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Gender & Sexuality

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SHOW ME HER THE MONEY

Alfred Blue III

I. INTRODUCTION

The fight for women’s equality in the United States has been a long and arduous journey that has impacted every segment of our society including healthcare, politics, education, and business. Although, as a nation, we have taken significant steps towards a more equitable society, the harsh reality is that we still have much further to go to achieve true equality for women. This reality is most clearly illustrated in the area of equal pay for women.

Today, women—of every race, across all ages, in almost every occupation, and in every state in the United States—are paid less than men. In 2018, the United States Census Bureau found that women of all races earned on average just 81.6 cents for every \$1 earned by men of all races.¹ As of 2020, women earned 84% of what men earn.² This gap is even wider for women of color. Latina women generally make only 57 cents for every dollar paid to their white, non-Hispanic male contemporaries³ and Black women typically make only 62 cent for every dollar paid to their male counterparts.⁴ These facts hold true regardless of a woman’s level of education, work experience, or profession, and in many cases, the pay gap increases over the course of a woman’s career.

External factors such as access to paid medical leave, occupational segregation, child-rearing responsibilities, and access to affordable childcare create additional hurdles for women seeking to climb the proverbial ladder in the workplace. Despite these obstacles, women in various spheres and industries continue to defy the odds by breaking

¹ Mary Leisenring, *Equal Pay Day is March 31 – the Earliest Since it Began in 1996*, U.S. CENSUS BUREAU (Mar. 31, 2020),

<https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html>.

² Amanda Barroso & Anna Brown, *Gender pay gap in U.S. held steady in 2020*, PEW RES. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/>.

³ Eleanor Delamater & Gretchen Livingston, *5 Facts About Latinas in the Labor Force*, U.S. DEP’T OF LABOR: U.S. DEP’T OF LABOR BLOG (Oct. 20, 2021), <https://blog.dol.gov/2021/10/20/5-facts-about-latinas-in-the-labor-force>.

⁴ Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS, fig.1 (Mar. 24, 2020), <https://www.americanprogress.org/article/quick-facts-gender-wage-gap/>.

down barriers that have existed for centuries. Today, there are more female executives and senior leaders at Fortune 500 companies than at any point in U.S. history,⁵ women make up one third of the Supreme Court (including for the first time a Black woman, Justice Ketanji Brown Jackson), and our country elected its first female vice president (a Black and South-Asian woman). In the worlds of sports, politics, business, technology, finance, and many others, women have continued to excel at the highest levels (even in male-dominated industries) and sit in seats rarely, or never before occupied by a woman. While there is undoubtedly much to celebrate, we should also be careful not to lose sight of the ongoing work necessary to accomplish true equality for women in our country.

II. HISTORY

To fully appreciate the evolution of women's rights in the workplace, one must first understand the history of women's participation in the American workforce. During the late 19th and early 20th century, a majority of women did not work outside of the home and the small percentage of women that did, stopped working when they married.⁶ In 1920, women made up approximately 24% of the labor force and 8.3 million women older than the age of 15 worked outside of the home.⁷ At the time, most women did not attend college and due to restrictive social and cultural norms, opportunities available to women outside of the home were extremely limited.⁸ Between the 1930's and 1970's, women joined the workforce in increasing numbers and by 1970, approximately 50% of single women and 40% of married women held jobs outside of the home.⁹ Between 1984 and 2009, the number of working women in America increased from 44 million to 72 million.¹⁰ In 2019—prior to the Covid-19 pandemic—approximately

⁵ Katharina Buchholz, *Only 15 Percent of CEOs at Fortune 500 Companies are Female*, STATISTA (Mar. 8, 2022), <https://www.statista.com/chart/13995/female-ceos-in-fortune-500-companies/>.

⁶ Janet L. Yellen, *The history of women's work and wages and how it has created success for us all*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/>.

⁷ *Women in the Workplace (Issue)*, ENCYCLOPEDIA.COM: GALE ENCYCLOPEDIA U.S. ECON. HIST., <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/women-workplace-issue> (last updated Nov. 16, 2022).

⁸ Yellen, *supra* note 6.

⁹ Yellen, *supra* note 6.

¹⁰ Vivian Giang, *The Incredible Rise of Women in the Workplace*, INSIDER (Mar. 27, 2013, 10:43 AM), [https://www.businessinsider.com/women-in-the-workplace-2013-](https://www.businessinsider.com/women-in-the-workplace-2013-3)

3.

60% of all women participated in the labor force.¹¹ Although the number of women in the workforce has increased dramatically, state and federal laws did not reflect this cultural shift until 1963.

III. LEGISLATION REGARDING EQUAL PAY

Two pieces of legislation have played significant roles in the fight for equal pay for women in the United States: The Equal Pay Act of 1963 (the “EPA”) and Title VII of the Civil Rights Act of 1964 (“Title VII” or “The Act”). The EPA, one of the first laws in U.S. history focused on reducing gender discrimination in the workplace, is a federal labor law that prohibits discrimination by employers based on sex. Specifically, the law requires equal pay for equal work by prohibiting employers from paying men and women different wages or benefits for doing jobs that require the same skills and responsibilities.¹² It is important to note that the EPA applies to many forms of compensation including salary, wages, overtime, bonuses, benefits, stock options, profit-sharing plans, vacation and holiday pay, vehicle allowances, and expense reimbursements.¹³ The EPA also sets the parameters for when paying a man and woman differently may be permissible, like when a pay discrepancy is based on seniority, for example.¹⁴ Though many business groups opposed the legislation at the time, Congress passed the Act as an amendment to the Fair Labor Standards Act of 1938.

Similarly, Title VII of the Civil Rights Act of 1964 has had a significant impact in combating discrimination against women in the workplace. The Act prohibits discrimination based on sex—such as paying a woman less than a man because of the simple fact that she is a woman—as well as the other protected classes of race, color, religion, and national origin.¹⁵ Title VII also makes it unlawful to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment

¹¹ U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK, REPORT 1092 (Apr. 2021), <https://www.bls.gov/opub/reports/womens-databook/2020/home.htm>.

¹² *Equal Pay/Compensation Discrimination*, EEOC, <https://www.eeoc.gov/equal-paycompensation-discrimination> (last visited Jan. 27, 2023) (emphasis added).

¹³ *Id.*

¹⁴ *The Equal Pay Act of 1963*, EEOC, <https://www.eeoc.gov/statutes/equal-pay-act-1963> (last visited Jan. 27, 2023) (“except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”).

¹⁵ 42 U.S.C. § 2000e-2(a).

discrimination investigation or lawsuit.¹⁶ Ensuring that female employees are paid as much as male employees is only one part of Title VII. Title VII also prohibits discrimination in any aspect of employment, including hiring practices, how employees are promoted, recruited, and trained, among other aspects of employment.

While the EPA and Title VII have many similarities, there are several key differences. First, the EPA is limited to gender discrimination, while Title VII covers several protected classes. Next, a plaintiff bringing a claim under the EPA is not required to file a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”), the agency responsible for enforcing federal discrimination employment laws.¹⁷ A plaintiff bringing a Title VII discrimination claim, however, must file such a charge. Additionally, a plaintiff must bring an EPA claim within two years of the discriminatory pay practice, whereas a Title VII claim must be filed within 180 or 300 days of the discriminatory practice.¹⁸ Fourth, the EPA requires a plaintiff to prove that their job is substantially equal to that of a higher-paid male employee, Title VII does not.¹⁹ Fifth, Title VII, unlike the EPA, which applies to most employers, is not applicable to employers who have less than 15 employees. Finally, under Title VII a plaintiff does not have to work in the same establishment as their allegedly higher-paid counterpart.²⁰

In 2009, President Obama further strengthened protections for women in the workplace by signing the Lilly Ledbetter Fair Pay Act of 2009 (the “Fair Pay Act”), which significantly broadened the period for filing discrimination claims.²¹ This Act overturned the Supreme Court’s decision in *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 550 U.S. 618 (2007), which held that to be timely, a plaintiff must file a

¹⁶ *Id.* § 2000e-3(a).

¹⁷ Overview, EEOC, <https://www.eeoc.gov/overview> (last visited Jan. 27, 2023).

¹⁸ See *supra* note 12.

¹⁹ See *supra* note 12.

²⁰ *Facts About Equal Pay and Compensation Discrimination*, EEOC, <https://www.eeoc.gov/laws/guidance/facts-about-equal-pay-and-compensation-discrimination> (last visited Jan. 27, 2023).

²¹ As discussed below, the Lilly Ledbetter Fair Pay Act establishes that a “discriminatory compensation decision” occurs each time a person is compensated pursuant to the discriminatory decision. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 5 Stat. 123 (2009).

