoplasty) and \$133,911 (total cost for phalloplasty), and trans people often have to bear that entire cost themselves.<sup>84</sup> Trans individuals are more likely to be uninsured than cisgender individuals,<sup>85</sup> and for those who are insured, many health insurance providers exclude “services related to sex change” or “sex reassignment surgery” from coverage.<sup>86</sup> Policies like these, that often require trans people to pay out of pocket, make it difficult or impossible for some trans people to get accurate ID.<sup>87</sup>

Rather than requiring gender-affirming surgery, other states mandate that the individual seeking a gender marker change undergo the “appropriate clinical treatment for gender transition.”<sup>88</sup> This more flexible requirement is intended to “capture a variety of clinical treatment methods” trans patients use to facilitate transition, including “changes in gender expression, psychotherapy, [and] hormone therapy.”<sup>89</sup> Still, some trans people do not desire surgical or medical intervention.<sup>90</sup> Furthermore, not all trans people who *do* desire gender-affirming care are able to afford or access it.<sup>91</sup>

Unsurprisingly, trans residents in states with more burdensome gender marker change requirements “are less likely to have IDs with accurate gender markers.”<sup>92</sup> Even in states with less burdensome requirements, some trans people who wish to update the gender marker on their license may find that

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<https://www.voteriders.org/pride/mississippi/#marker> [perma.cc/CY8Z-CCXM] (stating Mississippi has not legally defined the process for updating the gender marker on one’s license, but that individuals must first amend their birth certificates, which requires both medical documentation *and* a court order).

84. See, e.g., Kellan Baker & Arjee Restar, *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, J. L., MED., & ETHICS, Fall 2022, at 456, 463; see also O’NEILL ET AL., *supra* note 15, at 10 (citing the financial costs of court orders, physicians’ letters, and new ID cards).

85. Ivette Gomez et al., *Update on Medicaid Coverage of Gender-Affirming Health Services*, KFF (Oct. 11, 2022), <https://www.kff.org/womens-health-policy/issue-brief/update-on-medicare-coverage-of-gender-affirming-health-services> [perma.cc/4LZW-6LFG].

86. *Transgender Health Care*, HEALTHCARE.GOV, <https://www.healthcare.gov/transgender-health-care> [perma.cc/L32A-RCCM].

87. O’NEILL & HERMAN, *supra* note 64, at 5.

88. *License Gender Marker Change*, *supra* note 81; Gilroy et al., *supra* note 27, at 478.

89. Gilroy et al., *supra* note 27, at 478–79.

90. Spade, *supra* note 24, at 754.

91. Adam P. Romero, *The Nineteenth Amendment and Gender Identity Discrimination*, LITIGATION, Spring 2020, at 48, 49.

92. O’NEILL ET AL., *supra* note 15, at 10; see also O’NEILL & HERMAN, *supra* note 64, at 1 (stating that 47 percent of trans people in states with the fewest barriers had corrected their driver’s licenses, compared with 26 percent of those in states with the most barriers, while 16 percent of trans people in states with the fewest barriers have corrected their birth certificates, compared with 8 percent of those in states with the most barriers).

their state does not offer a marker that aligns with their identity—for instance, most states do not have a gender nonconforming option for driver’s licenses.<sup>93</sup>

### C. *The Impact of Voter ID Requirements on Trans Voters*

The 2015 U.S. Transgender Survey concluded that respondents “encountered substantial issues related to obtaining IDs and [other] records that reflect their gender identity.”<sup>94</sup> Ahead of the 2022 midterm elections, the Williams Institute predicted that as many as 203,700 trans voters could find it difficult to exercise their right to vote because of voter ID laws.<sup>95</sup> But it is hard to know how many trans voters were or continue to be affected; no studies have attempted to assess the effect of voter ID laws on the actual ability of gender minorities to cast a ballot.<sup>96</sup>

As indicated above, cost is one of the most significant challenges for trans voters. Survey respondents identified the cost of changing identification documents as one of the main barriers to obtaining documents that reflect their preferred name and gender.<sup>97</sup> Out of 27,715 respondents to the 2015 U.S. Transgender Survey, more than two thirds did not have an ID that bore both the name and gender they preferred.<sup>98</sup> Only 11 percent reported that all of their IDs had their preferred name and gender.<sup>99</sup> 35 percent of respondents who had not attempted to change their legal name stated they had not done

93. O’NEILL ET AL., *supra* note 15, at 4, n.1. However, effective April 2022, the Department of State introduced the option for citizens to select an “X” as their gender marker on their U.S. passport application. Press Release, Antony J. Blinken, Sec’y of State, U.S. Dept. of State, X Gender Marker Available on U.S. Passports Starting April 11 (Mar. 31, 2022), <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11> [perma.cc/YE2S-XZPK]. The policy change did not happen in a vacuum—a federal district court held the State Department’s implementation of its binary-only gender policy for U.S. passports was arbitrary and capricious several years prior. *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016). Still, while the “X” gender marker may align with an individual’s gender identity more than options on the gender binary, having to present an ID card with this gender marker may be forced outing.

94. JAMES ET AL., *supra* note 1, at 90.

95. O’NEILL ET AL., *supra* note 15, at 5. BIPOC, young people, students, low-income people, people experiencing homelessness, and people with disabilities were overrepresented in that number. *Id.* at 2.

96. *Id.* at 6. However, the Williams Institute identified twelve of the thirteen strict voter ID states as having the most barriers for changing one’s gender marker on either a birth certificate or a driver’s license. JODY L. HERMAN & KATHRYN O’NEILL, THE WILLIAMS INST., GENDER MARKER CHANGES ON STATE ID DOCUMENTS: STATE LEVEL POLICY IMPACTS 16 fig.A1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gender-Markers-Jun-2021.pdf> [perma.cc/K344-QKTK] (identifying Arkansas, Georgia, Mississippi, Missouri, North Dakota, and Tennessee as having the most barriers in both categories; identifying Arizona, Kansas, Nebraska, Ohio, and Wisconsin as having the most barriers for changing birth certificate gender marker; and identifying Wyoming as having the most barriers for changing driver’s license gender marker).

97. JAMES ET AL., *supra* note 1, at 9.

98. *Id.* at 4, 9.

99. *Id.* at 82.

so because they could not afford it.<sup>100</sup> 32 percent who had not updated the gender marker on their ID stated the same.<sup>101</sup> Accordingly, respondents with lower incomes were more likely to report that none of their IDs bore the name they preferred.<sup>102</sup>

Another barrier is harassment. Election officials have harassed or challenged trans voters whose gender expression and/or name in their registration record does not align with their ID.<sup>103</sup> In the words of one respondent to the 2015 U.S. Transgender Survey,

I had to try twice to get my county to change my name in the voter registration, which is extremely embarrassing as people are essentially shouting that you're trans in a public place. Some accused me of attempting voter fraud when all I wanted to do was try to make sure I had the best candidates who would protect my rights.<sup>104</sup>

32 percent of respondents to the 2015 U.S. Transgender Survey who presented an ID that did not align with their gender presentation faced verbal harassment, refusal of service, or assault.<sup>105</sup> While this statistic is across all contexts, it illuminates the risk of voting while trans.

Even the *threat* of disclosure has a chilling effect on trans voters.<sup>106</sup> A trans voter may stay home due to the fear of being “targeted, outed, or challenged at the polls, which serves to further suppress the power of their communities.”<sup>107</sup> For instance, in *Arroyo Gonzalez v. Rossello Nevares*, three trans plaintiffs challenged Puerto Rico’s birth certificate policy, which prohibited gender marker changes and required indication of name changes with strike-out lines.<sup>108</sup> The plaintiffs sought to change the gender marker on their birth certificates without including information on the certificate itself that would disclose their trans status.<sup>109</sup> One of the plaintiffs, J.G., was a trans man.<sup>110</sup> Without an accurate birth certificate, J.G. was unable to correct the gender marker on his voter

100. *Id.* at 84.

101. *Id.* at 89.

102. *Id.* at 85.

