

NOTE

THE IMPERMISSIBILITY OF SEX AS A VOTER QUALIFICATION

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*Election officials across the country are turning away voters when they perceive a mismatch between the sex listed on the voter's identification and the voter's gender presentation. The problem is particularly acute for transgender and gender nonconforming voters. This Note presents a fifty-state survey of voter ID laws and shows that there is no legal basis for using a mismatch or perceived mismatch between a voter's documented sex and their gender presentation to deny the franchise. No language in any state statute indicates that an individual's sex is required as evidence of their identity. Furthermore, this Note argues that changing the statutes to require sex as an identity qualifier would violate the Equal Protection Clause of the Fourteenth Amendment in at least two ways. First, such a requirement would amount to sex discrimination as that term is best understood in light of *Bostock v. Clayton County*. Second, under the Supreme Court's voting rights jurisprudence, such a requirement would constitute an invidious restriction on the right to vote, triggering strict scrutiny under *Harper v. Virginia Board of Elections*. Even if it did not amount to such a restriction, the requirement of sex as a voter qualification would still be struck down under the sliding scale scrutiny of the *Anderson-Burdick* doctrine. Thus, hinging the right to vote on the verification of one's sex is almost certainly unconstitutional.*

* J.D., University of Virginia School of Law, 2023 (they/them/theirs). The idea for this Note was sparked by two things: my own experiences at the polls as a trans, nonbinary voter, and a course I took at UVA, Regulation of the Political Process. For his advice and encouragement, I am grateful to Professor Michael Gilbert, who supervised this Note (and taught me the ins and outs of election law as a 2L). For their advice on the substance and style of this Note, I am indebted to my friends Tom Schnoor, Rachel Parrish, Chad Borgman, and Riley Segars. Additional gratitude is due to the editors of the *Virginia Law Review*, especially Harrison Gordon, Emma McLaughlin, Mackenzie Kubik, Anne Crumley, and Jordan Allen.

The status of state voter ID laws surveyed in this Note is subject to change. This Note provides up-to-date information as of April 1, 2024.

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*“What is most important is to cease legislating for all lives what is livable only for some, and similarly, to refrain from proscribing for all lives what is unlivable for some.”*¹

INTRODUCTION

Jane Doe, like many other Mecklenburg County, North Carolina residents, set out to cast her ballot in the county’s November 2019 general election.² A run-of-the-mill local race in a state without a voter ID requirement should have been nothing special; a simple trip to the polls. However, when she attempted to cast her ballot, the chief precinct judge stopped her and demanded to see her ID.³ His reasoning? Her face did not match the name she provided.⁴ Since her transition fourteen years ago, Doe had been living publicly as a woman—but rather than treating her like any other woman, the precinct judge insisted she present proof beyond that required by law to convince him she was who she said she was.⁵ Though Doe’s license had a photo consistent with her female identity, the name on her ID—her deadname,⁶ which she was in the process of legally changing⁷—was stereotypically male. The tense exchange between Doe and the precinct judge drew a crowd.⁸ Almost an hour after she arrived at the polls, and after handing over her license to be scrutinized, Doe cast her ballot and returned to her car in tears, rushing past the bystanders who had observed her humiliation.⁹

Doe is not alone in facing discrimination at the polls because she is transgender. During Vermont’s 2018 gubernatorial race,¹⁰ a poll worker

¹ Judith Butler, *Undoing Gender* 8 (2004).

² Bruce Henderson, *Transgender Voter Sues NC, Mecklenburg Election Officials for Questioning Identity*, *Charlotte Observer* (Feb. 12, 2020, 5:30 PM), <https://www.charlotteobserver.com/news/politics-government/election/article240227061.html> [<https://perma.cc/53VN-8VP7>].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Deadname, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/deadname> [<https://perma.cc/DGC3-FAVZ>] (last visited Feb. 25, 2024) (defining “deadname” as “the name that a transgender person was given at birth and no longer uses upon transitioning”).

⁷ Henderson, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ This was a historic race featuring the first openly transgender person to win a major party’s nomination for governor. Daniel Trotta, *In First, Transgender Woman Wins Democratic Nomination for Vermont Governor*, *Reuters* (Aug. 15, 2018, 12:32 AM),

refused to provide a ballot to a transgender woman because they thought her name was fake, not believing she was really female.¹¹ Ten years ago, when first-time voter Oliver headed to the polls in Maryland, the poll worker balked, telling Oliver it couldn't be *his* ID because it displayed an "F" gender marker.¹² Oliver is trans masculine and, though he had legally changed his name, he had not yet updated the gender marker on his state-issued ID.¹³ As Oliver described it, most people perceived him as male at that time due to his physical transition. Despite the "misalignment" between his license and his gender presentation, he expected he would be able to vote and came prepared to handle any resistance at the polls.¹⁴ Though ultimately permitted to cast his ballot, Oliver was ordered to "stand aside" for over an hour while the poll workers deliberated on whether or not they would allow him to vote.¹⁵ All three of these humiliating experiences lacked any legal grounding. In each instance, election officials exercised their discretion to verify voter identity in an unauthorized way.

Decades ago, the United States Supreme Court established that the Constitution protects the "right of all qualified citizens to vote."¹⁶ This right is so central that its abridgment or denial renders all other rights,

<https://www.reuters.com/article/us-usa-election-lgbt-vermont/in-first-transgender-woman-wins-democratic-nomination-for-vermont-governor-idUSKBN1L007K> [<https://perma.cc/TFP3-F93S>].

¹¹ Kate Sosin, *Trans Americans' Voting Rights Were Already in Jeopardy. The Pandemic Threatens to Make Things Worse*, *The 19th* (Aug. 18, 2020, 1:45 PM), <https://19thnews.org/2020/08/trans-americans-voting-rights-pandemic/> [<https://perma.cc/J4PF-LGQU>].

¹² 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> [<https://perma.cc/3DG5-M864>].

¹³ *Id.* Updating one's gender marker can often be a more difficult and expensive process. See *infra* Subsection I.B.1.

¹⁴ *Id.* Though Maryland does not generally require registered voters to present identification, election officials will ask voters to show identification if: (1) a voter registered by mail and had not previously met the identification requirements; (2) someone in the polling place challenges the voter's identity; or (3) the voter is registering to vote or changing their address during early voting. *Voting FAQ*, *Md. Att'y Gen.*, <https://www.marylandattorneygeneral.gov/Pages/votingFAQ.aspx#7> [<https://perma.cc/5UFN-7Z36>] (last visited Feb. 25, 2024). Those who are voting for the first time must either present an ID or, if they do not possess any of the permitted forms of ID, they must present "a utility bill, bank statement, government check, or paycheck that shows [their] name and address and is less than three months old." *Id.*

¹⁵ Moreau, *supra* note 12.

¹⁶ *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

even the most basic, “illusory.”¹⁷ And while the right to vote is arguably under attack in several ways,¹⁸ things have reached a tipping point for transgender and gender nonconforming voters. This Note illustrates that there is currently no basis in state law to turn away a voter for a perceived mismatch between the sex listed on their ID and their gender presentation. And in the event a state attempted to enact such a law, this Note argues that it would run afoul of the Equal Protection Clause.

Part I contextualizes the difficulty transgender and gender nonconforming people face in the political process by cataloging voter ID laws across the United States and detailing the hurdles in place that make it challenging for individuals to acquire an accurate ID. Part II presents a novel analysis of these voter ID laws to show what evidence is required to verify one’s identity at the polls. This survey reveals the stark absence of any statutory language indicating that an individual’s sex¹⁹ is required as necessary evidence of their identity. Nonetheless, at least some election officials are using sex as a criterion when verifying a voter’s identity. This has two consequences for transgender and gender nonconforming voters: (1) an election official may engage in sex stereotyping when evaluating a transgender voter’s ID, denying them a ballot as a result, and (2) any perceived mismatch between the voter’s gender presentation and the gender marker listed on their ID can be used as a reason to deny them the right to vote. No matter the motivation, such an exercise of discretion is impermissible, having no basis in state law.

The statutes surveyed in Part II could of course be changed. Assuming states started to require sex as a qualifier of voter identity, Part III argues such a regime would violate the Equal Protection Clause of the Fourteenth Amendment in at least two ways. As Section III.A addresses, such a requirement can be classified as sex discrimination following the

¹⁷ *Id.* at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964)).

¹⁸ See, e.g., Sophia Lin Lakin, *Fifty-Seven Years After Its Enactment, the Voting Rights Act Is in Peril*, ACLU (Aug. 5, 2022), <https://www.aclu.org/news/voting-rights/fifty-seven-years-after-its-enactment-the-voting-rights-act-is-in-peril> [<https://perma.cc/H6R9-BDHZ>].

¹⁹ I use “sex” here and throughout to reflect the “trend in U.S. law . . . toward viewing gender identity, defined as ‘an individual’s own internal sense of whether they are a man, a woman, or nonbinary,’ as a central characteristic of legal sex.” Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. Rev. 335, 335 (2024); see also Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 Minn. L. Rev. 831, 866–67 (2020) (“[T]he ‘new’ view of sex is premised on an ‘internal, deeply held sense’ of one’s identity. Under this view, sex ‘comes from the brain, not the body,’ from ‘between your ears, not between your legs.’ . . . And despite this confusing terminology, proponents of the new view of sex make clear that gender identity is determinative of legal sex.” (footnotes omitted)).

Supreme Court’s decision in *Bostock v. Clayton County*.²⁰ Because *Bostock* “fundamentally redefin[ed] what it means to discriminate on the basis of sex under the Equal Protection Clause,”²¹ its logic can be extended through the Nineteenth Amendment to protect transgender and gender nonconforming voters. Though this framework is persuasive, this Note asserts that it is not proactive in addressing the threat posed at the polls.

Section III.B posits an alternative and novel equal protection argument. At the core of the Supreme Court’s voting rights jurisprudence is the maxim that all voters must be accorded an equal vote.²² This has been reinforced several times over, most notably in *Harper v. Virginia Board of Elections*²³ and *Bush v. Gore*.²⁴ Building on these cases, this Note advances two arguments: (1) requiring sex as an identity qualifier is an “invidious restriction” on the right to vote that triggers strict scrutiny under *Harper* and must be held unconstitutional, and (2) even if sex as a qualifier does not rise to the level of “invidious” discrimination, such a requirement will still fail when subjected to the sliding scale scrutiny of *Anderson-Burdick*.²⁵ To the extent sex is conceived of as a “voter qualification,” hinging the right to vote on its verification is almost certainly unconstitutional.

This Note concludes by imagining a way forward. There are simple and easily deployed measures states can take both to ensure transgender and gender nonconforming constituents have unhindered access to the polls and to promote election integrity. California is an exemplar here. Though

²⁰ 140 S. Ct. 1731 (2020).

²¹ Susannah Cohen, Note, Redefining What It Means to Discriminate Because of Sex: *Bostock*’s Equal Protection Implications, 122 Colum. L. Rev. 407, 438 (2022).

²² See *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (“[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.” (emphasis added)).

²³ 383 U.S. 663, 665 (1966).

²⁴ 531 U.S. 98, 98 (2000).

²⁵ In *Crawford v. Marion County Election Board*, the Supreme Court set out the sliding scale scrutiny to be applied when evaluating restrictions on election administration set by states. 553 U.S. 181, 189–91 (2008). Courts must balance the asserted state interests for setting the restriction against the burden it places on voters. *Id.* at 190. Derived from two earlier cases, this process of balancing is referred to as the *Anderson-Burdick* test. *Id.*; see also SCOTUSblog, The *Anderson-Burdick* Doctrine: Balancing the Benefits and Burdens of Voting Restrictions, <https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> [https://perma.cc/Q3UC-RV23] (last visited Mar. 16, 2024).

not a voter ID state, California has promulgated guidance for its election officials that directly addresses how to handle potential questions or issues regarding a voter's gender identity. This guidance helps rein in the discretion of poll workers and functions as a template that other states can implement. By adopting similar guidance, states would manage transgender and gender nonconforming voters more uniformly and fairly going forward. The successful voter identification system California has in place helps demonstrate why requiring sex as an identity qualifier makes little sense; rather than introducing a qualifier that may be difficult to verify or leave a state in the crosshairs of the Fourteenth Amendment, a state need only provide guidance similar to California's to guide its poll workers in serving a diverse electorate.