²¹ *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, EEOC, <https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009> (last visited Jan. 27, 2023).

discrimination claim within 180 days of a discriminatory salary decision.²² Instead, the Fair Pay Act allows pay discrimination claims to accrue whenever: (1) an employee receives a discriminatory paycheck, (2) a discriminatory pay decision or practice is adopted, (3) a person becomes subject to the discriminatory decision or practice, or (4) a person is otherwise affected by the discriminatory decision or practice.²³ Because of this, employees can pursue unequal pay and discrimination claims against their employers without strict time constraints.

IV. RECENT CASES REGARDING UNEQUAL PAY

Over the years, the aforementioned legislation has helped curb gender discrimination in the workplace, however, the fact remains that women are still substantially underpaid. In recent lawsuits and EEOC proceedings around the country, employers have been found to be responsible for paying their male employees more than their female employees for the same work or otherwise discriminating against women in the workplace. Such industries include healthcare,²⁴ banking,²⁵ insurance,²⁶ legal education,²⁷ and sports.²⁸

One of the most notable cases involving gender discrimination and unequal pay is *Morgan v. United States Soccer Federation, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020), involving the U.S. Women’s National Soccer Team (“WNT”). In 2016, several members of the WNT, including some of the biggest names in sports, filed a complaint with the EEOC alleging unequal pay and wage discrimination by the U.S. Soccer Federation (the “USSF”).²⁹ In 2019, after negotiations with the USSF failed to achieve the desired results, 28 members of the WNT filed a federal discrimination lawsuit against the USSF, claiming

²² *Id.* (emphasis added).

²³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 5 Stat. 123, 123 (2009).

²⁴ *E.g.*, EEOC v. Covenant Med. Ctr., Inc., No. 2:20CV10662, 2020 WL 8410776 (E.D. Mich. Sept. 2, 2020) (health care system paid female developer less than two male co-workers).

²⁵ *E.g.*, EEOC v. First Metro. Fin. Serv. Inc., No. 1:18CV177, 2021 WL 1541381 (N.D. Miss. Mar. 17, 2021) (female bank manager paid less than males in same position).

²⁶ *E.g.*, EEOC v. Jackson Nat’l Life Ins. Co., No. 1:16CV02472, 2020 WL 359220 (D. Colo. Jan. 7, 2020) (insurance companies discriminated against female and African American employees in pay and promotions, tolerated harassment, and retaliated against employees who complained).

²⁷ *E.g.*, EEOC v. Univ. of Denver, No. 1:16CV02471, 2018 WL 2793801 (D. Colo. May 18, 2018) (female full professors at the University’s Sturm College of Law were paid an average of nearly \$20,000 less than their male counterparts).

²⁸ *E.g.*, *Morgan v. U.S. Soccer Fed’n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020).

²⁹ *Id.* at 645 n.3.

violations of Title VII and the EPA.³⁰ More specifically, the plaintiffs alleged that the USSF discriminated against the women by paying the male soccer players as much as four times more than the female soccer players, among other claims.³¹

In the complaint, the plaintiffs illustrated that a comparison of the WNT's pay and the U.S. Men's National Soccer Team's ("MNT") pay showed that if each team played 20 friendly matches or "friendlies" in a year and each team won all 20 friendlies, the female WNT players would earn a maximum of \$99,000 for the year or \$4,950 per game, while the male MNT players would earn an average of \$263,320 for the year or \$13,166 per game.³² The lawsuit further alleged facts showing that in 2014, the USSF gave the MNT a performance bonus of nearly \$5.4 million after they lost in the round of 16 in the World Cup Tournament in Brazil.³³ The WNT, however, received a bonus of only \$1.72 million after winning the 2015 World Cup in Canada.³⁴ Additionally, the plaintiffs alleged that the last time the MNT made it to the World Cup field, the male players each received a \$55,000 bonus, while the women only received \$15,000 each for making it to the 2015 World Cup—one of the greatest accomplishments in all of sports.³⁵ The MNT also shared a \$2 million bonus for qualifying, while the WNT shared only \$300,000.³⁶

After a hard fought and lengthy battle, the plaintiffs reached a historic \$24 million settlement with the USSF earlier this year. Notably, the settlement did not only include backpay for previous World Cup prize money, but more importantly, included provisions to ensure that men and women players would receive equal pay moving forward.³⁷

Sadly, women face similar discriminatory behavior in almost every other major industry. In another class action lawsuit against the tech giant Google, several female former employees alleged that Google paid women less than men for the same jobs and that Google locked women into lower career tracks leading to less pay and lower bonuses

³⁰ *Id.* at 640.

³¹ *Id.* at 651.

³² Complaint ¶58, *Morgan*, 445 F. Supp. 3d 635.

³³ *Id.* ¶ 61.

³⁴ *Id.*

³⁵ *Id.* ¶ 60.

³⁶ *Morgan*, 445 F. Supp. 3d at 641, 650.

³⁷ *Morgan v. U.S. Soccer Fed'n, Inc.*, No. 2:19CV01717RGKAGR, 2022 WL 16859651 (C.D. Cal. Aug. 11, 2022).

when compared to their male counterparts.³⁸ Although Google did not admit to any wrongdoing, Google agreed to a \$118 million settlement for 15,500 current and former female employees.³⁹ Similar to plaintiffs in other equal pay and gender discrimination lawsuits around the country, the Google plaintiffs sought to ensure that the illegal practices would not continue, in addition to the financial compensation. As part of the settlement, Google agreed to allow third-party experts to review its pay practices for three years and to allow a monitor to assess whether the company was following the experts' recommendations. The settlement included women who had worked for Google in California since 2013 and covered over 236 different employee titles.⁴⁰

This lawsuit is not the only recent gender discrimination/equal pay lawsuit Google has settled in the last few years. In 2021, Google also agreed to pay \$3.8 million to over 5,500 employees and job applicants after the U.S. Department of Labor found pay disparities affecting female software engineers at several of Google's offices.⁴¹ The Department of Labor also found Google's hiring practices disadvantaged females and Asian applicants for Google's engineering positions.⁴²

Beyond the technology and sports worlds, other lawsuits have impacted how women are paid and how juries hold big-name companies accountable for failing to fairly compensate women. Some of these companies include Nike,⁴³ Family Dollar,⁴⁴ and Goldman Sachs.⁴⁵

³⁸ Class Action Compl. ¶¶2–3, *Ellis v. Google, Inc.*, No. CGS-17-561299, 2017 WL 4075207 (Cal. Super. Ct. 2017).

³⁹ *Plaintiffs and Google Agree to \$118 Million Settlement of Pay Equity Class Action*, BUSINESSWIRE (June 10, 2022 8:42 AM), <https://www.businesswire.com/news/home/20220610005611/en/Plaintiffs-and-Google-Agree-to-118-Million-Settlement-of-Pay-Equity-Class-Action>.

⁴⁰ *Id.*

⁴¹ Office of Fed. Contract Compliance Programs, *GOOGLE LLC, US DEPARTMENT OF LABOR SETTLEMENT RESOLVES ALLEGED PAY, HIRING DISCRIMINATION AT CA., WASH. STATE LOCATIONS*, U.S. DEP'T OF LABOR: NEWS (Feb. 1, 2021), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20210201>.

⁴² *Id.*

⁴³ *E.g.*, *Cahill v. Nike*, No. 3:18CV1477JR, 2020 WL 5989202 (D. Or. Oct. 9, 2020).

⁴⁴ *E.g.*, *Scott v. Family Dollar Stores, Inc.*, No. 3:08CV00540MOCDSC, 2018 WL 1321048 (W.D.N.C. Mar. 14, 2018).

⁴⁵ *E.g.*, *Chen-Oster v. Goldman Sachs & Co.*, No. 1:10CV06950, 2011 WL 803101 (S.D.N.Y. Mar. 1, 2011).

V. WHAT TO DO IF YOU FACE GENDER DISCRIMINATION IN THE WORKPLACE

If you think your employer is discriminating against you or if you think you may be paid less because you are a woman, here are a few things you can do:

- i. Keep notes of the discriminatory behavior.
- ii. Gather helpful documents to support your unequal pay and/or discrimination claim (e.g., emails, text messages, job descriptions, performance evaluations, paystubs, complaints filed with employer, notes from conversations with employer).
- iii. Review your company's policies.
- iv. Consult counsel from the EEOC or consult an employment attorney who handles gender discrimination and equal pay cases.
- v. Report the pay difference to HR in writing or file a complaint with your employer.
- vi. File a complaint with the EEOC or file a lawsuit in court.

For others who want to join in the fight against unequal pay and gender discrimination, you can do the following:

- i. Speak out against biases and stereotypes in the workplaces and in other settings.
- ii. Vote for elected officials who support equal pay and anti-discrimination and legislation.
- iii. Provide equal opportunities for advancement for women in the workplace.
- iv. Compensate women at the same level that you compensate men.