103. Stuart Baum, Izabela Tringali & Mikael Morelión, *How Voter ID Laws Threaten Transgender Voters*, BRENNAN CTR. FOR JUST. (Nov. 20, 2020), <https://www.brennan-center.org/our-work/analysis-opinion/how-voter-id-laws-threaten-transgender-voters> [perma.cc/JD54-QF8A].

104. JAMES ET AL., *supra* note 1, at 235.

105. *Id.* at 9; *Id.* at 82 (“25% of people were verbally harassed, 16% were denied services or benefits, 9% were asked to leave a location or establishment, and 2% were assaulted or attacked.”).

106. Baum et al., *supra* note 103.

107. *Id.*

108. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 328 (D.P.R. 2018).

109. *Id.*

110. *Id.* at 329.



ID. J.G. did not vote in the 2016 election because presenting his voter ID would have disclosed his trans status.<sup>111</sup>

The anecdotal experiences of other trans voters suggest that J.G.’s concerns are well-founded. For instance, in 2013, a Texas voter could not afford to update his ID, so he attempted to vote with an ID containing his deadname (his name assigned at birth, with which he no longer identifies) and a photo that no longer resembled him.<sup>112</sup> Election officials interrogated him, refusing to believe the ID could be his.<sup>113</sup> Similarly, in 2016, Henry Seaton—a trans man—tried to vote with a state ID that still had a female gender marker.<sup>114</sup> The poll workers questioned Seaton about the “discrepancy between his ID and his appearance.”<sup>115</sup> Seaton “had to out [himself] as transgender” to cast his vote.<sup>116</sup> Everyone could see that Seaton was “flagged.”<sup>117</sup> And, in 2014, a Maryland poll worker asked a trans voter to step aside when the gender marker on his ID did not reflect his gender presentation.<sup>118</sup> The voter had not updated his ID because of the cost to change it.<sup>119</sup> After an hour, that voter was ultimately able to vote—but the interaction left him feeling humiliated, anxious, and discriminated against.<sup>120</sup> He decided to vote absentee in the future.<sup>121</sup> While absentee voting is an option for this Maryland voter, only twenty-seven states and D.C. offer “no-excuse” absentee voting.<sup>122</sup> Fifteen states require individuals to articulate a state-approved excuse explaining their inability to vote in person<sup>123</sup>—being trans is not on the list.<sup>124</sup>

As outlined above, voter ID laws have an outsized impact on trans voters. The next Part outlines how these laws, as applied to trans voters, are compelled speech in violation of the First Amendment.

111. *Id.* at 332.

112. Andrew, *supra* note 63.

113. *Id.*

114. Jo Yurcaba, *Over 200,000 Trans People Could Face Voting Restrictions Because of State ID Laws*, NBC NEWS (Nov. 1, 2022, 8:56 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/200000-trans-people-face-voting-restrictions-state-id-laws-rcna52853> [perma.cc/HV5P-9BAV].

115. *Id.*

116. *Id.*

117. *Id.*

118. Julie Moreau, *Strict ID Laws Could Disenfranchise 78,000 Transgender Voters, Report Says*, NBC NEWS (Aug. 17, 2018, 2:05 PM), <https://www.nbcnews.com/feature/nbc-out/strict-id-laws-could-disenfranchise-78-000-transgender-voters-report-n901696> [perma.cc/M6CK-TT4Z].

119. *Id.*

120. *Id.*

121. *Id.*

122. *Table 1: States with No-Excuse Absentee Voting*, *supra* note 47.

123. *Id.* The remaining eight states conduct elections by mail and automatically send ballots to voters.

124. *Table 2: Excuses to Vote Absentee*, *supra* note 47.

## II. COMPELLED SPEECH DOCTRINE

This Part offers an overview of First Amendment compelled speech doctrine. It then explores lower court cases in which plaintiffs have argued that forced outing is unconstitutional compelled speech. Notably, the courts decided these cases on other grounds, declining to rule on the plaintiffs' forced outing compelled speech arguments.

### A. *An Overview of First Amendment Compelled Speech Doctrine*

The Supreme Court has held that the First Amendment protects not only the right to speak freely but also “the right to refrain from speaking at all”<sup>125</sup>—in other words, the choice of “what to leave unsaid.”<sup>126</sup> The government “may not compel affirmance of a belief with which the speaker disagrees.”<sup>127</sup> Thus, the First Amendment “prohibits the government from telling people what they must say”—this is the very essence of compelled speech.<sup>128</sup>

#### 1. When Private Speech Is Compelled Speech

The Supreme Court has held that the First Amendment prohibition against compelled speech extends “equally to statements of fact the speaker would rather avoid”<sup>129</sup> and to statements of opinion.<sup>130</sup> The Court has upheld the prohibition against compelled speech in numerous contexts, holding that states may not, for example, compel students to salute the flag and recite the Pledge of Allegiance,<sup>131</sup> compel drivers to display the state motto on their license plates,<sup>132</sup> or compel website designers to create websites that convey messages with which they disagree.<sup>133</sup>

First, in *West Virginia State Board of Education v. Barnette* in 1943, a group of Jehovah's Witnesses challenged West Virginia's policy of requiring public school students to salute the flag and recite the Pledge of Allegiance.<sup>134</sup> The Court characterized the state-mandated flag salute and pledge as “a compulsion of students to declare a belief” against the students' religion.<sup>135</sup> The Court clarified that the state may not compel individuals to subscribe to the state's belief system, whether that belief is religious in nature or not.<sup>136</sup> Accordingly,

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125. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

126. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11, 16 (1986).

127. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

128. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006).

129. *Hurley*, 515 U.S. at 573.

130. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988).

131. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

132. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

133. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2322 (2023).

134. *Barnette*, 319 U.S. at 626–30.

135. *Id.* at 631.

136. *Id.* at 634, 642.

the Court held that compelling the flag salute and pledge was an unconstitutional invasion of the “sphere of intellect and spirit” protected by the First Amendment.<sup>137</sup>

The Court expanded upon these principles in its 1977 decision in *Wooley v. Maynard*, in which two Jehovah’s Witnesses challenged New Hampshire’s requirement that noncommercial vehicle license plates bear the state motto, “Live Free or Die.”<sup>138</sup> The Jehovah’s Witnesses, the Maynards, considered the state motto “repugnant to their moral, religious, and political beliefs.”<sup>139</sup> In opposition to another New Hampshire law, they covered the motto with tape and snipped the words “or Die” off the plate.<sup>140</sup> The Court described the policy as “requir[ing] that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message.”<sup>141</sup> The Maynards could not avoid being compelled to act as a billboard because a car is “a virtual necessity for most Americans.”<sup>142</sup> Therefore, the Court held, the policy contravened the First Amendment’s protection of the individual’s right “to refuse to foster . . . an idea they find morally objectionable.”<sup>143</sup> The *Wooley* dissent argued that the Maynards could affix a bumper sticker to their vehicle declaring their disagreement with the state motto, as a kind of disclaimer.<sup>144</sup> But the majority held that, because the First Amendment protects both the right to speak and the right to refrain from speaking, the state could not force the Maynards to speak at all on the matter.<sup>145</sup>

Most recently, the Court reaffirmed its compelled speech doctrine in *303 Creative LLC v. Elenis*.<sup>146</sup> There, a Christian website designer wanted to expand her services to create wedding websites for couples.<sup>147</sup> But she was worried, due to Colorado’s antidiscrimination public accommodations law, that the state would force her to design websites for same-sex couples, contravening her belief that marriage should only be between one man and one woman.<sup>148</sup> The website designer argued that the First Amendment protected her from

137. *Id.* at 642.

138. *Wooley v. Maynard*, 430 U.S. 705, 707, 714–15 (1977).

139. *Id.* at 707.

140. *Id.* at 708 n.4.

141. *Id.* at 715.

142. *Id.*

143. *Id.*

144. *Id.* at 722 (Rehnquist, J., dissenting).

145. *Id.* at 714 (majority opinion).

146. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321–22 (2023). It is not lost on this author that this case is anti-LGBTQ+—but as long as this is the doctrine we have, we might as well try to bend it toward justice. *See also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (holding that requiring parade organizer to include LGBTQ+ group in parade where organizer disagreed with group’s message constituted compelled speech).

147. *303 Creative*, 143 S. Ct. at 2308.

148. *Id.*

being compelled to express a message with which she disagreed.<sup>149</sup> In its opinion, the Court reaffirmed that “the government may not compel a person to speak its own preferred messages.”<sup>150</sup> The Court emphasized that compelling an individual to speak when they would “prefer to remain silent” and forcing them to “include other ideas with [their] own speech that [they] would prefer not to include. . . . offends the First Amendment just the same.”<sup>151</sup> Because the state sought “to force an individual to . . . defy [their] conscience about a matter of major significance,” the Court held that requiring the website designer to make websites conveying messages with which she disagreed violated the First Amendment.<sup>152</sup>

## 2. The Intersection of Government Speech and Compelled Speech

The Supreme Court has also distinguished between government and private speech. The Court has held that the First Amendment “restricts government regulation of private speech; it does not regulate government speech.”<sup>153</sup> The government may “say what it wishes”<sup>154</sup> because “[i]t is the very business of government to favor and disfavor points of view.”<sup>155</sup> The First Amendment may, however, limit the government’s speech when the government “seeks to compel private persons to convey the government’s speech.”<sup>156</sup> In *Pleasant Grove City v. Summum*, the Court identified three factors to distinguish between government and private speech: (1) whether history indicates that the government has long used the speech at issue to speak to the public,<sup>157</sup> (2) whether the speech at issue is “closely identified in the public mind with the government,”<sup>158</sup> and (3) whether the government maintained control over the message in the specific instance.<sup>159</sup>

In *Walker v. Sons of Confederate Veterans*, the Court applied this test and determined that Texas specialty license plate designs were government speech.<sup>160</sup> The case arose when the Texas Department of Motor Vehicles rejected the Sons of Confederate Veterans’ (SCV) specialty license plate design

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149. *Id.*

150. *Id.* at 2312.

151. *Id.*

152. *Id.* at 2321–22.

153. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring)).

154. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

155. *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment).

156. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

157. *Summum*, 555 U.S. at 470.

158. *Id.* at 472.

159. *Id.* at 471, 473.

160. *Walker*, 576 U.S. at 210.

proposal featuring the Confederate flag.<sup>161</sup> The Department denied SCV's proposal because "many members of the general public [found] the design offensive," which was "reasonable."<sup>162</sup> The Court found that all three *Summum* factors weighed in favor of the license plate designs being government speech: (1) the history of license plates indicated that they "long have communicated messages from the States," such as slogans;<sup>163</sup> (2) observers associated Texas license plate designs with the state;<sup>164</sup> and (3) Texas maintained direct control over the messages expressed on its specialty plates, as it approved each design before it appeared on a plate.<sup>165</sup>

As discussed above, *Wooley* was a somewhat similar case with a different outcome. Recall that in *Wooley*, the Court determined the state could not force the Maynards to use their private car as the state's billboard.<sup>166</sup> The *Walker* Court acknowledged the inconsistency; it admitted that characterizing the Texas specialty license plate designs as government speech "does not mean that the designs do not *also* implicate the free speech rights of private persons."<sup>167</sup> But the difference between the cases comes down, ultimately, to compelled speech. In *Walker*, no individual was compelled to display the Confederate flag license plate design on their vehicle.<sup>168</sup> If a driver had been compelled, though, that driver would be "convey[ing] the message[] communicated through [that] design[]," which would unwillingly associate the driver with the Confederate flag.<sup>169</sup> Ultimately, the *Walker* Court reaffirmed that "the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees."<sup>170</sup>

More broadly, then, even government speech may implicate the compelled speech doctrine "if it is sufficiently associated with a private person," as in *Wooley*.<sup>171</sup> If a private person is forced to communicate government speech, the fact that it is government speech does not insulate it from compelled speech analysis.<sup>172</sup>

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161. *Id.* at 203.

162. *Id.* at 206.

163. *Id.* at 210–11.

164. *Id.* at 212.

165. *Id.* at 213.

166. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has.").

167. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) (emphasis added).

168. *Id.*

169. *Id.* (quoting *Wooley*, 430 U.S. at 717 n.15, highlighting that a vehicle is "readily associated with its operator").

170. *Id.*

171. Lexi Meyer, Note, *License & (Gender) Registration, Please: A First Amendment Argument Against Compelled Driver's License Gender Markers*, 91 *FORDHAM L. REV.* 1983, 2007 (2023).

172. *Id.*

### 3. Compelled Speech Doctrine and the Right to Be Free from Forced Outing

*The harm is that the State of Ohio shouldn't force me to out myself every time that I have to present a legal document and then I get the looks, the whispers, the generalized humiliation that I get after presenting [it].*

—*Deposition of Plaintiff in Ray v. McCloud*<sup>173</sup>

Although the Supreme Court has not directly addressed the issue, it follows from the foregoing case law that the right to be free from compelled speech extends to the right to be free from forced outing by the government.<sup>174</sup> The Supreme Court has held that one of the liberties protected by the Constitution is the right of individuals “to define and express their identity.”<sup>175</sup> And the Court has stated that messages related to “sexual orientation and gender identity . . . are sensitive political topics, and they are undoubtedly matters of profound ‘value and concern to the public.’”<sup>176</sup> Speech on such public matters “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”<sup>177</sup> Lower courts have extended these principles to hold that expressing one’s sexuality or one’s gender identity is a form of speech.<sup>178</sup>

Scholars have also expanded upon this theory, exploring the intersection of gender identity and freedom of speech.<sup>179</sup> Because the First Amendment protects the right to keep facts and opinions private, these scholars argue, it also protects the rights of members of the LGBTQ+ community to keep their status as members of the community private.<sup>180</sup> Accordingly, “[c]ompelling

173. Brief in Support of Plaintiffs’ Motion for Summary Judgment at 15, *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020) (No. 18-cv-00272) (quoting the plaintiff’s deposition).

174. See, e.g., Brent Hunter Allen, Note, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1101 (1994) (“Forced outing pits free speech rights against the right not to speak.”).

175. *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

176. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (footnote omitted) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)).

177. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

178. See, e.g., *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (holding that a gay male high school student bringing a male date to prom constituted a political statement protected by the First Amendment); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff’d sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (holding that a school likely violated a trans girl’s right to freedom of expression by prohibiting her from wearing typical girls’ clothing and otherwise expressing her gender identity).

179. See, e.g., Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 93 (2015) (“Because a transgender [person]’s outward expression of gender . . . conveys an important message . . . about [their] identity, [their] expressive conduct should be treated as speech that falls within the protective umbrella of the First Amendment.”).

180. Allen, *supra* note 174, at 1100.

trans\* people to identify themselves by their assigned legal gender” when it does not comport with their gender identity “is repugnant to the First Amendment.”<sup>181</sup> When trans people are forced to present an ID that does not reflect their true identity, “they are compelled to affirmatively identify with a gender that is contrary to their core identity.”<sup>182</sup> Applying the compelled speech doctrine here, the result is that trans people may not be forced to express a message regarding their own gender identity that is contrary to their sincerely held beliefs.

Advocates and scholars have applied this compelled speech theory to argue that laws restricting or prohibiting trans people from changing the name or gender marker on their identification documents contravenes the First Amendment.<sup>183</sup> They argue that such laws compel trans people “to embrace a gender and an identity that do not reflect their reality.”<sup>184</sup> For instance, in *F.V. v. Barron*, trans women challenged Idaho’s policy of including revision history when an individual changed the name or gender marker on their birth certificate.<sup>185</sup> The plaintiffs argued in part that the policy violated their First Amendment right to be free from compelled speech: when the plaintiffs presented their birth certificates, they falsely identified themselves as having been “male” at some point in the past.<sup>186</sup> In so doing, they also endorsed an “inaccurate message with which they fundamentally disagree[d].”<sup>187</sup> Ultimately, the defendants conceded that their policy violated the Equal Protection Clause and agreed to change the policy pursuant to a court order.<sup>188</sup> The court held that,

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181. Brian T. Ruocco, Comment, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193, 214 (2016).