I. SETTING THE STAGE: THE NATIONAL LANDSCAPE OF VOTER ID LAWS

Since Indiana's photo ID law was upheld as constitutional in *Crawford v. Marion County Board of Elections*,²⁶ voter ID laws have proliferated across the nation, with varying degrees of stringency.²⁷ At their core, these laws aim to ensure accurate and fair elections by preventing in-person voter fraud.²⁸ Poll workers can use identification to compare the voter who shows up at the polls on election day against the list of voters registered in that precinct. This practice helps verify that the right person is voting at the right place and that they are entitled to do so. To orient readers and voters, Section I.A reviews the voter ID laws currently in effect across the country, outlining the various categories states fall into depending on the type of ID required and how they handle voters without an appropriate ID. With the impact of these requirements in mind, Section I.B details how obtaining an accurate ID is a difficult, if not impossible, endeavor for many transgender and gender nonconforming people.

²⁶ 553 U.S. at 202–03 (2008).

²⁷ See Michael D. Gilbert, Essay, *The Problem of Voter Fraud*, 115 *Colum. L. Rev.* 739, 752 (2015).

²⁸ *Id.* at 744–45. Whether voter ID laws eliminate or reduce in-person voter fraud, and whether that fraud is a significant issue in the first place, is debatable. Some people believe that the real objective of voter ID laws is to disenfranchise poor people, who tend to vote for Democrats. *Id.* at 748–49 & nn.50–51.

A. Surveying the Field

Every state has some form of voter ID law on the books to aid in the administration of local, state, and national elections.²⁹ Thirty-seven states currently request or require voters to present some form of identification at the polls, while the remaining states and the District of Columbia use other means to verify voters' identities.³⁰ The National Conference of State Legislatures ("NCSL") has grouped states into five categories based on the type of voter ID law in force: (1) Strict Photo ID, (2) Strict Non-Photo ID, (3) Photo ID Requested, (4) ID Requested, Photo Not Required, and (5) No Document Required to Vote.³¹

Strict Photo ID states will only accept photo identification, and a voter without acceptable identification can only vote via provisional ballot.³² For that provisional ballot to be counted, the voter needs to take additional steps, such as returning to the precinct office with an acceptable ID or certifying that they meet the criteria for an exception—for example, by having a religious objection to being photographed.³³ Strict Photo ID states³⁴ accept the following forms of identification, all of which must

²⁹ See Voter ID Laws, Nat'l Conf. of State Legislatures, <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/Q2WY-AHMF>] (last updated Feb. 2, 2024) [hereinafter NCSL Voter ID Laws]; see also Kathryn K. O'Neill, Nathan Cisneros, Will Tentindo & Jody L. Herman, UCLA Sch. of L. Williams Inst., *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2022 General Election 4* (Sept. 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-voter-id-impact/> [<https://perma.cc/E9T9-UF8A>] [hereinafter Williams Institute Report]. For a state-by-state summary compiled for this Note, see *infra* Appendix.

³⁰ NCSL Voter ID Laws, *supra* note 29. An example of an alternative method to verify identity is matching a voter's signature to the one recorded on the registration roll. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* See also, e.g., Miss. Code Ann. § 23-15-563(3) (2023) ("A person who appears to vote in person at a polling place and does not have identification as required by this section may vote by affidavit ballot. The affidavit ballot shall then be counted if the person shall present acceptable photo identification to the registrar within five (5) days. . . . An elector who has a religious objection to being photographed may vote by affidavit ballot, and the elector, within five (5) days after the election, shall execute an affidavit in the registrar's office affirming that the exemption applies."); Ohio Rev. Code Ann. § 3505.18(A)(2) (LexisNexis 2024) ("If an elector does not have or is unable to provide photo identification to the precinct election officials, the elector may cast a provisional ballot under section 3505.181 of the Revised Code."); Tenn. Code Ann. § 2-7-112(a)(3)(A)(i) (2023) (similar); Wis. Stat. § 6.79(3)(b) (2023) (similar).

³⁴ Arkansas, Georgia, Indiana, Kansas, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Tennessee, and Wisconsin. See *infra* Appendix. Most of these states are designated as "Strict Photo ID" by the NCSL and confirmed by the Author's review of the statutes; although NCSL lists neither New Hampshire nor Nebraska as "Strict Photo ID"

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bear the voter's photo in addition to a valid expiration date, name, and (sometimes) address:

1. Driver's license
2. United States passport
3. State or federal ID
4. Employee or student ID
5. Military ID
6. Tribal ID
7. Concealed carry permit/handgun license
8. Public assistance ID
9. Voter ID card³⁵

While there may occasionally be some exceptions,³⁶ all these forms of ID also list the individual's sex. This seemingly innocuous inclusion is the source of trouble for many transgender and gender nonconforming voters at the polls.

Strict Non-Photo ID States function almost identically to Strict Photo ID states except that they accept forms of identification without photos, like bank statements, provided they show the voter's name and address.³⁷ The remaining three categories are "non-strict," meaning that at least some voters without an acceptable form of identification have the option to cast a ballot on election day without any further action on their part.³⁸ Verification of voter identity in these states may be accomplished by matching the voter's signature with that contained in the state's voter registration records, collecting an affidavit of identity signed by the voter, or having another registered voter or poll worker vouch for the voter's identity.³⁹ Though the potential for discrimination and

states, the Author's review leads to the conclusion that their laws operate in the exact same way. NCSL Voter ID Laws, *supra* note 29; see *infra* Appendix.

³⁵ Though each Strict Photo ID state has slightly different requirements, see *infra* Appendix, the above list generally captures these requirements. For specific statutory provisions, see, e.g., Kan. Stat. Ann. §§ 25-2908(b), 25-2908(h), 8-1324(a), 8-1324(b)(2), 8-1324(j) (2023) (listing forms of identification); Miss. Code Ann. § 23-15-563(1)–(2) (2024) (listing forms of identification).

³⁶ Not all student, employee, or state IDs list sex. See Spencer Garcia, *My Genderless ID Makes Me Feel Safe*, ACLU (Feb. 19, 2021), <https://www.aclu.org/news/lgbtq-rights/my-genderless-id-makes-me-feel-safe> [<https://perma.cc/J9QN-WCVU>].

³⁷ NCSL Voter ID Laws, *supra* note 29.

³⁸ *Id.*

³⁹ *Id.*

disenfranchisement is greater in Strict Photo ID states because many of the acceptable forms of ID include a gender marker, the stories that opened this Note illustrate that these threats still exist even in more relaxed states.⁴⁰

B. The Difficulty of Accessing an Accurate ID While Trans

1. Administrative, Financial, and Surgical Barriers

Transgender and gender nonconforming voters face a unique hurdle in voter ID states since their current IDs often fail to reflect their correct name, photo, and/or gender marker.⁴¹ Updating an ID is administratively cumbersome, potentially cost-prohibitive, and a source of deep anxiety for many transgender and gender nonconforming people.⁴² Sometimes it is impossible.⁴³ Laws governing these processes differ wildly across state lines and, despite community resources,⁴⁴ often create bureaucratic mazes. Further, some states (including those with strict voter ID laws) require official proof of gender-affirming surgical treatment to update an ID like a driver's license (one of the most common forms of ID used to vote).⁴⁵

States that require gender reassignment surgery as a precondition for changing an ID's gender marker impose a hurdle unique to transgender

⁴⁰ Two of these states—Maryland and Vermont—fall into the No Document Required to Vote category. See *infra* Appendix.

⁴¹ Williams Institute Report, *supra* note 29, at 10.

⁴² *Id.* Having to update an ID can out a transgender or gender nonconforming person against their will and may also subject them to harassment and humiliation.

⁴³ In January 2024, Florida enacted a policy that bans residents from electing to update or change their gender on their Florida driver's licenses. See Identity Document Laws and Policies, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/identity_documents [<https://perma.cc/U382-QBPW>] (last visited Mar. 9, 2024); Denise Royal & Carlos Suarez, Florida Residents Can No Longer Elect to Change Their Gender on Their Driver's License. Transgender People Feel Targeted by the Policy, CNN (Feb. 2, 2024, 1:03 PM), <https://www.cnn.com/2024/01/31/us/florida-transgender-drivers-license-reaj/index.html> [<https://perma.cc/5EWG-F8F4>].

⁴⁴ See ID Documents Center, Nat'l Ctr. for Transgender Equal., <https://transequality.org/documents> [<https://perma.cc/VZ3T-6YM9>] (last updated Nov. 2023).

⁴⁵ A majority of strict photo ID states require some form of proof that the individual has either undergone gender reassignment surgery or received gender affirming care. These forms of proof may include a medical record of the surgery, a health care provider or social worker's attestation of the provision of gender reassignment surgery or gender affirming care, or a court order recognizing a gender change. See Williams Institute Report, *supra* note 29, at 10; National Center for Transgender Equality, *supra* note 44.

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voters. A surgical requirement presumes all transgender people *will* undergo gender reassignment surgery as part of their transition. But this is not always the case. Some do not want or need to undergo gender reassignment surgery as part of their transition to feel comfortable in their identity. Many also decide against pursuing hormone replacement therapy (“HRT”)—a prerequisite for many gender surgeries.⁴⁶ Requiring individuals to undergo intense and costly surgeries they may or may not want—let alone be able to afford—to change a letter on their license is a substantial burden.

It is important to note that this surgical requirement has been held unconstitutional in at least one state on equal protection grounds.⁴⁷ A group of transgender women in Alabama challenged the constitutionality of the Alabama Law Enforcement Agency’s policy requiring “genital surgery” to “obtain a license with a female sex designation.”⁴⁸ In finding for the plaintiffs, the district court held that Alabama’s surgery requirements failed to survive the intermediate scrutiny standard to which such sex classifications are subjected under the Equal Protection Clause.⁴⁹ This case is currently on appeal at the U.S. Court of Appeals for the Eleventh Circuit where, notably, the United States has filed an amicus brief in support of the plaintiffs on the theory that this policy violates the Equal Protection Clause and subjects transgender individuals to disparate

⁴⁶ Insurance plans vary on whether patients must undergo HRT as a prerequisite to surgery. See, e.g. Fan Liang, Top Surgery (Chest Feminization or Chest Masculinization), Johns Hopkins Med., <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/top-surgery> [<https://perma.cc/PEY6-A8YN>] (last visited Feb. 25, 2024). Some transgender people also choose to forego surgery or hormones or are priced out of pursuing either. See Benji Jones, The Staggering Costs of Being Transgender in the US, Where Even Patients with Health Insurance Can Face Six-Figure Bills, *Bus. Insider* (July 10, 2019, 2:38 PM), <https://www.businessinsider.com/transgender-medical-care-surgery-expensive-2019-6> [<https://perma.cc/D7HH-KSH5>]; Alyssa Jackson, The High Cost of Being Transgender, *CNN Health* (July 31, 2015, 11:40 AM), <https://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html> [<https://perma.cc/4PNH-8PQA>]. The governing health care standards state that physicians should expect this and treat patients accordingly. See E. Coleman et al., Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, 23 *Int’l J. Transgender Health* 1, 57 (2022) (“Gender-affirming interventions include puberty suppression, hormone therapy, and gender-affirming surgeries among others. It should be emphasized there is no ‘one-size-fits-all’ approach and [transgender and gender diverse] people may need to undergo all, some, or none of these interventions to support their gender affirmation.”).

⁴⁷ See *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1312 (M.D. Ala. 2021), *appeal pending*, No. 21-10486 (11th Cir. argued Mar. 15, 2022).

⁴⁸ *Id.* at 1311, 1313.

⁴⁹ *Id.* at 1323.

treatment.⁵⁰ Though not controlling, this case may indicate that requiring gender reassignment surgery to change an ID gender marker is a practice soon to fail under the Equal Protection Clause. While a hopeful sign for binary transgender voters,⁵¹ it is an incomplete answer to protecting voting rights more broadly.