VI. CONCLUSION

Though we have not yet reached full equality for women in the workplace, there are several reasons to be optimistic about the future in our country. The conversations surrounding gender equality—that for so long have only occurred behind closed doors—have now taken center stage in our society. In living rooms, classrooms, and boardrooms, men and women are fighting to ensure that women are fairly compensated and afforded the same opportunities as their male counterparts. Where employers fail to pay women equally, the law has provided mechanisms via the EPA, Title VII, and other state laws to hold employers accountable for their discriminatory behavior.

The following is a supplementary infographic for
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Show HER The Money



Workplace Discrimination Against Women

An Overview of Legislation and Caselaw Focused on Combatting Gender & Pay Inequality in the Workplace


1


1920

Women Made Up About 24% of the Labor Force¹

At the time, most women did not attend college. Due to restrictive social and cultural norms, women's opportunities to work outside of the home were limited.²

 **8.3 mil** women older than 15 years old worked outside of the home³

 **40 years** between the 1930's and 1970's, women joined the⁴ workforce in increasing numbers

 **double** by 1970, about 50% of single women and 40% of married women worked outside of the home, doubling 1920's numbers⁵

2

1963

The Equal Pay Act of 1963 ("EPA")⁶

- The EPA is one of the first federal labor laws in U.S. history enacted to reduce gender discrimination in the workplace.
- The EPA requires equal pay for equal work by prohibiting employers from paying men and women different wages or benefits for doing jobs that require the same skills and responsibilities.
- It applies to many forms of compensation including salary, wages, overtime, bonuses, benefits, stock options, and many others.
- It sets the parameters for when paying a man and woman differently is permissible (like when a pay discrepancy is based on seniority, for example).

3

1964

Title VII of the Civil Rights Act of 1964⁷

Title VII prohibits discrimination based on sex, race, color, religion, and national origin. It also makes it unlawful to retaliate against a person because the person complained about discrimination, filed a discrimination charge, or participated in an employment discrimination investigation or lawsuit. Finally, Title VII also prohibits discrimination in any aspect of employment, including hiring, promotions, recruitment, and training.

4

2009

The Lilly Ledbetter Fair Pay Act of 2009⁸

- President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, which significantly broadened the period for filing discrimination claims.
- The Act the Fair Pay Act allows pay discrimination claims to accrue whenever: (1) an employee receives a discriminatory paycheck, (2) a discriminatory pay decision or practice is adopted, (3) a person becomes subject to the discriminatory decision or practice, or (4) a person is otherwise affected by the discriminatory decision or practice.

5


2019

60% of Women Participated in the Workforce Before the COVID-19 Pandemic⁹

Between 1984 and 2009, the number of women working in America increased from 44 million to 72 million. In 2019—prior to the COVID-19 pandemic that has disproportionately impacted women in the workplace—approximately 60% of women participated in the labor force.

What To Do If You Face Gender Discrimination in the Workplace

If you think your employer is discriminating against you or if you think you may be paid less because you are a woman, here are a few things you can do:

- 
- Keep notes of the discriminatory behavior.
 - Gather helpful documents to support your unequal pay and/or discrimination claim (emails, text messages, job descriptions, performance evaluations, paystubs, complaints filed with employer, notes from conversations with employer).
 - Review your company's policies.
 - Consult counsel from the Equal Employment Opportunity Commission (EEOC) or consult an employment attorney who handles gender discrimination/equal pay cases.
 - Report the pay difference to HR in writing / file a complaint with your employer.
 - File a complaint with the EEOC/ file a lawsuit in court.

Source • Show HER The Money by Alfred Blue III. Infographic created by Karla Vera, Editor-in-Chief (2022-2023)

References

- 1 *Women in the Workplace (Issue)*, ENCYCLOPEDIA.COM: GALE ENCYCLOPEDIA U.S. ECON. HIST., <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/women-workplace-issue> (last updated Nov. 16, 2022).
- 2 Janet L. Yellen, *The history of women's work and wages and how it has created success for us all*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/>.
- 3 *Women in the Workplace*, *supra* note 1.
- 4 Yellen, *supra* note 2.
- 5 Yellen, *supra* note 2.
- 6 *Equal Pay/Compensation Discrimination*, EEOC, <https://www.eeoc.gov/equal-paycompensation-discrimination> (last visited Jan. 27, 2023); *The Equal Pay Act of 1963*, EEOC, <https://www.eeoc.gov/statutes/equal-pay-act-1963> (last visited Jan. 27, 2023) ("except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.").
- 7 42 U.S.C. §§ 2000e-2(a), 2000e-3(a).
- 8 *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, EEOC, <https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009> (last visited Jan. 27, 2023); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 5 Stat. 123, 123 (2009).
- 9 Vivian Giang, *The Incredible Rise of Women in the Workplace*, INSIDER (Mar. 27, 2013, 10:43 AM), <https://www.businessinsider.com/women-in-the-workplace-2013-3>; U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK, REPORT 1092 (Apr. 2021), <https://www.bls.gov/opub/reports/womens-databook/2020/home.htm>.



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GIRL POWER: CERTIFYING WOMEN-OWNED BUSINESSES

Natalie Brandt

I. INTRODUCTION

There are nearly 13 million American women-owned business enterprises.¹ That represents over 40% of American businesses.² Even though men run most publicly traded companies and the U.S. Supreme Court has yet to have a female majority, women undeniably represent an essential and robust piece of the American economy. And as the Chinese Proverb goes, “women hold up half the sky.” Women also pack lunches, drive carpools, care for aging parents, attend soccer games, and run their own companies.

Women become entrepreneurs for various reasons: the desire to be one’s own boss; job dissatisfaction; the pursuit of a passion; financial autonomy; or independence.³ One factor contributing to the growth and success of female entrepreneurship is the Woman-Owned Business Enterprise (“WBE”) certification.

What is a Certified Woman-Owned Business?

In short, a certified WBE is a business in which a woman (or women) owns at least 51% of the company.⁴ Many organizations offer certification, but the Women’s Business Enterprise National Council (“WBENC”) is the premier authority and agency for WBE certification in the United States and its Territories. Headquartered in Washington D.C, WBENC has 14 regional partner organizations (“RPOs”) around the country.⁵ Its certification standards are the most stringent of any certifying organization, and the WBENC certificate carries an unmatched cache and gravitas. A WBE will have a physical certificate, which can (and is often required) to be presented when bidding for certain jobs or contracts.

¹ AMERICAN EXPRESS, THE 2019 STATE OF WOMEN-OWNED BUSINESS REPORT (2019), <https://ventureneer.com/wp-content/uploads/2019/10/Final-2019-state-of-women-owned-businesses-report.pdf>.

² *Id.*

³ 2022 *Women in Business Trends*, GUIDANT, <https://www.guidantfinancial.com/small-business-trends/women-in-business/> (last visited Jan. 27, 2023).

⁴ *Certification*, WBENC, <https://www.wbenc.org/certification/> (last visited Jan. 27, 2023).

⁵ *Id.*

Why Does WBE Certification Exist?

Perhaps Kofi-Anan, the former UN Secretary-General, said it best: “[a]s study after study has taught us, there is no tool for development more effective than the empowerment of women.”⁶ The philosophical underpinning of WBE certification is to empower women in business by “offer[ing] the tools to help them succeed.”⁷

By dint of history, businesses are usually owned or operated by men. After all, it was not until the 19th Amendment was passed in 1920 that American women were given the right to vote. Even without political clout, however, women have owned and operated businesses for centuries. One of the earliest known women entrepreneurs is Anna Bissell.⁸ In the mid-1880s, Anna’s husband invented a small machine to sweep up dust in their shop.⁹ Together, the Bissells turned the clever, homemade domestic device into a business.¹⁰ After being unexpectedly widowed in 1889, Anna—devastated but driven to support her young family—carried on. She turned the Bissell Company into a corporate behemoth.¹¹ You can purchase one of several different Bissell vacuums today.

The WBENC exists to ensure women entrepreneurs can thrive in a world and economic landscape that has historically favored men. A WBE certificate is a badge of honor and a membership card to a powerful organization full of Anna Bissells, big and small.

How Do I Get Certified?

Generally, certification is a five-step process. It can take some time to complete, but it is straightforward. The WBENC provides a comprehensive checklist for applicants to follow. While certification is designed to be a “DIY” journey, some of the requirements often seem opaque; many applicant businesses retain lawyers to assist with the process, particularly with gathering and producing the necessary

⁶ *Empowering women the most effective development tool*, Annan says, U.N.: U.N. NEWS (Feb. 28, 2005), <https://news.un.org/en/story/2005/02/130132>.

⁷ *About WBENC*, WBENC, <https://www.wbenc.org/about-wbenc/#who-we-are> (last visited Jan. 27, 2023).