182. *Id.* at 215.

183. See, e.g., Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 901 (2018) (reviewing CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* (2017)).

184. *Id.*

185. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1134 (D. Idaho 2018), clarified by *F.V. v. Jeppesen*, 466 F. Supp. 3d 1110 (D. Idaho 2020), and by *F.V. v. Jeppesen*, 477 F. Supp. 3d 1144 (D. Idaho 2020)); see also *Ray v. McCloud*, 507 F. Supp. 3d 925, 940 n.11 (S.D. Ohio 2020) (declining to address plaintiffs’ compelled speech claim that Ohio’s policy of refusing to correct birth certificate gender markers when trans status was the basis for correction forced plaintiffs to endorse the state’s message that gender is evaluated based only on external genitalia at birth when they presented their IDs); Memorandum of L. in Support of Plaintiffs’ Motion for Summary Judgment at 19, *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018) (3:17-cv-01457) (arguing that Puerto Rico’s required inclusion of name revision history and prohibition on gender marker changes on birth certificates forced plaintiffs to disclose their trans identities when they presented their IDs); *Arroyo Gonzales v. Rossello Nevares*, 305 F. Supp. 3d 227 (D.P.R. 2018) (failing to address the plaintiffs’ aforementioned claim).

186. Plaintiffs’ Memorandum of L. in Support of Motion for Summary Judgment at 18, *Barron*, 286 F. Supp. 3d 1131 (No. 17-cv-00170) [hereinafter Plaintiff’s Memorandum of L., *Barron*].

187. *Id.* at 19.

188. *Barron*, 286 F. Supp. 3d at 1134. The plaintiffs argued that, in addition to violating the Equal Protection Clause, Idaho’s policy also violated the Due Process Clause and the First Amendment. *Id.* Accordingly, the plaintiffs requested that the court apply heightened scrutiny.

because the revision history would no longer be marked on reissued birth certificates, the plaintiffs' "compelled speech concern falls away, and the merits of this claim need not be addressed."<sup>189</sup>

In *Krebs v. Graveley*, a trans woman seeking to change her name challenged a Wisconsin policy that prohibited convicted sex offenders from legally changing their names.<sup>190</sup> Whenever she displayed her government ID, she was compelled to communicate information about herself and her identity that was false: her deadname and inaccurate gender identity.<sup>191</sup> The court here declined to analyze the plaintiff's claims, finding that her legal arguments were too underdeveloped—the only support she provided for her compelled speech argument was “a decade-old, student-written law review article.”<sup>192</sup> The court noted that it should not “conduct a party's legal research or invent arguments on a party's behalf.”<sup>193</sup> The court ultimately “stresse[d] the limitations of [its] holding,” emphasizing that it was based “entirely upon the briefing presented in this case.”<sup>194</sup>

In *Corbitt v. Taylor*, trans plaintiffs seeking to change the gender marker on their driver's licenses challenged Alabama's policy of prohibiting this change without evidence of gender-affirming surgery.<sup>195</sup> In part, the plaintiffs claimed that the policy infringed on their First Amendment right to be free from compelled speech.<sup>196</sup> In the plaintiffs' view, Alabama's policy was based on the state's ideology that a person's sex may only be evaluated based on the

*Id.* The defendants maintained that because they conceded the unconstitutionality of the policy under the Equal Protection Clause, the court should decide the matter on the “narrowest ground” and only reach the equal protection claim. *Id.*

189. *Id.* at 1135.

190. *Krebs v. Graveley*, No. 19-CV-634, 2020 WL 1479189, at \*1 (E.D. Wis. Mar. 26, 2020), *aff'd*, *Krebs v. Graveley*, 861 F. App'x 671 (7th Cir. 2021). Although I was unable to find information about the underlying conviction here, it is possible that the plaintiff was convicted because she was engaged in survival sex work. A 2023 study found that about 42 percent of young trans women reported having participated in sex work at some point in their life. Marla Renee Fisher et al., *Through a Different Lens: Occupational Health of Sex-Working Young Trans Women*, 8 *TRANSGENER HEALTH* 200, 203 (2023). About 25 percent of respondents cited “survival” as a motivator for engaging in sex work. *Id.* It is also possible that the plaintiff here was prosecuted under an antiloitering “walking while trans” law. “Walking while trans” refers to the presumption of law enforcement officers that trans women are likely engaged in sex work. Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 *WM. & MARY J. WOMEN & L.* 5, 5–6 (2017). Law enforcement officers “regularly stop, harass, and demand identification from” trans women they deem to be loitering. *Id.* at 6.

191. Plaintiff's Memorandum of L. in Support of Her Motion for Summary Judgment & a Permanent Injunction at 11–12, *Krebs*, No. 19-CV-634, 2020 WL 1479189 [hereinafter Plaintiff's Memorandum of L., *Krebs*].

192. *Krebs*, 2020 WL 1479189, at \*1–2 (referring to Julia Shear Kushner, *The Right to Control One's Name*, 57 *UCLA L. REV.* 313 (2009)).

193. *Id.* at \*2.

194. *Id.*

195. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021).

196. Memorandum in Support of Plaintiffs' Motion, *Corbitt*, *supra* note 26, at 51–52.



sex associated with their external genitalia at birth, unless they had undergone gender-affirming surgery.<sup>197</sup> The plaintiffs “would have to repeatedly endorse that lie, one that is repugnant to [them], . . . each and every time [they] carried [the license] with [them] or had to show it to someone.”<sup>198</sup> The policy forced trans people to repeatedly and publicly contradict their identity and their core beliefs.<sup>199</sup> Here, the court found for the plaintiffs, holding that the policy was a sex-based classification that did not pass intermediate scrutiny.<sup>200</sup> It did not, however, address the plaintiffs’ compelled speech argument.<sup>201</sup>

Courts should not shy away from addressing such cases on compelled speech grounds. And, as discussed below, the arguments these plaintiffs made may be extended to show that voter ID laws, as applied to trans voters, constitute compelled speech in violation of the First Amendment.

### III. VOTER ID REQUIREMENTS AS COMPELLED SPEECH

This Part draws upon the reasoning of Part II to advance the novel argument that, as applied to trans voters, voter ID laws constitute compelled speech under the First Amendment. It then shows how a court would apply strict scrutiny, concluding that the laws are unconstitutional as applied to trans voters. Finally, it puts forth possible reforms.

#### A. *Why Voter ID Laws Constitute Compelled Speech as Applied to Trans Voters*

Under the same logic argued in the above cases, voter ID laws constitute compelled speech as applied to trans voters. To advance a valid compelled speech claim, an individual must establish: “(1) speech; (2) to which [they] object[]; that is (3) compelled by some governmental action.”<sup>202</sup>

First, the presentation of voter ID is cognizable as speech under the First Amendment. While the First Amendment only specifically mentions “speech,” the Supreme Court has “long recognized that its protection does not end at

197. *Id.* at 52.

198. *Id.* at 53.

199. *Id.* at 53–54.

200. *Corbitt*, 513 F. Supp. 3d at 1315, 1323.

201. *See id.* Like *Corbitt*, other cases have failed to address their plaintiffs’ compelled speech arguments. *See Ortiz v. Foxx*, 596 F. Supp. 3d 1100 (N.D. Ill. 2022) (finding it [the district court] lacked jurisdiction and declining to reach the merits of plaintiffs’ compelled speech claim that an Illinois statute barring individuals convicted of certain crimes from changing the name on their government-issued ID forcibly outed plaintiffs whenever they presented their IDs); *Love v. Johnson*, No. 15-11834, 2016 WL 4437667 (E.D. Mich. Aug. 23, 2016) (dismissing case for mootness because Michigan voluntarily eliminated the challenged statutory requirement and not acknowledging the plaintiff had challenged as compelled speech the state’s requirement to produce an amended birth certificate before changing the gender marker on a state-issued ID).

202. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (beginning its compelled speech analysis with *Wooley*).

the spoken or written word.”<sup>203</sup> Symbolic speech or conduct is also protected if it is “sufficiently imbued with elements of communication.”<sup>204</sup> Initially, the Court adhered to a symbolic speech test, which required both (1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by viewers.<sup>205</sup> But the Court revisited this test in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, stating that the “particularized message” requirement was too limited: a “narrow, succinctly articulable message is *not* a condition of constitutional protection.”<sup>206</sup> In the wake of *Hurley*, circuit courts have split on the appropriate test for symbolic speech.<sup>207</sup> At a minimum, the circuit courts’ differing interpretations of *Hurley* “require that the display be of such a character that a viewer could draw an identifiable inference from it.”<sup>208</sup>

Under the broader standard articulated in *Hurley*, presenting ID is equivalent to speech—specifically, symbolic speech protected by the First Amendment. The Supreme Court has held that the disclosure or publication of information constitutes speech.<sup>209</sup> Presenting an ID is the disclosure of personal information. Whether or not the presenter of the ID intends to convey a particularized message, “the display [is] of such a character that a viewer could draw an identifiable inference from it”<sup>210</sup>—in this case, the presenter’s gender identity and name.

Importantly, presentation of ID is private speech, not government speech—like the speech in *Wooley* rather than *Walker*. In *Doe 1 v. Marshall*, the Middle District of Alabama addressed this issue when it considered a challenge to the state’s requirement that convicted sex offenders possess an ID card branded with the words “CRIMINAL SEX OFFENDER.”<sup>211</sup> The court found that the ID cards themselves were government speech, but it maintained that

203. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (finding that burning a flag was sufficiently “expressive” to be conduct covered by the First Amendment).

204. *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam).

205. *Johnson*, 491 U.S. at 404.

206. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (emphasis added).

207. *Compare Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) (interpreting *Hurley* to “leave intact the Supreme Court’s test for expressive conduct in *Texas v. Johnson*”), with *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 160 (3d Cir. 2002) (interpreting *Hurley* as having “eliminated the ‘particularized message’ aspect of the *Spence-Johnson* test” (quoting *Hurley*, 515 U.S. at 569–70)), and *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (identifying the test as whether “the reasonable person would interpret [a display] as *some* sort of message, not whether an observer would necessarily infer a *specific* message”).

208. *Cressman v. Thompson*, 798 F.3d 938, 957 (2015).

209. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). The Court also stated that the case presented a “conflict between interests of the highest order”—disclosure of matters of public concern and free speech—but, despite the strong public interest in the disclosures, the First Amendment still shielded them. *Id.* at 518.

210. *Cressman*, 798 F.3d at 957.

211. *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1324 (M.D. Ala. 2019).

the *Wooley* compelled speech argument still applied.<sup>212</sup> The district court reasoned that, while license plates are government speech, forcing drivers to display a certain message on that license plate still constitutes compelled private speech.<sup>213</sup> Thus, just as requiring a driver to display “Live Free or Die” on their license plate is compelled private speech, so too is requiring an individual to display “CRIMINAL SEX OFFENDER” on their ID card.<sup>214</sup> The *Marshall* court noted that the message on the ID cards was “readily associated” with the plaintiffs because the words are “about” them.<sup>215</sup> ID cards are “meant to convey substantive personal information about their holders.”<sup>216</sup> In the court’s words, “[t]he dirty looks that Plaintiffs get are not directed at the State.”<sup>217</sup>

As the Alabama court noted, identification documents are also distinguishable from *Walker*-type license plates in a crucial way: they convey a message associated with the individual, not the state. A license plate number serves the governmental purpose of vehicle registration and identification, but it communicates no personal information about the driver to an ordinary observer.<sup>218</sup> In contrast, an ID card does. Although the act of printing and issuing a driver’s license may be government speech, the act of presenting a driver’s license or other ID is private speech.<sup>219</sup> This is consistent with *Walker* and *Wooley*. The *Walker* Court acknowledged that the Texas specialty license plate designs could “also implicate the free speech rights of private persons.”<sup>220</sup> Like the website designer in *303 Creative*, the information on their IDs is intertwined with their core beliefs and identities.<sup>221</sup> Accordingly, the presentation of voter ID is private speech.

The third requirement—that the speech is compelled by government action—requires consideration of the particular trans voter impacted. There are three different types of trans voters who may be affected by such requirements: (1) the trans voter who cannot obtain a qualifying ID with an accurate name and/or gender marker because of their state’s stringent requirements, (2) the trans voter who can theoretically obtain a qualifying ID with an accurate name and/or gender marker but who has not been able to do so because the process is cost prohibitive, and (3) the trans voter who possesses a qualifying ID with an accurate name and gender marker. The rest of this Section analyzes each type of voter, in turn, to show how each faces a compelled speech problem.

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212. *Id.* at 1324–25.

213. *Id.* at 1325.

214. *Id.* at 1326.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015).

219. *Marshall*, 367 F. Supp. 3d at 1325 (finding that a driver’s license is government speech because “the State issues the ID cards and controls what is printed on them”).

220. *Walker*, 576 U.S. at 219.

221. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2322 (2023).

### 1. Trans Voters Unable to Obtain Accurate ID Due to the Requirements

In certain states, a trans voter may not be able to obtain an accurate ID for several reasons. First, if the individual resides in a state where they must show evidence of gender-affirming surgery to correct the gender marker on their ID, then an individual who has not had such surgery would be barred from updating the gender marker.<sup>222</sup> This voter would simply be unable to obtain an ID that accurately reflects their gender identity, unless they undergo an invasive and expensive surgery that many consider an unnecessary step in their transition. A voter in a state requiring other evidence of gender-affirming care (such as hormone therapy) where such care is similarly inaccessible would also be barred from obtaining an accurate ID.<sup>223</sup> Additionally, many states require a person seeking a name change to publicize the request in advance of the name change court hearing.<sup>224</sup> The publication requirement effectively publishes the individual's trans status, putting them at risk of harm, harassment, or discrimination.<sup>225</sup>

The trans voter is then faced with an impossible choice: They can try to vote with an ID that does not comport with their gender identity or appearance, and risk discrimination, violence, and disenfranchisement.<sup>226</sup> Alternatively, they can forego their right to vote—and suffer from de facto disenfranchisement, their participation in democracy thwarted by the voter ID requirements.<sup>227</sup>

If the voter attempts to vote with an ID that does not match their appearance, the potential resulting disclosure about their trans status is compelled speech. When the voter presents an ID that bears a gender marker not in alignment with their outward appearance, the voter is effectively forced to share their trans status with the poll worker.<sup>228</sup> Each time the voter presents their ID—“a virtual necessity for most Americans”<sup>229</sup>—they are forced to share a message that they may wish to keep private.<sup>230</sup> And it is no defense that the

222. *ID Documents Center*, *supra* note 71. States like Alabama, Georgia, and Louisiana require an individual seeking to change the gender marker on their ID to provide evidence that they have undergone gender-affirming surgery. *Id.*

223. *See, e.g., License Gender Marker Change*, *supra* note 81.

224. *See, e.g., I Want to Change My Name*, MICH. LEGAL HELP, <https://michiganlegalhelp.org/resources/family/i-want-change-my-name> [perma.cc/A7W9-RWD8] (recognizing that the required notice period varies between two and eight weeks before hearing by county in Michigan); *id.* States like Alaska, Delaware, Idaho, and Maryland require individuals to publish the notice of petition to change their name in a newspaper, usually several weeks in advance. *License Gender Marker Change*, *supra* note 81.

225. *ID Document Laws*, *supra* note 77.

226. O'NEILL & HERMAN, *supra* note 64, at 5, 16.

227. *See, e.g., Baum et al.*, *supra* note 103.

228. *See, e.g., Complaint for Declaratory and Injunctive Relief* ¶ 111, *Ortiz v. Foxx*, 596 F. Supp. 3d 1100 (N.D. Ill. 2022) (No. 19-cv-02923).

229. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

230. *See, e.g., Complaint for Declaratory and Injunctive Relief*, *supra* note 228, ¶ 111.

trans voter may disclaim that inaccurate information, for instance, by explaining that she is a trans woman, although her ID states otherwise. The Supreme Court rejected this very possibility in *Wooley*.<sup>231</sup> The First Amendment protects the right to refrain from speaking at all; that protection extends to statements of fact that the speaker wishes not to disclose.<sup>232</sup>

The argument that forced outing constitutes compelled speech is the strongest argument here, but another potential argument relates to the trans voter's forced endorsement of the state's message about gender identity. This argument is weaker,<sup>233</sup> but worth mentioning, especially since it has appeared in several briefs in the aforementioned lower court cases that extended compelled speech claims to identification documents. As discussed previously, some states require an individual to undergo "appropriate clinical treatment," such as facial or "top" surgery, before they may correct the gender marker on their ID.<sup>234</sup> Some of those states even require an individual to undergo genital surgery (an even more expensive and invasive procedure requiring a lengthy recovery) before they may correct the gender marker on their ID.<sup>235</sup> In those states, the government effectively communicates the message that sex is determined by one's external genitalia and that the only way to change one's gender identity is by undergoing gender-affirming surgery. When a trans voter who has not obtained gender-affirming surgery must present their ID, they are

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231. *Wooley*, 430 U.S. at 714. As discussed above, the dissent suggested that Mr. Maynard could simply affix a bumper stick to his car, declaring his disagreement with the state motto. *Id.* at 722 (Rehnquist, J., dissenting). Nevertheless, the majority held that the state may not force Mr. Maynard to speak *at all* on the topic. *Id.* at 714.

232. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

233. Two lower courts recently rejected this argument in challenges to state policies that refuse to amend gender markers on trans individuals' birth certificates. *Fowler v. Stitt*, No. 22-cv-115, 2023 WL 4010694, at \*6–8 (N.D. Okla. June 8, 2023); *Gore v. Lee*, No. 3:19-cv-0328, 2023 WL 4141665, at \*31–36 (M.D. Tenn. June 22, 2023). Both courts, however, declined to address whether the birth certificate policy constituted forced outing, although both plaintiffs put forth those arguments. Complaint for Declaratory & Injunctive Relief ¶ 142, *Fowler*, No. 22-cv-115, 2023 WL 4010694; Complaint for Declaratory & Injunctive Relief ¶ 220, *Gore*, No. 3:19-cv-0328, 2023 WL 4141665. As of this writing, both plaintiffs have filed appeals. But, even if both defendants ultimately prevail, a birth certificate conveys a different message (the individual's sex assigned at birth) than a driver's license or other ID (the individual's *current* sex). The *Gore* opinion acknowledges as much, stating that a birth certificate reflects "historical information." *Gore*, 2023 WL 4141665, at \*12. Requiring trans individuals to present ID (such as photo ID) with information about their *current* sex raises a compelled speech endorsement-of-message issue, whether or not the same can be said for birth certificates.

234. See *supra* Section I.B.2; *ID Documents Center*, *supra* note 71 (describing how both Florida and Idaho require only that the applicant has undergone "appropriate clinical treatment").

235. See *Meyer*, *supra* note 171, at 1997; *ID Documents Center*, *supra* note 71 (describing several states' requirements, including: Indiana, where applicants must "successfully" complete gender change surgery; Louisiana, which requires "successful" gender change/reassignment; and Oklahoma, which requires "irreversible and permanent" sex change). In other states, it seems that other types of surgery, such as "top" surgery, suffice. See, e.g., *ID Documents Center*, *supra* note 71 (describing how both Florida and Idaho require only that the applicant has undergone the "appropriate clinical treatment").

forced to endorse the state's belief about gender identity, a message with which they may disagree.<sup>236</sup> Each time they present their ID, they must communicate a message that is repugnant to them and that they know is false.<sup>237</sup> Just as students cannot be forced to pledge allegiance to the flag, the trans voter may not be compelled to “confess by word or act their faith” in what the state views to be the truth.<sup>238</sup> A trans voter may not be compelled to serve as a “mobile billboard” for the state's view of gender identity.<sup>239</sup>

## 2. Trans Voters Unable to Obtain Accurate ID Due to the Cost

In other states with less stringent requirements for updating the gender marker or name on an ID, a trans voter may still be barred from accessing an accurate ID due to associated costs. These costs can be financial, emotional, and physical.<sup>240</sup> Trans people are also more likely to be living at or near the poverty line than other members of the population.<sup>241</sup> Accordingly, the fees associated with changing the name or gender marker on an ID may present an insurmountable barrier and render an accurate ID inaccessible.<sup>242</sup>

Although the Supreme Court has dismissed the burdens of obtaining voter ID, it has not considered how securing an accurate ID is uniquely burdensome to trans people. For instance, in *Crawford v. Marion County Election Board*, the Court considered a challenge to an Indiana statute that requires photo ID for in-person voting.<sup>243</sup> The Court acknowledged that the statute imposed various burdens on those who lacked photo ID, including traveling to the Bureau of Motor Vehicles, gathering the requisite documents, and posing for a photo.<sup>244</sup> Even so, the Court concluded that those inconveniences “surely [did] not qualify as a substantial burden on the right to vote.”<sup>245</sup> And, the Court added, those who experienced a “somewhat heavier burden” (such as elderly or indigent people) had ten days to verify a provisional ballot, which “mitigated” the burden.<sup>246</sup> But a trans voter unable to obtain an accurate photo ID, due to the associated costs, would likely not be able to secure that ID with only

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236. See Plaintiff's Memorandum of L., *Barron*, *supra* note 186, at 19, and Memorandum in Support of Plaintiffs' Motion, *Corbitt*, *supra* note 26, at 53, for similar arguments.

237. See, e.g., *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1313 (M.D. Ala. 2021) (explaining the mental and moral hardships of carrying and presenting identification that incorrectly identifies one's sex designation).

238. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

239. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

240. See *supra* Section I.B.

241. O'NEILL ET AL., *supra* note 15, at 10.

242. Gilroy et al., *supra* note 27, at 478 (the process of obtaining correct ID documents can be cost prohibitive).

243. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–86 (2008).

244. *Id.* at 198.

245. *Id.*

246. *Id.* at 199.

ten additional days. Moreover, while the *Crawford* Court emphasized the incidental costs of obtaining a new ID for most voters,<sup>247</sup> the costs are far from incidental for trans voters. The costs trans voters must bear—from filing a court order to obtain a legal name or gender marker change, to paying to visit a physician to obtain medical documentation of their transition, to shelling out tens of thousands of dollars for gender-affirming surgery—are astronomical compared to what the *Crawford* Court contemplated. The *Crawford* Court also suggested that, if voters had to pay a tax or fee to obtain a new photo ID, that would change the analysis.<sup>248</sup> For trans people, a fee is a prerequisite to obtaining an accurate photo ID—and that fee is above and beyond what is required of cis voters.

Consequentially, the trans voter must present an ID that does not comport with their name or gender identity in order to vote. If the gender marker and the voter's appearance do not match, the voter is compelled to reveal private information (like their gender identity or deadname).<sup>249</sup> Moreover, the government has also compelled the voter to engage in speech to which they object, because the voter knows the message regarding their name or gender identity is false, but they are forced to present it as true.<sup>250</sup> For the same reasons outlined above, requiring a trans voter to disclose private information about their gender identity, their deadname, or both constitutes compelled speech.<sup>251</sup>

### 3. Trans Voters Who Have Updated Their ID

Finally, some trans voters are able to meet their state's requirements for changing an ID gender marker and/or name, and they are also able to afford the cost of doing so. This scenario presents the weakest compelled speech argument of the three. But still, there are potential compelled speech issues here. First, trans voters who *do* have acceptable ID still may be forced to reveal their trans status. Some trans people do not easily—or may not want to—pass, meaning they are not perceived by others as the gender with which they identify.<sup>252</sup> In such a case, presenting ID may still out individuals as trans against their will, even if the gender marker and name on their ID are accurate.<sup>253</sup>

247. *Id.* at 198.