2. *Disbelief and Discrimination: Hurdles Outside the Gender Binary*

The obstacles faced by nonbinary and gender nonconforming people can be even more complex, and they shed light on the deep-rooted problems that come with using sex as an identity qualifier. In a world “largely built on a fixed and binary definition of gender,” nonbinary people are faced with the “constant reminder that they don’t belong.”⁵² With respect to IDs, this problem manifests in two ways: (1) less than half the country allows individuals to select an “X” gender marker for their driver’s license, and (2) states that require proof of gender reassignment surgery to change one’s gender marker do not clarify or describe what this entails for nonbinary individuals and often do not permit an “X” gender marker to be used.⁵³

The 2015 U.S. Transgender Survey found that, while 61% of binary transgender people changed their name on their driver’s license, only 39% of nonbinary respondents did so.⁵⁴ Binary transgender people were also

⁵⁰ Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees at 1, *Corbitt*, No. 21-10486 (11th Cir. Aug. 2, 2021) (stating that “[t]he United States has a strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender, intersex, or otherwise gender nonconforming” and citing to a recent Executive Order “recogniz[ing] the right of all people to be ‘treated with respect and dignity’ and receive ‘equal treatment under the law, no matter their gender identity or sexual orientation’” (citing Exec. Order No. 13988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021))).

⁵¹ Transgender people who identify as either male or female rather than nonbinary or genderfluid.

⁵² Katy Steinmetz, *The Transgender Tipping Point*, Time (May 29, 2014, 6:08 AM), <https://time.com/135480/transgender-tipping-point/> [<https://perma.cc/EX8W-VMB7>].

⁵³ Movement Advancement Project, *supra* note 43 (showing that twenty-two states and the District of Columbia permit an X gender marker); see, e.g., Form 5532: Gender Designation Change Request Form, Mo. Dep’t of Revenue, <https://dor.mo.gov/forms/5532.pdf> [<https://perma.cc/CMR8-AMCD>] (last updated Dec. 2022) (stating “[i]n my professional opinion, the applicant’s gender is (Select One) [Male or Female] and can reasonably be expected to continue as such in the foreseeable future”).

⁵⁴ Sandy E. James et al., Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 86 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/US-TS-Full-Report-Dec17.pdf> [<https://perma.cc/X6G5-49TK>] [hereinafter 2015 U.S. Transgender Survey].

found to be much more likely than nonbinary and gender nonconforming people to update the gender on their driver's license.⁵⁵ The results of presenting an ID that does not match one gender's presentation are predictably negative, and the survey found that "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" after doing so.⁵⁶ Since nonbinary and gender nonconforming people are even less likely than binary transgender people to have an ID that matches their gender presentation, they face an uphill battle in convincing an election official that their ID (and gender marker) is valid.⁵⁷

In twenty-eight states, it is impossible for people outside the gender binary to have an ID with the appropriate "X" gender marker.⁵⁸ If sex is used as an identity qualifier, this becomes problematic. It is even more problematic in areas of the country with a predilection to treat nonbinary gender identity as illegitimate. Often, these are also the states where anti-transgender legislation is in the works and thus where the power of transgender and gender nonconforming voters is critical.⁵⁹ To address discrimination against nonbinary and gender nonconforming voters, it is necessary to respect and validate their gender identities. Professor Jessica Clarke has theorized what it may look like if American law were to do so.⁶⁰ This Note adopts Clarke's theory that the law can recognize

⁵⁵ *Id.* at 87.

⁵⁶ *Id.* at 82.

⁵⁷ This assertion is based in part on the Author's own experiences as a trans, nonbinary person. However, this is not an exaggeration. "[G]limmers of tolerance don't necessarily mean much . . . when you're living in opposition to [society's] most basic way of seeing and sorting and comprehending one another." Daniel Bergner, *The Struggles of Rejecting the Gender Binary*, *N.Y. Times Mag.* (June 4, 2019), <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> [<https://perma.cc/M7NM-BSC6>]; see also Jessica A. Clarke, *They, Them, and Theirs*, 132 *Harv. L. Rev.* 894, 910 (2019) ("Nonbinary people may encounter mistreatment for a variety of reasons, including *disbelief in nonbinary identity*, erasure of nonbinary experiences, dehumanization of those who do not fit conventional gender categories, concern that nonbinary people will undermine traditional gender roles, and politicization of nonbinary identity in a time of increasing polarization. *Bias against nonbinary people often takes the form of disbelief, disregard, disrespect, and paternalism.*" (emphases added)).

⁵⁸ Movement Advancement Project, *supra* note 43 (indicating that "22 states [plus] D.C." allow X on a driver's license). Some nonbinary and gender nonconforming people may not want an "X" designation, favoring no gender marker at all instead.

⁵⁹ States falling under this umbrella include strict voter ID states like Arizona, Georgia, Missouri, and Tennessee. See 2024 Anti-Trans Bills Tracker, *Trans Legislation Tracker*, <https://translegislation.com/> [<https://perma.cc/VQ7Q-H6PD>] (last visited Feb. 25, 2024).

⁶⁰ Clarke, *supra* note 57, at 895.

nonbinary gender “using familiar civil rights tools and concepts,” whether that takes “the form of recognition of a third-gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of nonbinary people into rules or spaces that require binary categories.”⁶¹

It becomes clear that administrative hurdles, burdensome fees, surgical requirements, and a limited ability to select one’s correct gender marker all present hindrances that stand in the way of ballot access for a discrete minority: transgender and gender nonconforming voters.

II. SEX AT THE POLLS: THE POTENTIAL FOR DISCRIMINATION AGAINST TRANSGENDER AND GENDER NONCONFORMING VOTERS

Analyzing voter ID laws on a national scale reveals that no state requires its election officials to verify a voter’s sex at the polls. This makes sense. Sex need not enter the voting process at all; it is far easier and more reliable to verify identity using data such as name and address. Despite it being unnecessary, and in the face of state statutory silence, sex nonetheless enters the equation. This has two consequences that bear on the right to vote for transgender and gender nonconforming individuals. First, even if they have an accurate ID, an election official may engage in sex stereotyping, turning them away because they do not look like what the election official *thinks* a man or woman should look like.⁶² Second, a mismatch—even a perceived one—between a voter’s gender presentation and the gender marker listed on their ID can be used by poll workers as a reason to prevent them from voting. In light of this, Section II.C concludes with the argument that sex need not, and *should* not, be used as a qualifier of voter identity.

A. Analyzing Voter ID Laws: A Fifty-State Survey

Election officials are charged by state law to determine whether or not voters meet the requirements to cast their ballots. Determining whether a voter is who they purport to be is perhaps the most critical decision they make. While the category of voter ID law has some impact on this process, a nationwide survey of these statutes undertaken for this Note

⁶¹ *Id.* at 901.

⁶² For voters with an “X” on their ID, it is possible that an election official unfamiliar with their identity may turn them away out of confusion or subject them to intense and uncomfortable questioning before allowing them to cast their ballot.

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reveals that election officials are given considerable latitude in judgment when making these decisions.⁶³

Voter ID laws fall into one of the following five categories: Strict Photo ID (twelve states); Strict Non-Photo ID (three states); Photo ID Requested (ten states); ID Requested, Photo Not Required (twelve states); and No Document Required to Vote (thirteen states and the District of Columbia).⁶⁴ Non-strict states tend to have more flexible regimes, providing voters with multiple avenues to ensure their ballot is counted, while strict states are significantly less accommodating. Despite these core differences, the language with respect to identifying voters tends to be much more uniform throughout.

State laws phrase the task of identifying potential voters in the following general ways: “[e]ach applicant . . . shall identify himself or herself to the chief clerk, who shall examine the list of qualified electors . . . and, if such voter’s name appears on such list . . . the voter shall be admitted . . . and permitted to vote”;⁶⁵ “each elector shall present proper identification to a poll worker”;⁶⁶ and poll managers “shall be judges of the qualifications of electors, and may examine, on oath, any person duly registered and offering to vote touching his or her qualifications as an elector.”⁶⁷ State-authored guides provided to poll workers have similar instructions and defer to the poll worker’s judgment with respect to proper verification of a voter’s identity.⁶⁸ This guidance

⁶³ Voters are required to either present their ID or identify themselves to the appropriate election official upon entering the polling location. The official then assesses whether the voter is who they purport to be, allowing them to vote if they are so satisfied. Some states require officials to verify identity by matching a voter’s signature with that on record. See, e.g., 10 Ill. Comp. Stat. § 5/4-22 (2023); Mo. Rev. Stat. § 115.427 (2023). Some permit officials to waive the identification requirement altogether if they know the voter or if another registered voter vouches for them. See Alaska Stat. § 15.15.225(b) (2023); Iowa Code § 48A.7A(1)(c) (2024); see also Table 2: State-by-State Details of In-Effect Voter Identification Requirements, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/elections-and-campaigns/voter-id#table1> [<https://perma.cc/Q3JF-4DY9>] (last updated Feb. 25, 2024); see also Voting Rights by State, Voting Rts. Lab, <https://tracker.votingrightslab.org/states> [<https://perma.cc/UZY8-BADH>] (last visited Feb. 25, 2024) (reviewing voting-related regulations by state).

⁶⁴ See *infra* Appendix.

⁶⁵ Ala. Code § 11-46-50 (2023).

⁶⁶ Ga. Code Ann. § 21-2-417(a) (2023).

⁶⁷ Miss. Code Ann. § 23-15-233 (2024).

⁶⁸ The following are excerpts from guides provided in strict voter ID states. See, e.g., Elections Div., Ga. Sec’y of State Off., Poll Worker Manual 46, <https://georgiapollworkers.sos.ga.gov/Shared%20Documents/Georgia%20Poll%20Worker%20Manual%202021.pdf> [<https://perma.cc/NL4S-3P33>] (last updated May 2021) (requiring poll workers to confirm the voter’s “name, date of birth and address”); Elections Div., Mo. Sec’y of State, Missouri’s Poll

rarely limits a poll worker's discretion in deciding whether a voter is who they say they are. Importantly, no state law surveyed includes or discusses "sex" with respect to verifying a voter's identity. As noted above, most (though not all) acceptable photo IDs do include a gender marker. But this is as close as any statute gets to acknowledging a voter's sex.

B. The Consequences of Voter ID Laws

1. The Reality: Sex Impermissibly Comes Into Play

Even though state voter ID laws do not mention sex in any way, it nonetheless enters the equation in practice. For many (if not most), voter ID laws will not be problematic: their IDs will reflect their correct information, they will look like their photo, and poll workers will waive them through without a second glance. This is less likely to be the case for transgender and gender nonconforming voters.⁶⁹ Nationwide data reveal that some transgender and gender nonconforming people do not register to vote "because they want[] to avoid anti-transgender harassment

Worker Guide: A Reference for Election Judges 8, <https://web.mit.edu/supportthevoter/www/files/2013/08/Missouri-2008-Poll-Worker-Guide.pdf> [<https://perma.cc/N6ZA-GEC7>] (last visited Feb. 26, 2024) (instructing poll workers to verify name, address, and requested ID and stating a voter may proceed to cast their ballot only "[w]hen the two judges from major parties are satisfied with the voter's identity"); Elections Div., Miss. Sec'y of State's Off., Poll Managers: Election Day Activities (2021 Municipal Certification Training) 18 (2021), [https://www.sos.ms.gov/content/documents/Elections/2021/2021%20Election%20Day%20Activities-%20Poll%20Manager%20Duties%20\(Full%20Page\).pdf](https://www.sos.ms.gov/content/documents/Elections/2021/2021%20Election%20Day%20Activities-%20Poll%20Manager%20Duties%20(Full%20Page).pdf) [<https://perma.cc/R4BN-B3MT>] (instructing poll workers to ask for an acceptable form of ID and "[v]erify the picture on the presented photo ID fairly depicts the voter"). Note that some liberal states with less restrictive voter ID laws provide more guidance to poll workers. California is a leading example. See Cal. Off. of the Sec'y of State, 2024 Poll Worker Training Standards 13–14, <https://elections.cdn.sos.ca.gov/poll-worker-training-standards/poll-worker-training-standards.pdf> [<https://perma.cc/7SYW-WKTY>] (last updated Jan. 2024) ("[Poll worker training] should include information about . . . people who are gender diverse and/or LGBTQ+. . . Voters may present and express their gender in a manner that is different than what may be assumed based on how they are listed on the voter list. A perceived difference between a voter's gender expression and the gender identity displayed in their documentation does not render their identification insufficient." If the photo ID presented does "not appear to match the voter's current gender expression," this "perceived difference does not disqualify the validity of a document establishing proof of residency or identity." Any doubt is required to be resolved "in favor of permitting the voter or new registrant to cast a polling place ballot.").