⁸ Marilyn Much, *Anna Sutherland Bissell Knew How to Clean Up in the Sweeper Market*, INVESTORS.COM: INV.’S BUS. DAILY (Oct. 5, 2018, 1:35 PM) <https://www.investors.com/news/management/leaders-and-success/anna-bissell-carpet-sweeper-founder/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

documentation. But hiring an attorney is not required and should not be considered a barrier to success. Like many aspects of running a business, achieving WBE certification simply takes patience, organization, and drive.

STEP ONE: Eligibility

The first—and perhaps most crucial—step in attaining WBE certification is determining whether your business is eligible.¹² Plenty of companies are owned or operated by women but, for myriad reasons, are not eligible to be classified as certified Woman-Owned Business Enterprises. Who is at the helm is only the first of about six threshold questions for assessing eligibility.

Question 1. Does a woman have majority ownership of the business?

Whether the business is an LLC, a partnership, or another type of entity, it must be owned by one or more women. That means that women hold at least 51% of the equity in the business.¹³ For example, if an LLC (ownership comprised of members) has just two members, one of which is a woman, she must technically own at least 51%. This is most readily proven with formation and governance documents.

Some examples of governing documents include:

- For an LLC, a certificate of formation filed with the Secretary of State, and an Operating Agreement;
- For a partnership, the Partnership Agreement would suffice.
- For a corporation, you could provide the Certificate of Formation and Bylaws, and other agreements that could affect management or control, such as a voting agreement.

Question 2. Does a woman manage the business?

Who makes day-to-day operating decisions? You must be able to demonstrate that a woman truly runs the company.¹⁴ A female leader cannot be a figurehead or operate in name only. A woman must lead the charge, make crucial operating decisions, and actively run things day to day.¹⁵ The simplest way to establish this is with governing

¹² *Certification Process*, WBENC, <https://www.wbenc.org/certification/certification-process/> (last visited Jan. 27, 2023).

¹³ *Certification Eligibility*, WBENC, <https://www.wbenc.org/certification/certification-eligibility/> (last visited Jan. 27, 2023).

¹⁴ *Id.*

¹⁵ *Standards & Procedures*, WBENC: CERTIFICATION ELIGIBILITY, at 12–14, <https://www.wbenc.org/wp->

documents and contracts. In addition to the governing document listed above, some examples of supporting materials would include agreements that affect management or control, such as:

- Management agreements
- Consulting Agreements
- Voting Agreements
- Service agreements affecting day-to-day operations
- Agreements with subsidiaries and other affiliates control

Question 3. Does a woman have unrestricted business control in legal documents and day-to-day operations?⁶

This question may seem very similar to number 2 above, and it is, but there is an important distinction. The company's legal documents must show that a woman (or women) has unrestricted ability to make decisions, vote, take on capital or debt, etc. There cannot be any document that undercuts or circumvents a woman owner's management or authority. For example, is there a management agreement wherein all management decisions are actually delegated to someone else? Does a woman own 51% of the company, but her two fellow members have the ability to veto her decisions? If decisions among members must be unanimous, then a woman owner could be outvoted.

Question 4. Does a woman hold the highest defined title in the company's legal documents?⁷

The actual title does not matter. A business can be run by a president, a CEO, or another C-level executive (think "Chief Idea Officer") or a General Partner in the case of a partnership. Whatever titles exist, the highest one in the power structure must be held by a woman.

Question 5. Is there documented evidence that the female owner(s) contributed capital or has industry expertise?

A woman cannot have simply been installed as a leader in the company. Her ownership must be proven with evidence that her equity stake is the product of her own investment of equity.¹⁸ That equity, however, can be in the form of money or expertise (a/k/a "sweat equity"). Remember, the philosophy behind granting WBE

[content/uploads/docs/WBENC_Standards_Procedures_Feb2018.pdf](#) (last updated Feb. 2018).

¹⁶ *Id.*

¹⁷ See *supra* note 13.

¹⁸ See *supra* note 13.

certification is to encourage and support female entrepreneurs and businesses. In other words, here is where the WBENC says, “put your money where your mouth is.”

Question 6. Is the owner a U.S. Citizen or a Lawful Permanent Resident?

The business must prove that its majority owners (whether comprised of one or more women) are U.S. citizens or lawful permanent residents.¹⁹ A driver’s license, birth certificate, or passport will suffice.

If the answer to these six questions is “yes,” then your business is likely eligible for certification. The next step is to compile and produce a variety of documentation for the certifying agency.

STEP 2: Gather Paperwork²⁰

Step two is gathering the required documentation, which are mostly identified as either “required” or “mandatory.” Mandatory documents must be included.²¹ If one is unavailable, you must provide a written statement explaining why. Required documents, by contrast, must also be produced but can be omitted if it is just not applicable to your business.

The WBENC’s checklist of documents is a helpful resource and provides a comprehensive list of exactly what is required. It is recommended that applicants marshal everything in advance of starting the online application.²² Some materials are optional, but most are mandatory. The following are some of the key documents requested by the WBENC²³:

- Sworn affidavit (the form is provided by the WBENC)²⁴
- Governing documents (e.g., formation documents and organizational agreements, such as those mentioned above)
- Financial Information (e.g., P&L statements, balance sheets, federal tax returns, form w-2)
- Personnel lists

¹⁹ See *supra* note 13.

²⁰ See *supra* note 12.

²¹ *Documentation Required*, WBENC, <https://www.wbenc.org/certification/documentation-required/> (last visited Jan. 27, 2023).

²² *Id.*

²³ *Id.*

²⁴ The sworn affidavit can be found here: https://www.wbenc.org/wp-content/uploads/docs/WBENC_Sworn_Affidavit.pdf.

- Debt information (e.g., loan agreements, security agreements, trusts, promissory notes)
- Management or consulting agreements
- Proof of capital or equity investment
- Resumes of leadership
- Licenses
- Leases

An attorney can be very helpful in preparing the requested materials—chief among those being governance documents—and explaining what is or is not mandatory. Many businesses, however, choose not to hire an attorney when starting a company, and some simply cannot afford to do so. Have no fear, intrepid entrepreneur! You can run a business: you can get certified. It may take time and perseverance, but the WBENC offers significant support, and regional partners are available to assist.²⁵

STEP 3: Apply²⁶

The third step is to complete the application, which is entirely online at WBENC’s website. The application consists primarily of filling in information and uploading supporting documentation. This is also an opportunity to brag: the WBENC asks applicants to tell their company’s stories. Why did you start or join this company? Who are your partners? What is the history of the business? The WBENC is actually interested and genuinely cares. There is a non-refundable application fee, the amount of which is proportional to the applicant company’s revenue. For instance, the application fee for a company generating revenue under \$1 million is \$350; the application fee for a company with revenue up to \$5 million is \$500.

STEP 4: Site Visit²⁷

Once your application is submitted, and the WBENC has confirmed that the supporting documentation is complete, the next step is a site visit. A regional partner for the WBENC will make an in-person visit to your place of business and conduct an interview. Often, applicants find this stage of the process intimidating, but it is a meaningful part of due diligence. “A site audit can feel like an attempt to poke holes in your application so they can deny your acceptance,” says Julie Strong, owner and CEO of C1S Group, a woman-owned construction

²⁵ *Regional Partner Organizations*, WBENC, <https://www.wbenc.org/regional-partner-organizations/> (last visited Jan. 27, 2023).

²⁶ See *supra* note 12.

²⁷ See *supra* note 12.

company based in Dallas, Texas. “But it’s really a very fair and transparent process.”

STEP 5: Certification Determination²⁸

The final step in the certification process is for the regional partner to review the application and decide if the company meets the eligibility requirements. This stage can take up to three months once the application is completed.

A small percentage of applications are denied, most of which are for documentation issues such as outdated ownership. Things happen, and ownership can change hands. For example, a father could leave his business to his daughter, who has successfully run and scaled the business since taking over. But if the operating agreement (in an LLC, for example) is not updated to reflect the change in ownership, the WBENC will deny the application. Denied applicants can appeal the decision within 30 days. If your application is denied for a resolvable documentation issue, you may reapply after six months.

Now What?

Certification is valid for one year from the date of issue.²⁹ WBEs must recertify annually to keep their status.³⁰ Renewal is not automatic, but the process is much simpler than the original application. If there are no changes to management or ownership, it’s as simple as submitting an affidavit, and regular annual financial information such as a tax return and W-2s. If there have been any structural changes to the company, you will need to submit additional updated records to support any changes in ownership or management. Every three years, the WBENC conducts a site audit and conducts interviews. Again, such oversight is benevolent and just continued due diligence.

What Are Some Benefits of Certification?