248. *Id.* Indiana offered free photo ID to voters without driver's licenses who were at least eighteen years old. *Id.* at 186.

249. See, e.g., Kolbert, *supra* note 10, at 513–14 (discussing the voter whose outward appearance suggests a different gender identity than what is shown on their ID); Memorandum in Support of Plaintiffs' Motion, *Corbitt*, *supra* note 26, at 53.

250. See, e.g., Plaintiff's Memorandum of L., *Krebs*, *supra* note 191, at 11–12.

251. See *supra* Section III.A.1.

252. See, e.g., *Transgender 101*, LGBTQIA RES. CTR., <https://lgbtqia.ucdavis.edu/trans-101/perma.cc/MZ2Z-P2N2> (last updated Feb. 6, 2020).

253. See generally Anna Brown, Juliana Menasce Horowitz, Kim Parker & Rachel Minkin, *The Experiences, Challenges and Hopes of Transgender and Nonbinary U.S. Adults*, PEW RSCH. CTR. (June 7, 2022), <https://www.pewresearch.org/social-trends/2022/06/07/the-experiences-challenges-and-hopes-of-transgender-and-nonbinary-u-s-adults> [perma.cc/JT43-RCEX]

There may also be a compelled speech issue connected with the correct name listed on the ID. In some cases, the ID name may differ from the one listed in the voter registration record—for instance, if the individual updated their ID document after registering to vote. But, even in states without voter ID requirements, voters still must provide the name listed on their voter registration to cast a ballot. If the name in the voter record is the voter’s deadname, this discrepancy could also present a compelled speech problem by forcing the voter to not only express a message with which they disagree (that their deadname is their real name) but also out themselves.<sup>254</sup>

Even if a trans person voting with a correct ID document does not present a compelled speech issue, there are other reasons to be concerned about voter ID requirements.<sup>255</sup> Although trans voters who have been able to update their IDs may not be harmed by compelled speech, they are still harmed by voter ID requirements.

### B. *Why Voter ID Laws as Applied to Trans Voters Do Not Pass Strict Scrutiny*

Content-based laws are unconstitutional unless they pass strict scrutiny.<sup>256</sup> Compelled speech laws are content-based because “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>257</sup> Thus, compelled speech is subject to strict scrutiny. To pass strict scrutiny, a law must both serve a compelling state interest and be narrowly tailored to that interest.<sup>258</sup> Especially in the First Amendment context, this is a high bar: freedom of speech is “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.”<sup>259</sup> While voter ID laws do serve a compelling state interest, when applied to trans voters, they result in unconstitutionally compelled speech that may be avoided with more narrowly tailored ID requirements.

#### 1. Compelling State Interest

Courts will undoubtedly find that states have a compelling interest in requiring voters to present ID. First and foremost, states point to the interest in

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(providing examples of how coming out as trans creates trauma for trans individuals, especially in certain contexts).

254. The strength of the compelled speech argument here depends on how difficult it is to update a voter registration. For instance, in a state with same-day voter registration, an individual can re-register to vote with their accurate ID and avoid the problem of having to cast a ballot under their deadname.

255. See *supra* Introduction for a discussion on the burdens trans voters may face due to the intersection of their race and gender identities.

256. See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

257. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

258. See *id.* at 800.

259. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).



“deterring and detecting voter fraud.”<sup>260</sup> The Supreme Court has held that “[t]here is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”<sup>261</sup> The Court has also reasoned that a state’s interest in “orderly administration and accurate recordkeeping” is another “sufficient justification for carefully identifying all voters participating in the election process.”<sup>262</sup>

States also identify “protecting public confidence” as an interest that justifies voter ID laws.<sup>263</sup> The Court has recognized this interest, too, holding that “public confidence in the integrity of the electoral process has independent significance” from preventing actual voter fraud because it “encourages citizen participation in the democratic process.”<sup>264</sup> The Court has also held that confidence in the integrity of elections “is essential to the functioning of our participatory democracy.”<sup>265</sup>

Although the Court has credited concerns about voter fraud as a compelling state interest in the past,<sup>266</sup> it is worth querying just how prevalent voter fraud really is. In 2012, an investigation by the News21 journalism project revealed that, from 2000 through part of 2012, there were only “about 0.000003 alleged cases of fraud for every vote cast.”<sup>267</sup> Still, given the precedent, preventing voter fraud and safeguarding elections are sufficiently compelling interests to justify voter ID laws.

## 2. Lack of Narrow Tailoring

While voter ID laws serve a compelling state interest, they still fail strict scrutiny if they are not narrowly tailored to that interest. Although the Court has held that voter ID laws satisfy a balancing test less rigorous than strict scrutiny, the analysis is different as applied to trans voters in the First Amendment context.<sup>268</sup> As discussed above, laws that compel speech must pass strict

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260. See *e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008).

261. *Id.* at 196.

262. *Id.*

263. See, *e.g.*, *id.* at 197.

264. *Id.*

265. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

266. See *id.* at 6 (Stevens, J., concurring).

267. German Lopez, *At Least 44 States Have Rejected the Trump Voter Fraud Commission’s Sweeping Data Request*, VOX (July 5, 2017, 12:06 PM), <https://www.vox.com/policy-and-politics/2017/7/5/15921806/trump-voter-fraud-commission-states> [perma.cc/F4RV-F2XB]; Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID Is Needed*, NEWS21 (Aug. 12, 2012, 10:39 AM) [hereinafter *News21 Study*], <https://votingrights.news21.com/article/election-fraud> [perma.cc/DC2G-YGWD]; see also *Frank v. Walker*, 773 F.3d 783, 791, 794 (7th Cir. 2014) (Posner, J., dissenting) (citing the same News21 study as evidence that there have been only ten cases of in-person voter fraud that could have been prevented by photo ID laws; stating that there is no evidence that voter-impersonation fraud is an “actual rather than invented problem”).

268. See *Crawford*, 553 U.S. 181.

scrutiny.<sup>269</sup> The *Wooley* Court held that, even where the government interest is compelling, it “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>270</sup> And, recently, the Court has been more sympathetic to First Amendment claims rather than Fourteenth Amendment claims.<sup>271</sup> With this context in mind, voter ID laws would fail strict scrutiny because they unnecessarily “stifle fundamental personal liberties” protected by the First Amendment.

First, voter ID laws do not use the least restrictive means to meet the end of protecting elections.<sup>272</sup> Thirteen states and D.C. do not require voter ID.<sup>273</sup> The inference to draw here is not that these jurisdictions are uninterested in preventing voter fraud and safeguarding their elections, but rather that they rely on other, less restrictive means of doing so. In fact, “[i]t is more likely that an individual will be struck by lightning than that [they] will impersonate another voter at the polls.”<sup>274</sup> The most common method of verifying a voter’s identity in those states is checking identifying information provided at the polls (like a voter’s signature) against the voter’s file.<sup>275</sup> Other states check off the names of registered voters on a registration list.<sup>276</sup> Still others allow voters to make a verbal or written statement of their name, registration address, and birth year in lieu of presenting ID.<sup>277</sup> The very fact that many states do not have voter ID requirements illustrates that there are narrower means to achieve the same ends of verifying voter identity.

Voter ID requirements are also underinclusive. The Court has indicated that a state’s willingness to grant exceptions to its generally applicable policy may indicate that the policy is not narrowly tailored to that interest.<sup>278</sup> Many states with voter ID requirements grant exceptions for certain groups, such as

269. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

270. *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

271. See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [perma.cc/5M7M-DFWB]; Jordan Smith, *In Overturning Roe, Radical Supreme Court Declares War on the 14th Amendment*, INTERCEPT (June 24, 2022, 6:30 PM), <https://theintercept.com/2022/06/24/roe-wade-overturned-supreme-court-14th-amendment> [perma.cc/2RBB-F9QX].

272. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

273. *Voter ID Laws*, *supra* note 6.

274. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD 4* (2007), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Truth-About-Voter-Fraud.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf) [perma.cc/TJ2U-LX9Z].

275. *Voter ID Laws*, *supra* note 6.

276. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

277. *ID Requirements*, VOTING RTS. LAB, [https://tracker.votingrightslab.org/issues/id-requirements?law=100#issues\\_map](https://tracker.votingrightslab.org/issues/id-requirements?law=100#issues_map) [perma.cc/MX78-YYYN].

278. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879, 1882 (2021) (“The creation of a system of exceptions . . . undermines the City’s contention that its non-discrimination policies can brook no departures.”).

individuals with religious objections to being photographed,<sup>279</sup> indigent individuals,<sup>280</sup> or individuals with a reasonable impediment to getting an ID.<sup>281</sup> Some states like Texas allow exempted voters to apply for a free, election-specific ID as a substitute for voter ID.<sup>282</sup> In such states, some trans voters would fall under this exemption because of their indigent status. But other trans voters who are not indigent may still not be able to afford gender-affirming care or another prerequisite to getting an accurate voter ID. Thus, they would still be impacted by voter ID requirements. In some ways, these exemptions appear to not only undermine the state's argument that the voter ID policy is narrowly tailored, but they also might undermine the notion that the state has a compelling interest in requiring voter ID to begin with. In my view, the other arguments for a lack of narrow tailoring are doctrinally stronger—the willingness of the government to grant exceptions to a law should not doom it.<sup>283</sup> However, given that the Court has looked favorably upon this theory, it is still worth mentioning.

While the Court has found that granting exceptions is problematic, so is the refusal to grant exceptions or accept other forms of ID. Strict photo ID requirements where voters are not able to present alternate forms of ID do not even seem to be targeted at voter fraud or election integrity.<sup>284</sup> Photo ID is far from the only means of verifying identity. Other voter ID states accept various forms of ID in lieu of photo ID. For instance, many nonphoto ID states permit voters to show a document that bears the voter's current address, like a utility bill, bank statement, or government check.<sup>285</sup> Still other states accept Social

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279. *Voter ID Laws*, *supra* note 6. Those states are Indiana, Kansas, Mississippi, South Carolina, Tennessee, Texas, and Wisconsin. *Id.*

280. *Id.* Those states are Indiana and Tennessee.

281. *Id.* (South Carolina.)

282. *Voters Without Photo ID May Qualify for an Exemption or Free ID*, TEX. SEC'Y OF STATE (Oct. 23, 2015), <https://www.sos.state.tx.us/about/newsreleases/2015/102315.shtml> [perma.cc/DQ8K-KNGV].

283. See, e.g., Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1122 (2022) (describing *Fulton*'s "individualized-exemptions doctrine" as "[h]ighly questionable" to some).

284. See generally *Frank v. Walker*, 773 F.3d 783, 788, 796 (7th Cir. 2014) (Posner, J., dissenting). Judge Posner stated that photo ID requirements are "ineffectual" against other forms of voter fraud. *Id.* He cataloged those other forms and concluded that "[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens." *Id.*

285. *ID Requirements*, *supra* note 277. Those states include Alaska, Arizona, Colorado, Hawaii, Montana, New Mexico, Utah (which requires two forms of ID that bear the name of the voter and provide evidence the voter resides in the precinct), Virginia, and West Virginia. *Id.*

Security cards as a form of valid nonphoto ID.<sup>286</sup> All but five states accept student ID cards as a form of valid ID.<sup>287</sup> States are thus able to achieve their ends of verifying voter identity through less stringent ID requirements.

Voter ID requirements, then, are not narrowly tailored to the asserted state interest. Thus, they would not pass strict scrutiny.

### C. *Prayers for Relief*

So, if plaintiffs are successful, where does this leave us? Of course, the best solution would be to abandon voter ID laws altogether, as research indicates that the issue they allegedly combat (voter fraud) is virtually nonexistent.<sup>288</sup> As outlined above, thirteen states and D.C. hold their elections without requiring voter ID.<sup>289</sup> Those jurisdictions use alternative methods of verifying voter identity, such as checking the voter's information against the registration record or a verbal attestation.<sup>290</sup> Using those alternative methods would not present a compelled speech problem for trans voters and would still address the state interest in safeguarding elections. But abolishing voter ID laws on a national scale is likely a political impossibility.<sup>291</sup>

Instead, states should expand the types of documents that voters may use to confirm their identities. States requiring photo ID should relax their restrictions, using nonstrict states' policies as a model. As discussed above, many nonphoto ID states allow voters to present as ID a variety of documents that contain the individual's address.<sup>292</sup> Those types of documents do not disclose an individual's gender marker and need not disclose their deadname, so they do not present a compelled speech issue. And these identity verification measures would still enable states to protect against voter fraud, to the extent that it even is an issue.

Finally, states should also simplify the process for updating identification documents, making it more accessible to trans people (and other populations,

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286. *Id.* Those states include Connecticut, Delaware, and West Virginia. *Id.*

287. Vigdor, *supra* note 5; *Voting with Student ID in 2023: The State of the Law & Pending Legislation*, VOTING RTS. LAB (Mar. 21, 2023), <https://votingrightslab.org/voting-with-student-id-in-2023-the-state-of-the-law-pending-legislation> [perma.cc/JB8M-3ZRM]. However, the tide is turning against accepting student IDs as a form of voter ID—Idaho and Ohio both recently enacted laws that prohibit student ID as a form of voter ID. *Id.*

288. *See, e.g.*, Lopez, *supra* note 267 (from 2000 through part of 2012, there were only about 0.000003 alleged cases of fraud per vote cast).

289. *See supra* Section III.B.2.

290. *Id.*

291. *See, e.g.*, Justin Papp, *GOP Showcases States with Added Voter ID Laws as Model for Country*, ROLL CALL (Mar. 10, 2023, 4:33 PM), <https://rollcall.com/2023/03/10/gop-showcases-states-with-added-voter-id-laws-as-model-for-country> [perma.cc/RRW6-XT84] (“Republicans are highlighting states that have tightened voting laws—especially with added voter identification requirements—like Georgia, Florida, Louisiana and Ohio as models to increase election integrity, drawing a fight with Democrats over what constitutes a successful election.”).

292. *ID Requirements, supra* note 277.

too). Ideally, one standardized process across the United States would eliminate any confusion among varying state processes.<sup>293</sup> States should also waive the costs associated with updating the name and gender marker on ID documents for trans applicants so that the process is not cost prohibitive. And individuals should not have to adhere to unreasonable requirements to secure an ID that accurately reflects their gender identity. States not only *should* loosen their ID requirements to better enable their citizens to vote, but they *must* do so to avoid violating the First Amendment.

#### CONCLUSION

Of course, expanding accepted types of voter ID—or even eliminating voter ID requirements—is not a panacea for every ID problem involving trans people.<sup>294</sup> But we should not let the perfect be the enemy of the good. The right to vote is a gateway to securing all other rights.<sup>295</sup> Relaxing or repealing voter ID laws will better enable trans voters to make their voices heard in our democracy.

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293. However, this is also likely a political impossibility. The decades-long struggle to implement the REAL ID Act illustrates the difficulty of imposing minimum ID requirements on a national scale. See, e.g., Juliana Kim, *REAL ID Enforcement Is Delayed Again to 2025*, NPR (Dec. 5, 2022, 4:10 PM), <https://www.npr.org/2022/12/05/1140778386/real-id-enforcement-delayed-2025-immigration-privacy> [perma.cc/F579-HT78].

294. Readers may also wonder about the implications of extending this compelled-speech argument to other areas—for instance, the requirement of presenting ID to board a flight. This Note narrowly analyzes ID requirements as they pertain to voting. In other circumstances, the strict scrutiny analysis would differ. For example, in the context of presenting ID to board a flight, compelling interests such as safety and national security may factor into the analysis.

295. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (calling the right to vote “a fundamental political right, because [it is] preservative of all rights”).