⁶⁹ See Williams Institute Report, *supra* note 29, at 2; 2015 U.S. Transgender Survey, *supra* note 54, at 89, 233–36.

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by election officials” and because “they thought their state’s voter identification law would stop them from voting.”⁷⁰

Survey respondents cited restrictive voter ID laws as being the primary barrier to exercising their right to vote. One participant described being a “victim of ‘de facto’ disenfranchisement and voter intimidation tactics”⁷¹ as a result of their state enacting strict photo ID laws. Another described their experience attempting to change their name in their state’s voter registration roles as “extremely embarrassing” and resulting in accusations of “attempt[ed] voter fraud” when they were simply attempting to update their ID in order to vote “to make sure [they] had the best candidates who would protect [their] rights.”⁷² At the root of this fear felt by many transgender and gender nonconforming voters is the way sex has entered the equation. Updating one’s ID necessitates such an assessment.

The Williams Institute has highlighted this troubling phenomenon in its report detailing the obstacles transgender and gender nonconforming people face in obtaining accurate IDs.⁷³ These hurdles have the power to “impact voting in the 35 states that have voter ID laws.”⁷⁴ Reviewing voter ID laws across the nation, this report found that “as many as 203,700 transgender Americans who are eligible to vote may find it difficult to do so because of voter ID laws, including 64,800 who could face disenfranchisement in states with strict photo ID requirements.”⁷⁵ While transgender and gender nonconforming people may be considered a minority in the United States,⁷⁶ the impact on their voting rights is staggering. Almost a million transgender adults in the United States were eligible to vote in the November 2022 general election.⁷⁷ Of this group, roughly 414,000 “live in the 31 states that both (1) primarily conduct their elections in person at the polls, and (2) have a voter ID law.”⁷⁸ Almost *half* of the individuals in this voting-eligible group “do not have an ID

⁷⁰ 2015 U.S. Transgender Survey, *supra* note 54, at 233.

⁷¹ *Id.* at 235.

⁷² *Id.*

⁷³ See Williams Institute Report, *supra* note 29, at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1 (“Over 1.6 million adults (ages 18 and older) and youth (ages 13 to 17) identify as transgender in the United States” and of the “1.3 million adults who identify as transgender, 38.5% (515,200) are transgender women, 35.9% (480,000) are transgender men, and 25.6% (341,800) reported they are gender nonconforming.”).

⁷⁷ *Id.* at 2.

⁷⁸ *Id.*

that correctly reflects their name and/or gender.”⁷⁹ As this Note has discussed, having an ID with incorrect information is often a substantial, if not fatal, barrier to voting.

2. The Fallout: Sex Stereotyping and Perceiving an Identity Mismatch

Acknowledging the difficulty of obtaining an accurate ID, some transgender and gender nonconforming voters will still encounter barriers to casting a ballot whether they do so or not. First, even if a transgender person is able to update their ID, an election official may engage in sex stereotyping, turning them away because they do not look like what the election official *thinks* a man or woman should look like.⁸⁰ Whether these concerns are motivated by a fear of voter fraud, transphobia, or other biases, abridging or denying a transgender or gender nonconforming person’s right to vote is impermissible and has no basis in state law. Second, a mismatch—even a perceived one—between one’s current gender presentation and the gender marker listed on one’s ID can be used by poll workers as a justification to prevent a transgender person from voting.

When Sade Viscaria arrived to cast her ballot in Vermont’s 2018 gubernatorial race, she presented her ID (with an “F” gender marker) to the poll worker. Given Vermont’s lax voter ID law,⁸¹ this presumably should have been enough. However, the poll worker refused to give her a ballot, not believing Viscaria was female.⁸² Here, Viscaria was subject to sex discrimination not sanctioned by state law: she did not look like or possess the name of a woman in the eyes of this poll worker, who went as far as accusing Viscaria of having a fake ID.⁸³ In this situation, Viscaria had taken every step required of her to obtain an accurate ID to no avail, and while nothing in Vermont state law authorized this denial, the poll worker’s consideration of her sex nonetheless affected Viscaria’s rightful access to the franchise. Even though the voter ID law itself did not disenfranchise Viscaria, the poll worker did. As this example shows,

⁷⁹ *Id.*

⁸⁰ For voters who have an “X” on their ID, it is possible that an election official unfamiliar with their identity may turn them away out of confusion or subject them to intense and uncomfortable questioning before allowing them to cast their ballot.

⁸¹ See *infra* Appendix.

⁸² Sosin, *supra* note 11.

⁸³ *Id.*

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sometimes an accurate ID is no match for the discretion afforded to poll workers.

Those unable to update their ID (or, in the case of nonbinary and gender nonconforming voters, those unable to obtain an accurate ID in the first place) likewise run the risk of being turned away. An inaccurate ID will likely result in a poll worker finding that a transgender voter's name, ID (if required), and appearance do not match.⁸⁴ This discrepancy opens the door for that poll worker to “deny the voter the ability to vote using a regular ballot.”⁸⁵ The lack of specific statutory guidance results in varied identification practices across polling locations within a state, leading to confusion when there is debate regarding a voter's identity with respect to their sex.

Consider the following hypothetical. A trans man who has undergone masculinizing HRT, legally changed his name, and is socially perceived as male, but has not had all the required gender reassignment surgeries, will have an “F” on his license. This mismatch has the potential to so confuse poll workers that they question whether he is representing his identity truthfully and potentially deny him access to the ballot. Failing to undergo surgery may thus result in abridgment or denial of the right to vote and, at the very least, a humiliating and dangerous encounter at the polls.⁸⁶ Though this hypothetical may now be cabined to a small number of states, the stories that opened this Note demonstrate that the threat of discrimination and disenfranchisement is not so limited. To the extent poll workers step outside the statutory language and state-promulgated guidance when verifying voter identity, they are acting in a way that unconstitutionally infringes on the right of transgender and gender nonconforming people to vote.⁸⁷

⁸⁴ Williams Institute Report, *supra* note 29, at 11.

⁸⁵ *Id.*

⁸⁶ *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1313 (M.D. Ala. 2021) (“The alternative to surgery is to bear a driver license with a sex designation that does not match the plaintiffs’ identity or appearance. That too comes with pain and risk. . . . More concretely, carrying licenses with sex designations that do not match plaintiffs’ physical appearances exposes them to a serious risk of violence and hostility whenever they show their licenses.”).

⁸⁷ Transgender and gender nonconforming voters likely have an as-applied constitutional challenge available should they face discrimination at the polls.

C. Sex Should Not Be a Qualifier When Assessing Voter Identity

According to the Supreme Court, the main purpose of voter ID laws is to create an effective method for “establishing a voter’s qualification to vote.”⁸⁸ States have a legitimate interest in making sure registered voters cast their ballots only once and that they are casting their ballot *only* on their own behalf. This Note does not dispute this; instead, it asks *what* information election officials need to accomplish that goal.

Beginning with two definitions helps frame this question. State voter ID laws use either the term “voter” or “elector.”⁸⁹ Black’s Law Dictionary defines “voter” as “[s]omeone who has the qualifications necessary for voting”⁹⁰ and narrows the definition of “registered voter” to “[s]omeone who is qualified to vote and whose name is recorded in the voting district where he or she resides.”⁹¹ A voter is a “qualified elector” if they are “a person who meets the voting requirements for age, residency, and registration and who has the present right to vote in an election.”⁹² These definitions track what state voter ID laws are after: verification that the person showing up at the polls is who they say they are and is qualified to vote.

A voter is eligible if they: (1) are a citizen of the United States who is eighteen years of age or older,⁹³ (2) meet the state’s residency requirements,⁹⁴ and (3) are registered to vote by their state’s deadline (if required).⁹⁵ Noncitizens (including permanent legal residents), some

⁸⁸ Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 193 (2008); see also Gilbert, *supra* note 27, at 744–45 (“The target (or some would say ‘alleged’ target) of strict voter ID laws is voter fraud. Some individuals forbidden from voting—noncitizens, felons, nonresidents, or others—may nevertheless cast a ballot. Likewise, some eligible but unscrupulous voters may vote multiple times, once for themselves and again for a relative or someone else who may or may not consent to the scheme. . . . Voter ID requirements should mitigate the problem.” (footnotes omitted)).

⁸⁹ See, e.g., Me. Stat. tit. 21-A § 671 (2024) (“A voter who wishes to vote must state the voter’s name and residence address to an election clerk.”); Ala. Code § 17-9-30(a) (2023) (“Each elector shall provide valid photo identification to an appropriate election official prior to voting.”).

⁹⁰ Voter, Black’s Law Dictionary (11th ed. 2019).

⁹¹ *Id.*

⁹² Elector, Black’s Law Dictionary (11th ed. 2019).

⁹³ U.S. Const. amend. XXVI, § 1.

⁹⁴ See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978) (“[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.”).

⁹⁵ Who Can and Cannot Vote, USA Gov, <https://www.usa.gov/who-can-vote> [<https://perma.cc/N3J4-ARLF>] (last updated Feb. 20, 2024).

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people convicted of a felony,⁹⁶ and some individuals who have been found mentally incapacitated under state law, are not allowed to vote.⁹⁷ The right to vote is not conditioned on one's race,⁹⁸ financial status,⁹⁹ or—most relevant for purposes of this Note—sex.¹⁰⁰

To enforce these restraints on voter eligibility, states utilize voter ID laws that list the types of identity evidence (or “qualifiers”) on which election officials are allowed to rely. Setting aside Strict Photo ID states,¹⁰¹ every other state requires, at a minimum, a voter to present their name and address.¹⁰² And in the majority of states that request or require some form of identification, sufficient forms of ID include utility bills, pay checks, and bank statements since these documents verify a voter's name and address.¹⁰³ As discussed above, governing statutes in all states are silent on the issue of verifying a voter's sex as part of verifying identity.¹⁰⁴ This silence is mirrored in the types of voter information that states keep on file. Most registration rolls include the names, addresses, political party affiliations, and voting history of voters.¹⁰⁵ Some also include a voter's date of birth and/or Social Security number.¹⁰⁶ Out of

⁹⁶ “In all but two states and DC, individuals convicted of at least some crimes lose their right to vote. Whether and how a person becomes eligible to vote again varies across states.” Disenfranchisement & Rights Restoration, Voting Rts. Lab, <https://tracker.votingrightslab.org/issues/disenfranchisement-and-rights-restoration> [<https://perma.cc/2UCW-Y3VB>] (last visited Feb. 25, 2024); see *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding convicted felons could be barred from voting without violating the Fourteenth Amendment).

⁹⁷ USAGov, *supra* note 95.

⁹⁸ U.S. Const. amend. XV, § 1.

⁹⁹ U.S. Const. amend. XXIV, § 1.

¹⁰⁰ U.S. Const. amend. XIX.

¹⁰¹ All Strict Photo ID states require some form of *photo* identification to verify a voter unless that voter meets one of the state's criteria for an exception.

¹⁰² And, if required, evidence establishing the same. Evidence is typically required in every category except No Document Required to Vote. See *infra* Appendix.

¹⁰³ Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Montana, Utah, Virginia, and West Virginia all permit these documents to suffice for identification verification purposes. See *infra* Appendix (providing citations). North Dakota requires that a valid ID reflect an individual's name, address, and date of birth. N.D. Cent. Code § 16.1-01-04.1(2) (2023).

¹⁰⁴ See *infra* Appendix. While some states require a photo, no state statute specifically lists sex or gender as a qualifier poll workers must verify. And even in Strict Photo ID states, some permissible forms of ID may not list sex at all. If anything, verifying some resemblance between the voter and their ID is the basis for the photo requirement.

¹⁰⁵ See Access to and Use of Voter Registration Lists, Nat'l Conf. of State Legislatures, <https://www.ncsl.org/elections-and-campaigns/access-to-and-use-of-voter-registration-lists> [<https://perma.cc/EZH7-PD9S>] (last updated Sept. 1, 2023).