WBENC and its affiliates and partners provide networking opportunities, access to capital, and even direct access to business opportunities.³¹ The WBENC database serves both the WBEs listed and outside companies that want to do business with WBEs. As a WBE, you can use your certification credentials to reach WBENC

²⁸ See *supra* note 12.

²⁹ *Currently Certified – Get Involved!*, WBENC, <https://www.wbenc.org/certification/currently-certified/> (last visited Jan. 27, 2023).

³⁰ *Id.*

³¹ See *supra* note 4.

corporate members and a host of government agencies, many of which carry mandates to contract with a certain percentage of WBEs. The City of Dallas, for instance, has a formal policy around hiring WBEs for the City's construction, general services, and professional services contracts. It states in part, "[i]t is the policy of the City of Dallas to encourage the growth and development of M/WBEs that can successfully compete for contracting opportunities."³²

A profound challenge for many women entrepreneurs is networking and support. Other women, regardless of industry, can provide unmatched connections, support, resources, and encouragement. In addition to regular networking events, the WBENC provides programming, education, and resources designed specifically to ensure women succeed.

Being a WBE can also help with recruiting. Some businesses now specifically recruit and only hire women. And some women just prefer to work with or for other women. Natalie Wurst, the co-founder of Clutch Creative Marketing (clutchcm.com), notes that most of her 20 employees are women. Natalie values the creativity and comradery of women in the workplace. "Women have a lot to offer, and we enjoy employing them."

Why is the Process So Rigorous?

The rigors of the certification process are precisely why the certificate is so valuable. For years, businesses took advantage of loopholes and lackadaisical oversight. For example, a business owned and operated by men could appoint a female administrative assistant as the President without giving her any authority. Technically, that company could claim to be a woman-owned business and, thus, enjoy minority status and access to customers eager to meet their diversity quotas. This ruse and its various analogs worked for decades.

Over time, however, organizations and communities closed ranks and created precise and robust metrics for achieving WBE status. The philosophy is grounded in support: support of women and their ability to launch, operate, and grow businesses. The WBENC and other such agencies go through a due diligence process to ensure that women truly get the advantages of being a WBE.

³² See the WBENC certification site for the complete list or contact a WBENC regional partner for help.

But I Have a Small Business...

The size and type of business do not matter. A sole proprietorship can qualify as a WBE.³³ The application process is open to all. The smaller the company, the fewer supporting documents needed—a company comprised of one woman has less to prove. The documents, however, still need to be accurate and current. A small business would, perhaps, benefit most from the support, contacts, and resources offered by a community of WBEs.

The Small Business Administration (“SBA”) has its own certification: the Woman-Owned Small Business (“WOSB”) accreditation.³⁴ The application process is similar to that of the WBENC, but it is specifically designed to give women-owned small businesses access to government contracting opportunities.³⁵

Should I Apply?

One does not need WBE certification to succeed. The organization and the certificate exist to encourage and assist businesswomen regardless of their industry, company size, or revenue. The application process is significant, to be sure, but it is also a good checklist of the key documents any functioning business should really have and use. So often, business disputes arise because parties do not take the time to craft or maintain accurate contracts, governance documents, or financial records. By merely asking applicants to prove up their ownership bona fides, the WBENC ends up helping businesswomen take care of their own interests. So, even if you choose not to apply now, the WBENC checklist is an excellent reminder of the documentation necessary to run a successful operation. Seeking WBE certification is your decision, but why not get some help holding up your half of the sky?

³³ See *supra* note 15, at 10.

³⁴ *Women-owned businesses*, SBA, <https://www.sba.gov/business-guide/grow-your-business/women-owned-businesses> (last visited Jan. 27, 2023).

³⁵ *Id.*

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GIRL POWER: Certifying Women- Owned Businesses



What Is A Certified Woman-Owned Business?

A certified WBE is a business in which a woman (or women) owns at least 51% of the company.¹

Many organizations offer certification, but the Women's Business Enterprise National Council (WBENC) is the premier authority and agency for WBE certification in the United States and its Territories.



Why Does WBE Certification Exist?

The WBENC exists to ensure women entrepreneurs can thrive in a world and economic landscape that has historically favored men.

How Do I Get Certified?²

STEP 1 - ELIGIBILITY³

6 threshold questions for assessing eligibility:

1) Does a woman have majority ownership of the business?

- Whether the business is an LLC, a partnership, or another type of entity, it must be owned by one or more women. That means that women hold at least 51% of the equity in the business.

2) Does a woman manage the business?

- You must be able to demonstrate that a woman truly runs the company. A female leader cannot be a figurehead or operate in name only. A woman must lead the charge, make crucial operating decisions, and actively run things day to day.

3) Does a woman have unrestricted business control in legal documents and day-to-day operations?

- The company's legal documents must show that a woman (or women) has unrestricted ability to make decisions, vote, take on capital or debt, etc. There cannot be any document that undercuts or circumvents a woman owner's management or authority.

4) Does a woman hold the highest defined title in the company's legal documents?

- The actual title does not matter. Whatever titles exist, the highest one in the power structure must be held by a woman.

5) Is there documented evidence that the female owner(s) contributed capital or has industry expertise?

- A woman cannot have simply been installed as a leader in the company. Her ownership must be proven with evidence that her equity stake is the product of her own investment of equity.

6) Is the owner a U.S. Citizen or a Lawful Permanent Resident?

- The business must prove that its majority owners (whether comprised of one or more women) are U.S. citizens or lawful permanent residents. A driver's license, birth certificate, or passport will suffice.

If the answer to these six questions is "yes," then your business is likely eligible for certification. The next step is to compile and produce a variety of documentation for the certifying agency.



STEP 2 - GATHER PAPERWORK

Some materials are optional, but most are mandatory. The following are some of the key documents requested by the WBENC:



- Sworn affidavit
- Governing documents
- Financial Information
- P&L statements, balance sheets
- Federal Tax returns, W-2's
- Personnel lists
- Debt information
- Licenses
- Loan agreements, security agreements, trusts, promissory notes
- Proof of capital or equity investment
- Resumes of leadership
- Leases
- Management or consulting agreements

STEP 3 - APPLY

Complete the application, which is entirely online at WBENC's website.

- There is a non-refundable application fee, the amount of which is proportional to the applicant company's revenue.



STEP 4 - SITE VISIT



A regional partner for the WBENC will make an in-person visit to your place of business and conduct an interview.

STEP 5 - CERTIFICATION DETERMINATION

The final step in the certification process is for the regional partner to review the application and decide if the company meets the eligibility requirements.

- This stage can take up to three months once the application is completed.
- Denied applicants can appeal the decision within 30 days. If your application is denied for a resolvable documentation issue, you may reapply after six months.



Now What?

Certification is *valid for one year* from the date of issue. WBEs must recertify annually to keep their status.⁴



What Are Some Benefits of Certification?

WBENC and its affiliates and partners provide networking opportunities, access to capital, and even direct access to business opportunities.⁵

Source • *Girl Power: Certifying Women-Owned Businesses* by Natalie Brandt. Infographic created by Annaliza Rodriguez, Staff Editor (2022-2023).

References

¹ *Certification*, WBENC, <https://www.wbenc.org/certification/> (last visited Jan. 27, 2023).

² *Id.*

³ *Certification Eligibility*, WBENC, <https://www.wbenc.org/certification/certification-eligibility/> (last visited Jan. 27, 2023).

⁴ *Currently Certified - Get Involved!*, WBENC, <https://www.wbenc.org/certification/currently-certified/> (last visited Jan. 27, 2023).

⁵ *Certification*, WBENC, <https://www.wbenc.org/certification/> (last visited Jan. 27, 2023).



POLITICIZING CHILD ABUSE: ANALYZING THE TEXAS ATTORNEY
GENERAL’S ARGUMENTS TO PROHIBIT GENDER-AFFIRMING CARE TO
TRANSGENDER MINORS

Nicole T. LeBoeuf and Derek Mergele-Rust

I. INTRODUCTION

On February 18, 2022, at the request of Representative Matt Krause of Fort Worth, as Chair of the House Committee on General Investigating,¹ Texas Attorney General Ken Paxton issued Opinion No. KP-0401 (“OAG Opinion”).² The OAG Opinion asserts that several procedures and treatments, when approved for minor children, “can” legally constitute child abuse.³ Such treatments, per the OAG Opinion, specifically include puberty-suppressing or puberty-blocking medications, hormonal supplements, and surgeries, labeled by Mr. Krause as “sex-change procedures.”⁴ Although Texas Attorney General opinions are advisory only and cannot make law,⁵ on February 22, 2022, Texas Governor Greg Abbott directed the Commissioner of the Texas Department of Family and Protective Services, Jamie Masters, to investigate “gender transitioning procedures” as child abuse (“Abbott Directive”).⁶ The Abbott

¹ Letter from Chairman Matt Krause, Tex. House Comm. on Gen. Investigating to Tex. Att’y Gen. Ken Paxton (Aug. 23, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0426KP.pdf> [hereinafter Request Letter]; see also Letter from Comm’r Jaime Masters, Tex. Dept. of Family & Protective Servs. to Governor Greg Abbott, State of Tex. (Aug. 11, 2021), https://gov.texas.gov/uploads/files/press/Response_to_August_6_2021_OOG_Letter_08.11.2021.pdf (calling “genital mutilation” actionable and reportable child abuse, unless medically necessary, and proffering an opinion of “medical necessity”).