¹⁰⁶ *Id.*

the forty-six states that make public the content of their voter registration lists, only seven include sex or gender as data points.¹⁰⁷ Tracking this data, while arguably unnecessary, is not akin to verifying sex as part of the voting process. The existence and subsequent publication of this data serves an informational and potentially statistical purpose; it is not used to permit or deny voters access to the polls.

It is not immediately clear why voter ID laws are silent on sex. It may be that sex is viewed as superfluous. While corroborating a voter's name and address makes logical sense as an identity verification method, verifying a person's *sex* does not. Whether the poll worker believes a voter looks like, sounds like, and is named like someone belonging to that sex is not only unnecessary but subject to serious abuses of discretion that may result in voter disenfranchisement. Evaluating someone's sex requires an election official to exercise their subjective judgment, replete with their own assumptions and biases regarding gender.

Some may argue sex *should* be a qualifier when assessing voter identity in order to prevent voter fraud.¹⁰⁸ Such an argument mirrors the familiar trope surrounding the debate around bathrooms: if transgender people (particularly transgender women) are allowed to use the bathroom aligning with their gender identity, this will result in letting male sexual predators into women's bathrooms.¹⁰⁹ The argument goes similarly in the

¹⁰⁷ Id. Even states that make their voter registration information available keep some personal identifiable information confidential (date of birth, Social Security number, email address, etc.). Illinois, Maryland, North Carolina, South Carolina, Virginia, and Wyoming all provide some form of public access to sex and/or gender information contained within voter files. Indiana, though it collects such information, keeps it entirely confidential. See Availability of State Voter File and Confidential Information, U.S. Election Assistance Comm'n, https://www.eac.gov/sites/default/files/voters/Available_Voter_File_Information.pdf [<https://perma.cc/DY3D-DF4M>] (last updated Oct. 29, 2020) (listing Maryland, North Carolina, South Carolina, Virginia, and Wyoming as states that include sex and/or gender as publicly accessible information in voter files).

¹⁰⁸ See Hans A. von Spakovsky, Protecting the Integrity of the Election Process, 11 Election L.J. 90, 91 (2012) (asserting voter ID laws prevent and deter "impersonation fraud at the polls," "voting under fictitious voter registrations," and "double voting by individuals registered in more than one state or locality"). Assuming this point stands, it is not clear that requiring sex as an identity qualifier is a failproof barrier for would-be fraudsters. Changing one's gender marker and name are time-consuming and expensive tasks, even requiring confirmation of gender reassignment surgery for the latter in some states. Further, this Note does not argue for the removal of any and all voter ID requirements—just that sex should not be an identity qualifier.

¹⁰⁹ Katy Steinmetz, Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring, *Time* (May 2, 2016, 4:29 PM), <https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<https://perma.cc/9GU2-JYJB>].

voting context: if people can vote without verifying they *are* the sex an election official thinks they *should* be based on identifiable characteristics, this will result in opening the door for impersonators to steal an election.

However, requiring voters to verify their sex would likely not satisfy those who fear an uptick in voter fraud. Take the case where a transgender woman (like Jane Doe in North Carolina) has the appropriate gender marker on her ID (“F”) but is still denied the right to vote because her name (or appearance) signals “M” to the poll worker. Here, Jane Doe is not committing voter fraud, but the poll worker acts as if she is because the name on her ID is traditionally masculine. She is then denied the right to vote not because she defrauded the poll worker but because the poll worker incorrectly exercised their discretion based on a sex stereotype. The very right those who worry about “voter fraud” seek to protect is, in fact, denied. In this reality, *anyone* with a gender-neutral name or gender nonconforming appearance (butch lesbians, cisgender men who present more femininely, etc.) could be subject to an accusation of voter fraud.

States do not face, and need not open themselves to, such a complicated reality. There are fair and reliable ways (already codified) to verify voter identity that do not require taking sex into account and still protect election integrity. Further, in-person voter fraud is so rare¹¹⁰ that there is no need for verification beyond name and address—and even if there were, it would be more logical to use a marker that is both neutral and unlikely to change, such as height. The complications that introducing sex into the equation tips the scales in favor of interpreting voter ID laws as they already stand: neutral in terms of sex.

III. THE PROMISE OF THE EQUAL PROTECTION CLAUSE: SEX CANNOT BE A VOTER QUALIFICATION

So far, this Note has shown that neither state law nor official guidance authorize taking a voter’s sex into account when verifying identity at the polls. However, given the current political landscape, one major question looms: What if the laws change? It is not difficult to hypothesize a state like Georgia drafting legislation to require sex as an identity qualifier.¹¹¹

¹¹⁰ Gilbert, *supra* note 27, at 746 n.37 (“Some suggest that voter fraud is rarer than UFO sightings.”).

¹¹¹ Georgia is a Strict Photo ID state. In addition, the Georgia legislature has enacted some anti-transgender bills into law and introduced several others. See Delphine Luneau, *Georgia Gov. Brian Kemp Signs Unnecessary, Harmful Legislation Allowing Discrimination Against*

This Part explores two constitutional arguments that condemn the use of sex as a qualification of voter identity. Both sound in the Equal Protection Clause.

First, *Bostock v. Clayton County* has so redefined discrimination on the basis of sex that denying transgender and gender nonconforming voters the franchise due to a perceived mismatch (or otherwise) could be argued to violate the Equal Protection Clause. As this Note details, other legal scholars have noted the promise of this approach. However, a second, more powerful argument exists, one grounded in decades of settled voting rights jurisprudence. When exercising power over elections, states are limited to fixing qualifications for voters that do not conflict with the Equal Protection Clause. *Harper v. Virginia Board of Elections*¹¹² and *Bush v. Gore*¹¹³ set the framework for this obligation “to avoid arbitrary and disparate treatment”¹¹⁴ of voters. When states toe the line of arbitrary and disparate treatment, the sliding scale scrutiny of *Anderson-Burdick* as applied in *Crawford v. Marion County Election Board*¹¹⁵ provides a way of analyzing these cases of voter discrimination with respect to their constitutionality. Thus, even if sex as an identification qualifier fails to trigger strict scrutiny under *Harper*, it will almost certainly be barred under *Anderson-Burdick* analysis.

A. *Bostock’s Potential Promise*

One avenue for protecting the voting rights of transgender and gender nonconforming people is through the door opened by the Supreme Court in *Bostock*.¹¹⁶ The argument goes like this: *Bostock* should be understood “as fundamentally redefining what it means to discriminate on the basis of sex under the Equal Protection Clause.”¹¹⁷ And although the majority insisted the opinion was cabined to the Title VII context, its “rationale did not depend on the employment context for its finding that discrimination based on sexual orientation and gender identity is necessarily

Transgender Kids Playing School Sports, Hum. Rts. Campaign (Apr. 28, 2022), <https://www.hrc.org/press-releases/georgia-gov-brian-kemp-signs-unnecessary-harmful-legislation-allowing-discrimination-against-transgender-kids-playing-school-sports> [<https://perma.cc/P7J6-E6FB>]; 2024 Anti-Trans Bills Tracker, *supra* note 59.

¹¹² 383 U.S. 663, 666 (1966).

¹¹³ 531 U.S. 98, 104–05 (2000).

¹¹⁴ *Id.* at 105.

¹¹⁵ 553 U.S. 181, 190–91 (2008).

¹¹⁶ 140 S. Ct. 1731 (2020).

¹¹⁷ Cohen, *supra* note 21, at 438.

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discrimination based on sex.”¹¹⁸ This reasoning applies in the context of the Nineteenth Amendment, expanding its protection to cover transgender and gender nonconforming voters from the abridgement or denial of the right to vote on “account of sex.”¹¹⁹ The crux of the issue at the polls—when transgender and gender nonconforming voters are turned away by a skeptical or bigoted poll worker—then, is an instance of constitutionally impermissible sex stereotyping.

As Professor Katie Eyer notes, gender stereotyping arguments having their roots in *Price Waterhouse v. Hopkins*¹²⁰ have played “perhaps the most substantial role in the decisions of . . . courts that anti-transgender discrimination ought to be deemed sex discrimination.”¹²¹ As *Price Waterhouse* “recognizes, and as *Bostock* reaffirmed, affording an individual disadvantageous treatment because they fail to conform to gender stereotypes is a core form of sex discrimination.”¹²² Thus, in the voting context, an election official’s judgment that a transgender woman appears “insufficiently feminine”¹²³ is a clear instance of a kind of impermissible sex stereotyping that lower federal and state courts have consistently recognized.¹²⁴ In these cases courts typically rule in favor of transgender litigants.¹²⁵ Eyer agrees with those who seek to ground the

¹¹⁸ *Id.* at 439.

¹¹⁹ See Michael Milov-Cordoba & Ali Stack, *Transgender and Gender-Nonconforming Voting Rights After Bostock*, 24 U. Pa. J.L. & Soc. Change 323, 339 (2021) (“While the textualist logic of *Bostock* and textual parallels between Title VII and the Nineteenth Amendment make it an obvious first target, the *Bostock* Court’s analysis of gender provides a solid foundation to expand voting rights for transgender and gender-nonconforming voters via the protections of the Fourteenth Amendment.”); see also 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. Special Edition 27, 69 (2020) (discussing the limited definition of what constitutes discrimination “on account of sex” in the voting context: “[L]inguistically and conceptually, [the phrase ‘on account of sex’] might also refer to burdens that fall on transgender or nonbinary individuals. If these laws are considered voting abridgments on account of sex, then Congress’s enforcement authority could include legislation protecting the voting rights and political rights of transgender individuals.”).

¹²⁰ 490 U.S. 228, 250 (1989).

¹²¹ Katie Eyer, *Transgender Constitutional Law*, 171 U. Pa. L. Rev. 1405, 1440 (2023).

¹²² *Id.*

¹²³ *Id.* at 1441.

¹²⁴ *Id.* at 1424.

¹²⁵ *Id.* (“[Between 2017–2021], there was a wave of decisions in the lower courts developing a jurisprudence of transgender equality: . . . that transgender individuals should be considered a suspect or quasi-suspect class (and thus discrimination against them should be subject to heightened scrutiny), that anti-transgender discrimination should be considered sex discrimination (and thus under established law should receive intermediate scrutiny), and that discrimination against the transgender community is irrational.”).

path forward in the rationale of *Bostock*, arguing that although it “was a statutory opinion, relying on the specific language of Title VII, its basic principles seem highly likely to extend to the constitutional context.”¹²⁶ Eyer’s sex-stereotyping framework offers a viable vehicle for the voter ID issues facing transgender and gender nonconforming voters. Standing on its own, a voter ID requirement does not *itself* discriminate against transgender and gender nonconforming voters. However, stereotyping voters on the basis of sex does, in the ways the stories above highlight, likely trigger the requisite equal protection analysis.

Central to sex discrimination law is “the protection of gender nonconformity” which prevents states and other regulated entities from “requiring [one’s] gender to conform to the traditional stereotypes of one’s sex.”¹²⁷ However, it is critical to note that “transgender discrimination is *not* gender nonconformity discrimination.”¹²⁸ Transgender discrimination is *sex* discrimination because it is “based in transgender persons’ sex, not their gender.”¹²⁹ As such, “discriminating against a transgender person necessarily entails considering their sex assigned at birth.”¹³⁰ In this way, *Bostock* falters. By failing “to ground” its theory of “transgender discrimination more deeply” in the government’s “fundamental . . . interests [in] combatting core sex discrimination problems,” the majority missed the opportunity to articulate how “fighting *transgender* discrimination helps to fight stereotypes” in exactly the same way as “sex discrimination law has long sought to do.”¹³¹

As a consequence, the *Bostock* majority fails to clearly connect the phenomena of sex discrimination and transgender discrimination; the majority relegates the latter to the legally unprotected category of gender nonconformity.¹³² This approach assumes transgender people seek *only* to change their gender rather than their sex. However, that assumption is contested “both as a matter of the latest medical authority *and* as a matter

¹²⁶ Id. at 1502–03.

¹²⁷ Schoenbaum, *supra* note 19, at 831–32.

¹²⁸ Id. at 835 (emphasis added).

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id. at 838 (emphasis added).

¹³² Id. at 879–80.

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of law.”¹³³ The more modern view of sex shifts the focus from anatomy as its “primary determinant” to “one’s internal sense of sex.”¹³⁴

In doing so, it nonetheless “retains the distinguishing features that render sex distinct from gender in sex discrimination law: its biological basis and its immutability.”¹³⁵ *Bostock* gets this right: the majority recognizes that “being transgender is about changing one’s designated sex, not about changing one’s gender.”¹³⁶

This distinction is critical. The issue is not simply that a poll worker judges someone to be gender nonconforming, but that they judge someone is *not* the sex they purport to be. This is why cisgender individuals who transgress social gender norms will not necessarily be subject to the same discrimination: transgender individuals are conforming their gender presentation to their sex in a way cisgender people are not¹³⁷ because they are challenging notions of how a particular gender *should* manifest. The “root of bias against transgender” and gender nonconforming people is *not* simply bias against those acting contrary to social gender norms, but instead “bias against being transgender itself (i.e., against changing designated sex).”¹³⁸ This bias is hard to miss in laws that make changing one’s gender marker difficult or in the above-detailed actions taken by election officials. And, importantly for the analysis in this Note, the “question of a person’s legal sex has been treated as a matter of state law . . . [a]nd under a large and growing number of state laws, transgender persons’ identified sex is their legal sex.”¹³⁹ As Professor Ido Katri has uncovered, there is a “growing legal trend toward recognition of an

¹³³ Id. at 866.

¹³⁴ Id. at 868.

¹³⁵ Id. at 868, 869 (“[N]umerous legal authorities that classify persons by sex have adopted the new view of sex, treating one’s internal sense of identity as determinative. This can be seen perhaps most prominently in the formal legal designation of sex on things like passports and birth certificates. Since 2010, the federal government has issued passports that reflect a person’s identified sex rather than birth-designated sex.”).

¹³⁶ Id. at 882 (emphases added).

¹³⁷ Id. at 868. A cisgender person who transgresses social gender norms, like when a cisgender man chooses to wear a skirt, is not seeking to change (or to reflect a change) to their designated sex at birth (and the gender that traditionally accompanies it). Rather, the man who dons a dress is stretching the bounds of his gender *presentation*: he may disagree with society telling him men don’t wear dresses, but he is not disagreeing with society telling him he is a man.

¹³⁸ Id. at 883.

¹³⁹ Id. at 885.

individual right to autonomous gender identity,” pushing against the default that states should solely possess this classification power.¹⁴⁰

Transgender discrimination, then, often takes the form of an assessment by someone that “a masculine person could not be a woman or that a feminine person could not be a man . . . [an assumption] that sex should conform to gender, rather than that gender should conform to sex.”¹⁴¹ The failure to acknowledge and respect someone’s professed sex, whether in the form of voter ID laws or the exercise of a poll worker’s discretion, is unconstitutional sex discrimination. And while *Bostock* provides a viable vehicle for transgender and gender nonconforming voters to bring lawsuits on this basis, this Note argues a more proactive path forward exists within the Supreme Court’s voting rights jurisprudence.

B. Preventing Arbitrary and Disparate Treatment of Transgender Voters

Sixty years ago, the Supreme Court set the cornerstone of equality governing elections to this day: “[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.”¹⁴² This core idea of equality among voters who meet the “basic qualifications”¹⁴³ has been reinforced several times over, most prominently in *Harper v. Virginia Board of Elections*¹⁴⁴ and *Bush v. Gore*.¹⁴⁵ Both cases address measures taken by states that threatened the right to vote. In *Harper*, the Court declared Virginia’s poll tax unconstitutional on equal protection grounds,¹⁴⁶ and in *Bush v. Gore*, the per curiam opinion lambasted Florida’s “standardless manual recounts” as an example of the “arbitrary and disparate treatment” of voters states have a sweeping constitutional “obligation to avoid.”¹⁴⁷ Given this

¹⁴⁰ Ido Katri, *Transitions in Sex Reclassification Law*, 70 *UCLA L. Rev.* 636, 659 (2023). And as Ben-Asher recognizes, sex classification by the state is “not just an administrative act”; it can also be “an act of violence” whereby “[t]he state uses its legal authority to label its citizens in official documentation as M or F.” Ben-Asher, *supra* note 19, at 372.

¹⁴¹ Schoenbaum, *supra* note 19, at 899.

¹⁴² *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

¹⁴³ *Id.* at 379–80.

¹⁴⁴ 383 U.S. 663 (1966).

¹⁴⁵ 531 U.S. 98 (2000).

¹⁴⁶ *Harper*, 383 U.S. at 670.

¹⁴⁷ *Bush v. Gore*, 531 U.S. at 103, 105; see Samuel Issacharoff, *The Court’s Legacy for Voting Rights*, *N.Y. Times*, Dec. 14, 2000, at A39.

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framework, this Section advances two arguments: first, using sex as a qualifier of verifying voter identity is the type of invidious restriction on the right to vote that triggers strict scrutiny under *Harper*; and second, the exercise of poll worker discretion to this end (and to the extent a state attempts to codify such a requirement in law) is similarly unconstitutional under *Bush v. Gore*. Finally, even if using sex as a qualifier of voter identity does not amount to an invidious restriction on the right to vote, it would still be struck down under the sliding scale scrutiny of *Anderson-Burdick*.

1. The Voting Rights Blueprint: Harper v. Virginia Board of Elections and Bush v. Gore

In striking down Virginia’s poll tax, the *Harper* Court applied strict scrutiny because it considered voting a fundamental right.¹⁴⁸ While states have a legitimate interest in fixing voter qualifications, the Court held that those qualifications must be “germane to one’s ability to participate intelligently in the electoral process.”¹⁴⁹ Alongside wealth, the Court listed “race, creed, [and] color” as similarly impermissible qualifications for a state to impose as a condition for accessing a ballot.¹⁵⁰ This list is not necessarily exhaustive. As *Gray v. Sanders* held three years prior to *Harper*, sex also seems to fall among the slate of unconstitutional qualifications.¹⁵¹ Sex, like race and wealth, has nothing to do with whether someone can “participate intelligently in the electoral process.”¹⁵² And because sex is not germane to that ability, conditioning one’s participation at the polls on that basis is an instance of invidious discrimination.¹⁵³

¹⁴⁸ *Harper*, 383 U.S. at 667 (holding voting to be a fundamental right because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights”); see Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000*, at 86 (rev. ed. 2001).

¹⁴⁹ *Harper*, 383 U.S. at 668.

¹⁵⁰ *Id.*

¹⁵¹ See *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) (“[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.” (emphasis added)).

¹⁵² *Harper*, 383 U.S. at 668.

¹⁵³ *Id.* (“The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an ‘invidious’ discrimination that runs afoul of the Equal Protection Clause.” (citation omitted) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“When the law lays an unequal hand . . . it has

It could be argued that because sex is an integral part of a voter's identity, states could validly use it as a qualifier to help verify voter identity. Under this reasoning, the requirement that one's sex be verified is a reasonable, non-discriminatory restriction on the right to vote, similar to voter ID laws the Court has upheld.¹⁵⁴ However, it is not clear that sex *is* definitive of one's identity, especially when the experiences of transgender and gender nonconforming people are considered.¹⁵⁵ Sex is unlike the concrete voter identification data discussed above. One's name, address, date of birth, and even Social Security number are data points used to verify identity every day by numerous entities and considered sufficiently reliable.¹⁵⁶ It is doubtful the *Harper* Court had transgender voters in mind when Justice Douglas penned the majority opinion, but it did arguably anticipate this scenario; citing its repudiation of *Plessy v. Ferguson*, the Court recognized "the Equal Protection Clause is not shackled to the political theory of a particular era."¹⁵⁷ To the extent the Court expanded equal protection to encompass transgender and gender nonconforming people in *Bostock*, this Note's extension of *Harper* logically follows.¹⁵⁸

Reinvigorating the spirit of *Gray* and *Harper*, *Bush v. Gore* reaffirmed voting as a fundamental right.¹⁵⁹ As Samuel Issacharoff noted, the oft-missed greater import of this fractured decision is its "surprising expansion of voting rights."¹⁶⁰ The majority opinion announced "a

made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.")).

¹⁵⁴ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185, 188–89 (2008).

¹⁵⁵ The REAL ID Act, in establishing minimum security standards for license issuance and production, requires only that a driver's license lists the person's "gender" as defined by the State. 6 C.F.R. § 37.17(c) (2023). It is not clear that any of the state laws surveyed here actually endeavor to define "gender" or "sex" in any meaningful way. This would appear to give less definitive weight to sex than many may initially assume it carries.

¹⁵⁶ In the Help America Vote Act of 2002 ("HAVA"), Congress required states to verify voter information contained in registration applications. The language in HAVA is enlightening to the extent it reveals what Congress meant by voter information. "[T]he term 'applicable information' means information regarding whether . . . the name (including the first name and any family forename or surname), the date of birth (including the month, day, and year), and social security number of an individual provided to the Commissioner match the information contained in the Commissioner's records." Help America Vote Act of 2002, Pub. L. No. 107-252, § 303(a)(5)(C), 116 Stat. 1711 (codified at 42 U.S.C. § 15483).

¹⁵⁷ *Harper*, 383 U.S. at 669.

¹⁵⁸ The *Harper* Court anticipated as much: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Id.* at 669.

¹⁵⁹ Issacharoff, *supra* note 147.

¹⁶⁰ *Id.*

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sweeping obligation of the states ‘to avoid arbitrary and disparate treatment of the members’ of the electorate.”¹⁶¹ The issue in *Bush v. Gore* was the “standardless hand recounts in Florida.”¹⁶² The issue addressed by this Note is the similarly standardless procedures for determining a voter’s identity with respect to sex. Using a perceived mismatch grounded in impermissible sex stereotypes between a transgender person’s appearance and the sex listed on their ID (or a refusal to acknowledge the legitimacy of a nonbinary voter’s sex and thus their form of ID) is an instance of disparate and unfair treatment of voters. Cisgender voters adhering to “traditional” gender expressions and binary transgender voters who “pass”¹⁶³ will almost certainly not raise a poll worker’s eyebrows when presenting their IDs to vote. Hinging the ability to cast a ballot on surviving the potential scrutiny of an underinformed or even bigoted poll worker is both arbitrary and disparate: it impacts only those who transgress traditional gender boundaries.

2. Applying Anderson-Burdick

Even if using sex as an identification qualifier does not amount to an invidious restriction on the right to vote requiring strict scrutiny under *Harper*, it should still be found impermissible. In *Crawford v. Marion County Election Board*, the Court distinguished between two types of restrictions on voting: invidious restrictions (requiring strict scrutiny) and reasonable, nondiscriminatory restrictions (requiring sliding scale scrutiny).¹⁶⁴ The first set of restrictions are what *Harper* held unconstitutional because they are unrelated to voter qualifications.¹⁶⁵ The second set, according to *Crawford*, are those “evenhanded restrictions” enacted to “protect the integrity and reliability of the electoral process.”¹⁶⁶

¹⁶¹ *Id.* (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)).

¹⁶² *Id.*

¹⁶³ “Passing” means that other people perceive a transgender person as the gender with which they identify. To put it simply, passing is when a transgender person is not perceived *as trans*, but as the cisgender version of their gender identity. See Transgender and Nonbinary Identities, Planned Parenthood, <https://www.plannedparenthood.org/learn/gender-identity/transgender> [<https://perma.cc/2ZFQ-8FM6>] (last visited Feb. 25, 2024).

¹⁶⁴ 553 U.S. 181, 189–90 (2008).

¹⁶⁵ *Id.* at 189.