² Tex. Att’y Gen. Op. No. KP-0401 (2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf>.

³ *Id.* at 2.

⁴ *Id.* at 1–2; Request Letter, *supra* note 1.

⁵ Tex. Govt. Code §§ 402.041, 402.042; cf. *Opinions*, KEN PAXTON ATT’Y GEN. TEXAS, <https://www.texasattorneygeneral.gov/opinions> (describing a Texas Attorney General opinion as a “written interpretation of existing law” and explaining that such opinions “cannot create new provisions in the law or correct unintended, undesirable effects of the law”) (last visited Feb. 3, 2023); see also *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996) (citing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref’d per curiam, 536 S.W.2d 559 (Tex. 1976)) (“While Attorney General opinions are persuasive, they are not controlling on the courts.”).

⁶ Letter from Governor Greg Abbott Letter to Comm’r Jaime Masters, Tex. Dept. of Family & Protective Servs. (Feb. 22, 2022),

Directive also expressly references Texas’s child abuse reporting requirements and the criminal penalties that may be levied against professionals “including doctors, nurses, and teachers” for failing to report abuse.⁷ Finally, the Abbott Directive directs “all other state agencies” to “follow the law as explained in OAG Opinion No. KP-0401.”⁸

Upon receipt of the Abbott Directive, the Texas Department of Family and Protective Services (“DFPS”) immediately began investigating families of transgender⁹ children, while internally directing its employees to refrain from using any emails or text messages for such investigations, and to pass all such investigations up the chain to high-level supervisors.¹⁰ A number of lawsuits have now been filed seeking to declare the directive in the Abbott Directive to be ultra vires (meaning that it was done beyond the scope of his powers) and a violation of separation of powers. The other legal arguments assert that gender-affirming care for minors, when provided in connection with a medical diagnosis of gender dysphoria¹¹ is medically accepted care that can be lifesaving, medically necessary, and age-appropriate.¹²

During the 87th Regular session, the Texas Legislature considered, but did not pass, proposed legislation that would have changed Texas law to include treatment for gender dysphoria under the definition of

<https://gov.texas.gov/uploads/files/press/O-MastersJaime20220221358.pdf>
[hereinafter Abbott Directive].

⁷ *Id.*

⁸ *Id.*

⁹ A transgender boy is someone who assigned a female sex at birth but persistently, consistently, and insistently identifies as male. A transgender girl is someone who was assigned a male sex at birth but persistently, consistently, and insistently identifies as female.

¹⁰ See *Texas Department of Family and Protective Services Records Regarding State Directive Classifying Gender-Affirming Care as ‘Child Abuse,’* AM. OVERSIGHT (Aug. 19, 2022), <https://www.americanoversight.org/document/texas-department-of-family-and-protective-services-records-regarding-state-directive-classifying-gender-affirming-care-as-child-abuse>.

¹¹ According to the American Psychiatric Association’s Diagnostic & Statistical Manual of Mental Disorders (“DSM-V”), “gender dysphoria” is the diagnostic term for the condition experienced by some transgender people of clinically significant distress resulting from the lack of congruence between their gender identity and the sex assigned to them at birth. In order to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.

¹² See *Abbott v. Doe*, No. 03-22-00107-CV, 2022 Tex. App. LEXIS 1607, 2022 WL 710093 (Tex. App.—Austin Mar. 9, 2022).

child abuse.¹³ If the OAG Opinion and the subsequent Abbott Directive are without legal authority, then the open investigations of the families of transgender children, based on the provision of medically prescribed gender-affirming care, would appear to be nothing more than the inappropriate politicization of private medical decisions made by Texas families and their children.

II. THE TEXAS ATTORNEY GENERAL'S ARGUMENTS

Child abuse has several definitions under the Texas Family Code,¹⁴ but the Attorney General specifically points to the first four definitions in the statute as relevant to the OAG Opinion. In the opinion, the Attorney General argues that:

- 1) elective “sex-change” procedures performed on minors often sterilize the minor in violation of the minor’s constitutional right to procreate;
- 2) insufficient evidence exists to prove that if puberty blockers are stopped, the body will resume a normal puberty process, potentially effecting a child’s ability to procreate;
- 3) no evidence exists to demonstrate long-term mental health benefits or a reduction in suicide rates from hormonal or surgical intervention;
- 4) the State has a duty to intervene in parental choices when procedures impose significant or irreversible effects on children; and

¹³ See S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021), <https://legiscan.com/TX/text/SB1646/id/2332814> (Senate Bill 1646 would have amended Section 261.001 of the Texas Family Code to add certain treatments to the definition of “child abuse.”); see also H.B. 68, 87th Leg., Reg. Sess. (Tex. 2021), <https://legiscan.com/TX/bill/HB68/2021> and H.B. 1339, 87th Leg., Reg. Sess. (Tex. 2021), <https://legiscan.com/TX/bill/HB1339/2021> (House Bill 68 and House Bill 1339 would have prohibited medical treatment for gender dysphoria in minors).

¹⁴ See e.g., Tex. Fam. Code §261.001(1)(A)–(D) (“Abuse’ includes the following acts or omissions by a person: (A) mental or emotional injury to a child that results in an observable and material impairment in the child’s growth, development, or psychological functioning; (B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child’s growth, development, or psychological functioning; (C) physical injury to a child that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm; [and] (D) failure to make a reasonable effort to prevent an action by another person that results in the physical injury that results in the substantial harm to the child . . .”).

- 5) a conservator’s right to consent to medical treatment does not extend to elective medical procedures and treatments that infringe on a child’s constitutional right to procreate.¹⁵

The next sections will identify the current standards of care for a minor diagnosed with gender dysphoria, and then analyze the Attorney General’s arguments against the adopted standards of care.

III. AGE-APPROPRIATE STANDARDS FOR GENDER-AFFIRMING CARE

The World Professional Association of Transgender Health (“WPATH”) is an international interdisciplinary professional and educational organization dedicated to transgender health.¹⁶ WPATH has developed medical standards of care for treating persons with gender dysphoria.¹⁷ Gender dysphoria is the formal diagnosis from the DSM-V for when a person’s gender identity¹⁸ does not match the gender assigned to them at birth. The WPATH Standards of Care have been adopted by the American Medical Association, the American Pediatric Association, and the Endocrine Society, and are widely viewed as the standard practices for treating gender dysphoria.

Treating gender dysphoria in minors is critical because minors who experience gender dysphoria are nine times more likely to attempt suicide than their peers.¹⁹ For people who suffer from gender dysphoria, the condition is worsened as their body develops through puberty and further diverges from their gender identity.²⁰ Prescribed treatments of gender dysphoria—puberty blockers, hormone therapy, and surgery—are meant to alleviate the dysphoria and reduce the divergence between a person’s gender identity and their physical attributes.

Puberty blockers were first approved by the Food and Drug Administration (“FDA”) in 1993.²¹ Initially, puberty blockers were

¹⁵ Tex. Att’y Gen. Op. No. KP-0401 (2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf>.

¹⁶ *Mission and Vision*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, <https://www.wpath.org/about/mission-and-vision> (last visited Feb. 3, 2023).

¹⁷ *Id.*

¹⁸ Gender identity refers to a person’s internal, innate, and immutable sense of belonging to a particular gender.

¹⁹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020).

²⁰ *Id.*

²¹ *About Puberty Blockers*, OR. Health & Science Univ. Gender Clinic (Sept. 2020), <https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Puberty-Blockers-Handout.pdf>.

developed for children who were entering puberty at a very early age. In those cases, puberty blockers were prescribed by a doctor for a period of time, usually no more than two years, so that a child could enter puberty at a more “age-appropriate” time. Once a doctor determined that it was an appropriate time for the child to begin puberty, the child simply stopped taking the puberty blockers and entered puberty. Like any medication, puberty blockers are not side-effect free, and there is a possibility that taking puberty blockers could impact bone density, fertility, and mental health. In the case of gender dysphoria, the goal of puberty blockers is to stall puberty to give the minor additional time to evaluate their gender identity with mental health and medical professionals.²²

Hormone therapy treatments are also prescribed by doctors. Usually, if a minor is transitioning from male to female, the hormone treatment consists primarily of estrogen. If a minor is transitioning from female to male, the hormone treatment consists primarily of testosterone. The goal of hormone therapy is to allow the body to develop more consistently with the person’s gender identity and to reduce the dysphoria between the minor’s gender identity and the development of their body through puberty. Hormone therapy is only prescribed in consultation with a doctor, (preferably a mental health professional) and with the minor’s informed consent, because if the minor decides to stop taking the hormone therapy, some of the bodily developments may not be entirely reversible without surgery.