¹⁶⁶ *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)); see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and

The applicable standard of review for those restrictions is the *Anderson-Burdick* test, as formulated by the *Crawford* court, which weighs the asserted injury to the right to vote against the precise interests put forth by the State as justifications for that burden.¹⁶⁷

Courts must make the “hard judgment” under *Anderson-Burdick* as to whether the State’s interests are “sufficiently weighty to justify the limitation” on the voter or class of voters.¹⁶⁸ States must do this by “mak[ing] a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.”¹⁶⁹ In *Crawford*, plaintiffs challenged Indiana’s requirement that in-person voters present a government-issued photo ID at the polls.¹⁷⁰ The State asserted three main interests: preventing voter fraud, ensuring voter confidence, and election modernization.¹⁷¹ At their core, these interests were designed to “protect[] the integrity and reliability of the electoral process.”¹⁷² Assessing these interests to be legitimate and important, the Court turned its attention to the alleged burden.¹⁷³ For most voters, that burden was small, requiring gathering of the necessary documents, a trip to the DMV, and having their picture taken.¹⁷⁴ Some voters faced more substantial hurdles; though the obstacles were the same, the financial and practical cost of completing these tasks impacted some—the elderly, the poor, and the homeless—significantly more.¹⁷⁵ These disproportionately heavy costs for some voters are precisely what matters for the *Anderson-Burdick* analysis. While the dissent found these burdens to tip in favor of the

honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))).

¹⁶⁷ The Supreme Court in *Crawford* developed this sliding scale scrutiny from two previous election law cases, *Anderson*, 460 U.S. 780, and *Burdick*, 504 U.S. 428. *Crawford*, 553 U.S. at 190 (describing the Court in *Burdick* as “reaffirm[ing] *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule’” and applying this framework in evaluating state law requiring government-issued photo IDs to vote (internal quotation marks omitted) (quoting *Anderson*, 460 U.S. at 789 (citing *Burdick*, 504 U.S. at 434))).

¹⁶⁸ *Crawford*, 553 U.S. at 190, 191.

¹⁶⁹ *Id.* at 209 (Souter, J., dissenting) (explaining the majority’s standard).

¹⁷⁰ *Id.* at 185 (majority opinion).

¹⁷¹ *Id.* at 191.

¹⁷² *Id.*

¹⁷³ *Id.* at 197–99.

¹⁷⁴ *Id.* at 198.

¹⁷⁵ *Id.* at 199.

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plaintiffs,¹⁷⁶ the majority disagreed, holding that the State's compelling interests outweighed the burden the photo ID laws placed on that subsection of voters.¹⁷⁷

Applying *Anderson-Burdick* to the type of case explored in this Note demonstrates that requiring sex as an identity qualifier runs afoul of the Equal Protection Clause. The burden on transgender and gender nonconforming voters takes several forms: (1) being turned away from the polls due to a perceived mismatch by a poll worker between that person's gender presentation and/or name and the sex marker on their ID (disenfranchisement); (2) the cost and, in some cases, surgical requirement of obtaining a correct gender marker (voter deterrence); (3) the cost and difficulty of obtaining a legal name change (voter deterrence); and (4) the potential humiliation and bigotry faced at the polls (voter deterrence). As in *Crawford*, the ability of those turned away or humiliated at the polls to access a provisional ballot or to vote absentee may initially seem to obviate that burden.¹⁷⁸ However, if a state insisted on using sex as an identity qualifier, the mismatch problem would persist in the case of both provisional and absentee ballots, particularly in states that also require gender reassignment surgery to alter one's gender marker. Additionally, only twenty-two states and the District of Columbia recognize and allow citizens to choose an "X" gender marker.¹⁷⁹ Nonbinary and gender nonconforming people in the remaining twenty-eight states are unable to select a correct gender marker, rendering their ID incorrect and likely resulting in barriers when attempting to vote if sex is a required identity qualifier. These are serious and, in some cases, severe burdens.

Moving to the next step of the *Anderson-Burdick* analysis, the number of voters affected is arguably substantial. According to the 2015 U.S. Transgender Survey, 33% of the 27,715 respondents reported they had "no form of identification that list[ed] their correct name," 44% had no form of identification that reported their correct gender, and 46% had no form of identification "that correctly represented both their name and gender."¹⁸⁰ Extrapolating those results across the 1.4 million adults

¹⁷⁶ Id. at 209 (Souter, J., dissenting).

¹⁷⁷ Id. at 202–03 (majority opinion).

¹⁷⁸ Id. at 199.

¹⁷⁹ Movement Advancement Project, *supra* note 43.

¹⁸⁰ See Williams Institute Report, *supra* note 29, at 11; 2015 U.S. Transgender Survey, *supra* note 54, at 4. While the final results from the 2022 U.S. Transgender Survey are still pending,

estimated to identify as transgender in the United States¹⁸¹ means that over ten-thousand voters would face these burdens if sex were explicitly made a qualifier. And while these numbers vary across state lines, there likely remains a substantial number of potentially affected voters in each state. In any case, empirical precision is not demanded under *Anderson-Burdick*.¹⁸²

The state's interests in requiring sex as an identity qualifier are likely to be similar to those in *Crawford*: combating voter fraud and protecting public confidence in the integrity of elections. Preventing voter fraud has time and again been held to be a compelling interest.¹⁸³ The concern here is in-person voter fraud. Poll workers may worry that a voter whom they perceive to have a mismatch between their gender presentation and their ID gender marker or whose name does not match their appearance may be trying to impersonate someone else. Setting aside for the moment the argument that voter impersonation may not be a real problem,¹⁸⁴ and assuming a state has at least a modest interest in combating in-person voter fraud by requiring sex as a qualifier of identity, it still fails to offset

an early snapshot into its findings notes that of the 92,329 respondents, “[n]early half (48%) . . . said that none of their IDs listed the name they wanted” and “[f]ifty-nine percent . . . said that none of their IDs listed the gender they wanted.” Sandy E. James, Jody L. Herman, Laura E. Durso & Rodrigo Heng-Lehtinen, Nat’l Center for Transgender Equal., *Early Insights: A Report of the 2022 U.S. Transgender Survey* 4, 22 (2024).

¹⁸¹ Andrew R. Flores, Jody L. Herman, Gary J. Gates & Taylor N.T. Brown, UCLA Sch. of L. Williams Inst., *How Many Adults Identify as Transgender in the United States?* 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf> [<https://perma.cc/5TYJ-PXUC>].

¹⁸² While Justice Souter’s dissent discusses the empirical question in more depth, the *Crawford* majority does not set out such a requirement in any case. See *Crawford*, 553 U.S. at 221 (Souter, J., dissenting) (“Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim.”).

¹⁸³ *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (acknowledging “the State’s compelling interest in preventing voter fraud”); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in preserving the integrity of its election process.”).

¹⁸⁴ See *Crawford*, 553 U.S. at 226 (Souter, J., dissenting) (“[T]he national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo [ID] requirement is virtually nonexistent: the ‘problem’ of voter impersonation is not a real problem at all.” (quoting Brief for The Brennan Center for Justice; Demos: A Network for Ideas & Action; Lorraine C. Minnite; Project Vote; & People for the American Way Foundation in Support of Petitioners at 25, *Crawford*, 553 U.S. (No. 07-21))); Gilbert, *supra* note 27, at 744–46; Glenn Kessler, *The Truth About Election Fraud: It’s Rare*, Wash. Post (Nov. 1, 2022, 3:00 AM), <https://www.washingtonpost.com/politics/2022/11/01/truth-about-election-fraud-its-rare/> [<https://perma.cc/35JU-Y6BD>].

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the heavy burden this requirement places on transgender and gender nonconforming voters. Further, every state can verify a voter's identity in other, more concrete, ways.¹⁸⁵ Revising state election law to include sex as a required qualifier of identity is unnecessary; the state cannot justifiably assert an interest in preventing voter fraud that is independent of the state's ability to easily confirm a voter's identity without reference to sex.

CONCLUSION

One path forward to advance the rights of transgender and gender nonconforming people would be to “insist that legal rules stop classifying people based on sex” altogether.¹⁸⁶ As this Note has shown, state voter ID laws governing the verification of voter identification are *already* sex-neutral. This absence of any language regarding sex suggests it is not a necessary qualifier bearing on voter identification. Some may argue that sex is inherent in one's identity and is thus covered by the statutory directive to verify a voter's identity. However, statutory language directing election officials and poll workers to verify the voter's name and address presents a rebuttal. Further, the lack of guidance on how to assess an individual's sex for identification purposes complicates this further.

Bias and individual perception affect an evaluation of someone's sex in significantly greater ways than they do when simply verifying a person's name and address. The latter requires a simple matching between the voter roll and the form of identification presented. An evaluation of someone's sex is not so simple. It requires a poll worker or election official to exercise their subjective judgment, replete with their own assumptions and biases regarding gender. This evaluation may also be colored by the official's own political position regarding the highly polarized existence of transgender and gender nonconforming people. As such, no apparent way exists to ensure that this evaluation will ever be fair or accurate.

The status quo need not continue. Implementing clear legal standards and promulgating official guidance that any disagreements, suspicions, or judgments regarding someone's sex ought to be resolved in favor of permitting that individual to vote would go a long way. California is a

¹⁸⁵ A voter's name, address, and date of birth are all available and widely utilized data. See *infra* Appendix.

¹⁸⁶ Clarke, *supra* note 57, at 942.

leading example here. Though California is not a strict voter ID state and does not require a form of identification to vote, its voter registration process does require either a driver's license, California identification number, or the last four digits of a person's Social Security Number.¹⁸⁷ Nevertheless, the Secretary of State has promulgated poll worker guidance that gives explicit instructions to not deny or interfere with the rights of transgender and gender nonconforming voters at the polls.¹⁸⁸ That voters are to be permitted to cast a ballot despite "doubt as to the sufficiency of proof of a document presented" when a voter's ID does not appear "to match the voter's . . . gender" indicates California has determined that sex is not all that important of a voter qualification.¹⁸⁹

And California is right. Whether someone is "M," "F," or "X" has quite literally *no bearing* on their ability to cast a ballot. Sex, then, is not so crucial to verifying identity that it ought to be a barrier to vote.

No grand gestures are needed to secure the voting rights of transgender and gender nonconforming people; it is enough that the existing law is not weaponized. To rest on the words of Justice Douglas, "the right to vote is too precious, too fundamental to be so burdened or conditioned."¹⁹⁰

¹⁸⁷ See Registering to Vote, Cal. Sec'y of State, <https://www.sos.ca.gov/elections/voting-resources/voting-california/registering-vote> [<https://perma.cc/D7QZ-RAJU>] (last visited Feb. 25, 2024).

¹⁸⁸ California Office of the Secretary of State, *supra* note 68, at 13–14.

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

APPENDIX: STATUTORY EVIDENCE VERIFYING VOTER IDENTITY¹⁹¹

State	Voter ID Law Category ¹⁹²	Relevant Statute(s)	Evidence of Identity
Alabama ^{**†}	Photo ID Requested	Ala. Code § 17-9-30 (2024)	Name; Photo
Alaska ^{**†}	ID Requested; Photo Not Required	Alaska Stat. §§ 15.15.225, 15.07.064 (2023)	Address; Name
Arizona	Strict Non-Photo ID	Ariz. Rev. Stat. Ann. § 16-579(A) (2024)	Address; Name
Arkansas	Strict Photo ID	Ark. Const. amend. 51, § 6 (2023); Ark. Code Ann. §§ 7-1-101(40(A)), 7-5-305(a), 7-5-308 (2023)	Address; DOB; Name; Photo
California	No ID Required to Vote	Cal. Elec. Code § 14216 (West 2024)	Address; Name
Colorado	ID Requested; Photo Not Required	Colo. Rev. Stat. §§ 1-1-104(19.5)(a), 1-7-110(1)(a) (2024)	Address; Name
Connecticut	ID Requested; Photo Not Required	Conn. Gen. Stat. § 9-261 (2023)	Address; Name ¹⁹³

¹⁹¹ The information in this Appendix is provided as a convenience. The Author's intent is to provide readers with a sense of what evidence of identity they would be requested or required to produce at a polling location in their respective states. However, this Appendix is not all-inclusive and should not be construed as legal advice. Inferences are drawn throughout, and in addition to general voter ID requirements, many states have exceptions and alternative pathways to vote certification. Because these alternative pathways tend to be narrow, these inferences and exceptions are reflected in the Appendix endnotes rather than addressed in depth. For a fuller, updated understanding of your state's requirements, this Note recommends navigating directly to the state codes cited in the "Relevant Statute(s)" column or visiting your local precinct's website.

¹⁹² Voter ID Law Categories are based on definitions provided by NCSL. NCSL Voter ID Laws, *supra* note 29. NCSL categorizes laws based on two main criteria: what type of identification is required (photo or non-photo) and what alternative avenues are available to voters who do not have an acceptable form of identification (strict or non-strict). *Id.* In "strict" states, voters who cannot show an acceptable form of identification are permitted to cast a provisional ballot. However, in order for that vote to be counted, they still must provide the requisite form of identification. *Id.* In "non-strict" states, voters typically have alternative avenues to certify their votes that do not require them to present documentary identification. *Id.*

¹⁹³ In the rare event that a voter can neither present documentary evidence of name nor address to support the voter's attestation of their identity, photo ID is required. Conn. Gen. Stat. Ann. § 9-261 (2023).

State	Voter ID Law Category ¹⁹²	Relevant Statute(s)	Evidence of Identity
Delaware [‡]	ID Requested; Photo Not Required	Del. Code Ann. tit. 15, § 4937 (2023)	Address; Name
District of Columbia	No ID Required to Vote	D.C. Code § 1-1001.07(c)(1)(D), 1-1001.07(i)(1) (2024)	Address; DOB; Name
Florida ^{*‡}	Photo ID Requested	Fla. Stat. § 101.043 (2023)	Name; Photo
Georgia [*]	Strict Photo ID	Ga. Code Ann. § 21-2-417 (2023)	Name; Photo
Hawaii	No ID Required to Vote ¹⁹⁴	Haw. Rev. Stat. §§ 11-15, 11-102 (2023)	Address; DOB; Name
Idaho [‡]	Photo ID Requested	Idaho Code §§ 34-1106, 34-1113, 34-1114 (2023)	Address; Name; Photo
Illinois	No ID Required to Vote	10 Ill. Comp. Stat. §§ 5/4-22, 5/5-29, 5/6-66, 5/17-9 (2023)	Address; Name
Indiana [†]	Strict Photo ID	Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2023)	Address; Name; Photo
Iowa ^{‡195}	Photo ID Requested	Iowa Code §§ 48A.7A, 48A.10A, 49.78 (2024)	Address; Name; Photo
Kansas [†]	Strict Photo ID	Kan. Stat. Ann. §§ 8-1324, 25-2908 (2023)	Address; Name; Photo
Kentucky ^{†‡196}	Photo ID Requested	Ky. Rev. Stat. Ann. §§ 117.001(15), 117.225, 117.227, 117.228 (West 2024)	Address; Name; Photo

¹⁹⁴ Beginning with the 2020 primary elections, all elections in Hawaii are conducted via mail. Haw. Rev. Stat. § 11-101. The entry for Hawaii is based off of requirements for voter registration because mail-in ballots are sent exclusively to registered voters. Id. at § 11-102.

¹⁹⁵ While NCSL places Iowa in the “ID Requested, Photo Not Required” category, this Note recategorizes the state as “Photo ID Requested.” See NCSL Voter ID Laws, *supra* note 29. The statutory language suggests that while voters will be asked to produce a photo ID, if a voter does not have one, they may have another voter swear an oath attesting to their identity. Iowa Code §§ 48A.7A, 48A.10A, 49.78 (2024).

¹⁹⁶ While NCSL places Kentucky in the “ID Requested, Photo Not Required” category, this Note recategorizes the state as “Photo ID Requested.” See NCSL Voter ID Laws, *supra* note 29. The statutory language suggests that while voters will be asked to produce a photo ID, if a voter does not have one, they may execute a “voter’s affirmation.” Ky. Rev. Stat. Ann. § 117.228 (West 2024).

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State	Voter ID Law Category ¹⁹²	Relevant Statute(s)	Evidence of Identity
Louisiana [‡]	Photo ID Requested	La. Stat. Ann. § 18:562 (2024)	Address; Name; Photo
Maine	No ID Required to Vote	Me. Stat. tit. 21-A, § 671 (2024)	Address; Name
Maryland	No ID Required to Vote	Md. Code Ann., Elec. Law § 10-310 (LexisNexis 2023)	Address; DOB; Name
Massachusetts	No ID Required to Vote	Mass. Gen. Laws ch. 54, § 76 (2023)	Address; Name (if requested)
Michigan ^{*‡}	Photo ID Requested	Mich. Comp. Laws §§ 168.523 (2023), 168.2 (2024)	Address; DOB; Name; Photo
Minnesota	No ID Required to Vote	Minn. Stat. § 204C.10 (2023)	Address; DOB (if requested); Name
Mississippi ^{*†}	Strict Photo ID	Miss. Code Ann. § 23-15-563 (2024)	Name; Photo
Missouri [*]	Strict Photo ID	Mo. Rev. Stat. § 115.427 (2023)	Name; Photo
Montana ^{‡197}	Photo ID Requested	Mont. Code Ann. §§ 13-13-114, 13-15-107 (2024)	Address; Name; Photo
Nebraska [*]	Strict Photo ID	Neb. Rev. Stat. § 32-914 (2024)	Address; Name; Photo
Nevada	No ID Required to Vote	Nev. Rev. Stat. § 293.277 (2023)	Name
New Hampshire [†]	Strict Photo ID ¹⁹⁸	N.H. Rev. Stat. Ann. § 659:13 (2023)	Address; Name; Photo

¹⁹⁷ On March 27, 2024, the Montana Supreme Court held Mont. Code Ann. § 13-13-114 unconstitutional to the extent that it excluded student IDs from the list of acceptable photo IDs. *Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074, 1107 (Mont. 2024).

¹⁹⁸ New Hampshire is currently categorized by the NCSL as “ID Requested; Photo Not Required.” NCSL Voter ID Laws, *supra* note 29. However, on March 14, 2024, the New Hampshire House of Representatives approved a bill that would eliminate any exceptions to the state’s voter ID laws and install a strict ID requirement. Ethan DeWitt, *House Passes Bill Removing Exceptions to State Voter ID Law*, N.H. Bulletin (Mar. 14, 2024, 5:54 PM), <https://newhampshirebulletin.com/2024/03/14/house-passes-bill-removing-exceptions-to-state-voter-id-law/> [<https://perma.cc/9PXS-67B3>]. Currently, voters without identification who

State	Voter ID Law Category ¹⁹²	Relevant Statute(s)	Evidence of Identity
New Jersey [‡]	No ID Required to Vote	N.J. Stat. Ann. § 19:15-17 (West 2023)	Address; Name
New Mexico [‡]	No ID Required to Vote	N.M. Stat. Ann. §§ 1-12-10, 1-1-24 (2023)	Address; DOB; Name
New York	No ID Required to Vote	N.Y. Elec. Law § 8-304 (McKinney 2024)	Name
North Carolina [†]	Strict Photo ID	N.C. Gen. Stat. §§ 163-166.7, 163-166.16 (2023)	Address; Name; Photo
North Dakota [†]	Strict Non-Photo ID	N.D. Cent. Code §§ 16.1-01-04.1, 16.1-05-07 (2023)	Address; DOB; Name
Ohio [†]	Strict Photo ID	Ohio Rev. Code Ann. §§ 3505.18, 3505.181(7)(a) (LexisNexis 2024)	Address; Name; Photo
Oklahoma	ID Requested; Photo Not Required	Okla. Stat. tit. 26, § 7-114 (2024)	Address; DOB; Name; Photo
Oregon ^{*199}	No ID Required to Vote	Or. Rev. Stat. §§ 247.012, 254.470 (2024); Or. Admin. R. no. 165-007-0030 (2024)	Address; DOB; Name
Pennsylvania	No ID Required to Vote	25 Pa. Stat. and Cons. Stat. Ann. §§ 2602(z.5), 3050 (West 2023), <i>invalidated in part by</i> Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014)	Address; Name
Rhode Island [‡]	Photo ID Requested	17 R.I. Gen. Laws § 17-19-24.2 (2024)	DOB; Name; Photo
South Carolina ^{**‡}	Photo ID Requested	S.C. Code Ann. § 7-13-710 (2024)	Name; Photo
South Dakota ^{**}	Photo ID Requested	S.D. Codified Laws §§ 12-18-6.1, 12-18-6.2 (2024)	Name; Photo

sign an affidavit attesting to their identity and address are permitted to vote. Id. As of April 1, 2024, the bill is headed to the New Hampshire Senate. Id.

¹⁹⁹ Oregon conducts all elections by mail-in ballots. Or. Rev. Stat. § 254.465 (2024). The entry for Oregon is thus based off of requirements for voter registration.

State	Voter ID Law Category ¹⁹²	Relevant Statute(s)	Evidence of Identity
Tennessee [†]	Strict Photo ID	Tenn. Code Ann. § 2-7-112(a)(1)(A), 2-7-112(c), 2-7-112(f) (2023)	Address; Name; Photo
Texas [†]	Photo ID Requested	Tex. Elec. Code Ann. §§ 63.001, 63.0101 (West 2023)	Address; Name; Photo
Utah	ID Requested; Photo Not Required	Utah Code Ann. §§ 20A-1-102(76), 20A-3a-203 (LexisNexis 2023)	Address; Name
Vermont	No ID Required to Vote	Vt. Stat. Ann. tit. 17, § 2563 (2023)	Address (if requested); Name
Virginia	ID Requested; Photo Not Required	Va. Code Ann. § 24.2-643 (2023)	Address; Name
Washington ^{‡200}	No ID Required to Vote	Wash. Rev. Code §§ 29A.40.160, 29A.08.010 (2023)	Address; DOB; Name
West Virginia	ID Requested; Photo Not Required	W. Va. Code § 3-1-34 (2023)	Address; Name
Wisconsin [†]	Strict Photo ID ²⁰¹	Wis Stat. §§ 5.02(6m), 6.79 (2023)	Address; Name; Photo
Wyoming	Strict Non-Photo ID ²⁰²	Wyo. Stat. Ann. § 22-1-102(xxxix) (2023)	Name

²⁰⁰ NCSL currently classifies Washington as a “ID Requested; Photo Not Required” state. However, as of June 6, 2024, Washington will conduct all elections by mail-in ballots. 2024 Wash. Sess. Laws 5843. The entry for Washington is thus based off of requirements for voter registration. See Wash. Rev. Code § 29A.08.010 (2023).

²⁰¹ Wisconsin’s law appears to accept non-photo identification such as birth certificates under Wis. Stat. § 5.02(6m). However, in 2011 Wisconsin enacted a strict photo voter ID law. In July 2016, however, “a federal court ruled that the law was unconstitutional, and that an alternative to showing an ID, such as signing an affidavit attesting to identity, must be permitted.” NCSL Voter ID Laws, *supra* note 29. In August 2016, however, a state court of appeals held that the law could be implemented so long as Wisconsin keeps its pledge to provide free temporary IDs. *Id.* Thus, NCSL continues to label Wisconsin as a “Strict Photo ID” state. *Id.*

²⁰² In the future, Wyoming may be considered a Strict Photo ID state. Currently, Wyoming accepts Medicare and Medicaid identification cards as valid forms of ID for voting, neither of which contain a photo. NCSL Voter ID Laws, *supra* note 29. However, this provision will be repealed as of December 31, 2029. *Id.*

* States denoted with asterisks may not explicitly list name, address, or photo requirements. However, these requirements are nonetheless implied where the acceptable forms of ID necessarily include the voter's name, address, and/or photo. These include driver's licenses, passports, employee ID cards, military or veteran ID cards, firearms licenses, non-driving personal identification cards, voter identification cards, and student ID cards.

† While states denoted with a dagger generally have strict photo ID requirements, they also grant exceptions to certain individuals. These may include individuals with religious objections to being photographed, indigent individuals, those who have a "reasonable impediment" to obtaining the requisite identification, hospitalized individuals, victims of domestic abuse or stalking, individuals with disabilities, armed service members, residents of long-term care facilities, and members of federally recognized tribes.

‡ While states denoted with a double dagger generally *request* specific forms of identification from voters, alternative pathways to vote certification are possible in these states. These include having election officials or other recognized, registered voters attest to the voter's identity, signing a personal affidavit attesting to one's eligibility to vote, taking an oral or written oath attesting to one's identity, or consenting to signature matching. In some states, alternatives can be conducted at the polls. In others, the voter must take additional steps after casting a provisional ballot.