Finally, surgery is treated as appropriate only in rare circumstances. The WPATH Standards of Care only approve surgery in minors who are transitioning from female to male and where the gender dysphoria is having a severe impact on the minor’s mental health.²³ The only surgery that falls within the WPATH Standards of Care is what is commonly referred to as “top surgery,” which is the removal of breast tissue to conform to a “common” male appearance.

The prescription of puberty blockers, hormone therapy, or surgery by a doctor, require the consent of all parents with legal rights to the child. If one parent believes that the prescribed treatment is in the best interest of their child, but the other parent does not, the treatment may not proceed. This is true for any treatment of a minor child.

²² *Id.* at 2.

²³ E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, INT’L J. TRANSGENDER HEALTH, Sept. 15, 2022, at 48.

IV. EVALUATION OF THE ATTORNEY GENERAL’S OPINION, THE GOVERNOR’S DIRECTIVE, AND DFPS’S ACTIONS

A. *Neither the Texas Governor nor the Texas Attorney General have authority to change or dictate how the DFPS implements its work.*

On May 13, 2022, the Texas Supreme Court noted, “DFPS’s press statement [] suggests that DFPS may have considered itself bound by either the Governor’s letter, the Attorney General’s Opinion, or both . . . but neither the Governor nor the Attorney General has statutory authority to directly control DFPS’s investigatory decisions.”²⁴

By attempting to redefine what constitutes child abuse and purporting to “direct” DFPS to investigate all reported instances of gender-affirming care being provided to minor children, the Governor exceeded his authority. Under the Texas Constitution, the Governor is authorized to “cause the laws to be faithfully executed,” but is not authorized to make the law (as the Legislature can).²⁵ Also, neither he nor the Attorney General can suspend laws under the Texas Constitution.²⁶ The power to make rules regarding investigations of child abuse resides with DFPS—not the Governor or the Attorney General—and must be done in conformance with the rulemaking process.²⁷

The Texas Constitution prohibits one branch of state government from exercising power inherently belonging to another branch.²⁸ The Legislature considered these very changes to the definition of “child abuse” during the 87th Regular Session of the Texas Legislature and declined to adopt such changes by amending existing statutes or passing new ones.²⁹ Any effort to do so through the Attorney General or the Governor is an overreach by the executive branch into the legislative branch.

²⁴ *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022) (reviewing on mandamus an order granting injunctive relief entered in a case addressing the OAG Opinion, the Abbott Directive, and the DFPS directive).

²⁵ Tex. Const. art. IV, § 10.

²⁶ Tex. Const. art. I, § 28 (“No power of suspending laws in this State shall be exercised except by the Legislature.”).

²⁷ See Tex. Fam. Code Ann. §§ 261.001, 261.301; Tex. Hum. Res. Code Ann. § 40.027(c)(3); Tex. Gov’t Code Ann. §§ 2001.023, 2001.029, 2001.032, 2001.033, 2001.035.

²⁸ Tex. Const. art. II, § 1.

²⁹ See sources cited *supra* note 13.

The “power to make, alter, and repeal laws” lies with the state Legislature, and such power is “limited only by the express or clearly implied restrictions thereon contained in or necessarily arising from the Constitution.”³⁰ Texas law mandates that the executive branch and the courts must, in construing statutes, take them as they find them.³¹ In particular, the other branches are not empowered to “substitute what [they] believe is right or fair for what the legislature has written.”³² Doing otherwise impermissibly trespasses into the role of the Legislature.

B. DFPS’s changes to its definition of abuse and its targeting of the families of transgender children exceed its rulemaking authority.

Texas agencies operate under rules which, by definition, implement, interpret, and prescribe law or policy, or describe the procedure or practice requirements of a state agency.³³ The creation of an agency policy that enlarges the definition of child abuse to include the provision of evidence-based and medically necessary gender-affirming treatment to a minor with a medically diagnosed condition³⁴ constitutes rule-making.³⁵ Although DFPS Commissioner Masters is statutorily authorized to “develop and adopt standards for persons who investigate suspected child abuse or neglect at the state or local level” by rulemaking,³⁶ any such rulemaking is governed by statute.

Under the Texas Administrative Procedure Act, a Texas state agency’s rulemaking authority is limited by the Texas Government Code.³⁷ In order to change its rules regarding what constitutes child abuse, DFPS

³⁰ *Diaz v. State*, 68 S.W.3d 680, 685 (Tex. App.—El Paso 2000, pet denied) (citations omitted).

³¹ See *City of Port Arthur v. Tillman*, 398 S.W.2d 750, 752 (Tex. 1965); *Tex. Highway Comm’n v. El Paso Bldg. & Const. Trades Council*, 234 S.W.2d 857, 863 (Tex. 1950); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920).

³² *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017).

³³ Tex. Gov’t Code § 2001.003(6)(A).

³⁴ See the order of temporary injunction entered in *Doe v. Abbott*, No. D-1-GN-22-000977, 2022 WL 831383, at *1 (353rd Dist. Ct., Travis County, Mar. 11, 2022), in which the Court found after evidentiary hearing that “gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022” and “[t]he Governor’s Directive was given the effect of a new law or new agency rule, despite no new legislation, regulation or even stated agency policy.”

³⁵ See *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 657, 658 (Tex. App.—Austin 1999, writ dismissed w.o.j.) (holding that memoranda constituted a “rule” because they “set out binding practice requirements” that “substantially changed previous enforcement policy”).

³⁶ Tex. Hum. Res. Code Ann. § 40.002(b); Tex. Fam. Code § 261.310(a).

³⁷ Tex. Gov’t Code § 2001.023.

must substantially comply with such statutes. DFPS has not done so as there has been no publication in the Texas Register of the proposed rule change, no reasonable opportunity for public comment, no legislative review of the proposed rule, and no formal adoption of the rule by the agency together with a summary of comments and the factual bases for the rule.³⁸ Nor has there been any showing of the need for an emergency rule.³⁹

A rule that is not properly promulgated under the mandatory requirements of the Texas Administrative Procedure Act is invalid.⁴⁰ But even if DFPS had complied with the rulemaking requirements of the Texas statutes, such a rule would be invalid because it stands in contravention of the agency's enabling statute. Section 40.002 of the Texas Human Resources Code specifies that DFPS "shall . . . provide family support and family preservation services that respect the fundamental right of parents to control the education and upbringing of their children."⁴¹ Thus, a rule is facially invalid if it (1) contravenes specific statutory language of an agency's enabling statute; (2) runs counter to the general objectives of the statute; or (3) imposes burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.⁴²

Additionally, a rule that purports to govern matters outside the authority of an agency is also invalid as a matter of law. The definition of "child abuse" is provided by statute in Tex. Fam. Code § 261.001(1). A change to the statutory definition falls outside of the agency's authority, and is a matter appropriately left to the Legislature.⁴³

C. The OAG Opinion, Abbott Directive, and DFPS's decision to accept gubernatorial direction governing its practice constitute violations of the United States and Texas Constitutions.

Parents have a fundamental right to oversee the care, custody, and control of their children without government intervention.⁴⁴ This

³⁸ Tex. Gov't Code §§ 2001.023, 2001.029, 2001.032, 2001.033, and 2001.035.

³⁹ See *id.* § 2001.034.

⁴⁰ *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008).

⁴¹ Tex. Hum. Res. Code § 40.002(b)(2).

⁴² *Gulf Coast Coal. of Cities v. Pub. Util. Comm'n*, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.).

⁴³ See *Williams v. Tex. State Bd. of Orthotics & Prosthetics*, 150 S.W.3d 563, 568 (Tex. App.—Austin 2004, no pet.) ("An agency rule is invalid if . . . the agency had no statutory authority to promulgate it . . .").

⁴⁴ *Troxell v. Granville*, 530 U.S. 57, 66 (2000).

means that the government cannot interfere with child-rearing decisions because they do not like the decisions that the parents are making, without a showing that the child is in immediate danger.⁴⁵ This fundamental right is embedded in the Due Process and the Equal Protection Clauses of the United States and Texas Constitutions.⁴⁶ Additionally, parents are legally presumed to act in their child's best interest.⁴⁷ Fundamental rights that are protected by the Constitution enjoy strict scrutiny.⁴⁸ Strict scrutiny requires the government to show that any law restricting a fundamental right is narrowly tailored to further a compelling governmental interest.

In 2021, Arkansas passed a law that banned gender-affirming care for minors.⁴⁹ The Government argued that its compelling governmental interest was “protecting the health and safety of its citizens, particularly ‘vulnerable’ children who are gender nonconforming.”⁵⁰ The Court held that the defendants failed to show that “Arkansas ha[d] a compelling state interest in infringing upon parents’ fundamental right to seek medical care for their children, or that [the law] was narrowly tailored to serve that interest.”⁵¹ Specifically, Arkansas’s goal was “pretextual” because the law allowed all of the same treatments for minors who did not suffer from gender dysphoria.⁵² In the case of puberty blockers, this would include minors who are entering puberty too early, thus allowing minors access to the same treatment as long as they have a different clinical diagnosis. In the case of hormone therapy, a similar situation would occur as many teenage girls are prescribed estrogen treatments in the form of birth control, but prescribing estrogen would be banned specifically for transgender girls under the guise of protecting the health and safety of children. As a result, the Eastern District Court in Arkansas expressly says that the purpose of the law in Arkansas was not to ban a treatment, but rather to “ban an outcome that the State deems undesirable.”⁵³ Therefore, the law does not stand up to strict scrutiny, and is not valid.

⁴⁵ *Id.* at 68–69.

⁴⁶ *Id.* at 66; *see also In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020).

⁴⁷ *Troxell*, 530 U.S. at 68.

⁴⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973) (“[T]his Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights . . .”).

⁴⁹ *See Brandt v. Rutledge*, 551 F.Supp.3d 882, 887 (E.D. Ark. 2021).

⁵⁰ *Id.* at 887–88.

⁵¹ *Id.* at 893.

⁵² *Id.*

⁵³ *Id.* at 891.

Texas, and specifically DFPS in child abuse investigations, faces a similar hurdle because, like the Arkansas law, the Government's actions are not narrowly tailored, and because the medical treatments in question are consensus treatments adopted by the medical community. DFPS would struggle to argue why the exact same treatment would be harmful to minors with one clinical diagnosis, but not harmful to minors with another clinical diagnosis. Because the treatments are medically acceptable in other situations, the treatments fall within the scope of the parent's decision-making authority and are protected by the Constitution.

V. CONCLUSION

The reality is that children's lives are on the line. As identified above, transgender children are nine times more likely to attempt to commit suicide than their cisgender peers.⁵⁴ Not all parents agree on the best way to treat their children who suffer from gender dysphoria. However, that is a conversation to be had between parents, the child, and medical professionals. The government has no legal authority to insert itself into that conversation, especially when their goal is merely to politicize the definition of child abuse in an effort to ban an outcome the government or some of its officials consider to be undesirable.

⁵⁴ See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020).

ISSUES FACED BY TRANSGENDER MIGRANTS IN U.S. DETENTION
CENTERS

Rebecca L. Warren

I. INTRODUCTION

Monserrath Lopez, a transgender woman, was walking through a public park in her home country of Honduras, listening to music, when four masked men appeared and beat her unconscious.¹ After waking up several hours later in an unknown location, the same men beat her, sexually abused her, sheared off her hair with scissors, and threatened to kill her.² Fearing for her life, Monserrath spent the next three months making her way through Mexico to seek refuge in the United States.³

When Monserrath arrived at a Texas port of entry, she presented herself to the United States Border Patrol and requested asylum.⁴ After being held in isolation for four days, she was handcuffed, shackled, and transported to a men's detention center in Texas, where she was held for six months.⁵ Throughout her detention, she was sexually assaulted and verbally harassed by male detainees.⁶ When she reported this, guards responded that the alternative was solitary confinement.⁷

II. THE ISSUES

A. *Transgender individuals face unique challenges.*

A transgender person (also referred to as a gender nonconforming person) is one whose gender identity, gender expression or behavior does not conform social and cultural expectations based on the sex assigned at birth.⁸ A person's sexual orientation cannot be assumed

¹ Adam Frankel, "Do You See How Much I'm Suffering here?" *Abuse against Transgender Women in U.S. Immigration Detention*, HUMAN RIGHTS WATCH, Mar. 23, 2016, at iii, https://www.hrw.org/sites/default/files/report_pdf/uso3r6_web.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at iii–iv.

⁸ Mayo Clinic Staff, *Transgender Facts*, MAYO CLINIC (July 23, 2021), <https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-facts/art-20266812>.

from their gender identity or expression and being transgender may or may not involve hormonal treatments or surgical procedures.⁹

Transgender individuals who experience distress or discomfort due to the difference between their gender identity and the sex assigned to them at birth may be diagnosed with gender dysphoria, a mental health disorder recognized by the American Psychiatric Association.¹⁰ Gender dysphoria can lead to other mental health challenges such as anxiety, depression, and post-traumatic stress disorder.¹¹ Being transgender, however, is not a mental health disorder.¹²

Transgender individuals are often marginalized in their communities and experience an increased risk of assault and other forms of abuse due to the social stigma associated with their nonconforming gender identity or expression.¹³ A transgendered person, more likely to face rejection from family and physical or sexual assault, may carry with them a lifetime of untreated trauma that can contribute to addiction and exacerbate mental health challenges.¹⁴ According to a 2015 survey of more than 27,700 transgender people, 40% reported attempting suicide, and 82% had considered suicide in their lifetime.¹⁵

In terms of educational experiences, 77% of transgender persons in the survey group reported negative experiences in grades kindergarten through twelfth grade (54% were verbally harassed, 24% were physically attacked, and 13% were victims of sexual violence), and 17% of the survey group reported leaving school completely between

⁹ *Id.*

¹⁰ *A glossary: Defining Transgender Terms*, MONITOR ON PSYCHOLOGY, Sept. 2018, at 32, <https://www.apa.org/monitor/2018/09/ce-corner-glossary>.

¹¹ *Transgender: Ensuring Mental Health*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/21963-transgender-ensuring-mental-health>, (last reviewed Oct. 10, 2021).

¹² *Id.*

¹³ See Jaclyn M. White Hughto, Sari L. Reisner, & John E. Pachankis, *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, SOC. SCI. & MED., (forthcoming Dec. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4689648/>.

¹⁴ *Id.*; see also Susannah Hermaszewska, Angela Sweeney, B. Camminga, Riley Botelle, Kate Elliott, & Jacqueline Sin, *Lived experiences of transgender forced migrants and their mental health outcomes: systematic review and meta-ethnography*, BJPSYCH OPEN, May 2022, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9169499/>.

¹⁵ SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* (Dec. 2016), <https://calculators.io/national-transgender-discrimination-survey/>.

kindergarten and twelfth grade due to mistreatment.¹⁶ The United Nations Human Rights Commissioner describes the experience of trans people as being caught in a “spiral of exclusion” that often begins in childhood with bullying at school and rejection from family and later involves marginalization and stigmatization in their communities and denial of employment.¹⁷ Unable to enter the workforce, transgender individuals often end up homeless.¹⁸

Because of these challenges, transgender persons are characterized as a vulnerable group by not only human rights organizations but also United States government agencies.¹⁹ Transgender people are often victims of violent acts that are the manifestation of “deeply entrenched stigma and prejudice [and] irrational hatred... driven by an intention to punish those seen as defying gender norms.”²⁰ In fact, transgender people in the United States are four times more likely to be the victim of a crime when compared to people who express gender based on their sex assigned at birth (86.2 victimizations per 1000 compared to 21.7 victimizations per 1000).²¹

Facing social aggression and violent crime, as well as barriers to education, housing, and employment, many transgender persons live in fear and poverty.²² Ultimately, due to institutionalized oppression and increased rates of poverty, many transgendered persons face criminal charges and are over-represented in the criminal justice system.²³

¹⁶ *Id.*

¹⁷ *The struggle of trans and gender-diverse persons*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> (last visited Jan. 28, 2023).

¹⁸ *Id.*

¹⁹ *Id.*; see *Vulnerable Populations: Transgender Care Program*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT: ENFORCEMENT AND REMOVAL OPERATIONS (June 2021), <https://www.ice.gov/doclib/detention/transgenderInfographic.pdf>.

²⁰ See *supra* note 17.

²¹ Press Release, Rachel Dowd, UCLA School of Law Williams Institute, Transgender people over four times more likely than cisgender people to be victims of violent crime (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/>.

²² *Quick Guide to the Criminalization of Transgender and Gender Non-Conforming People*, TRANSFORMATIVE JUST. L. PROJECT ILL., <https://chartreuse-roadrunner-rpsl.squarespace.com/s/Quick-Guide-to-the-Criminalization-of-Trans-People.pdf> (last visited Jan. 28, 2023).

²³ *Id.*

B. *Transgender individuals often experience significant trauma in detention.*

“A trans person is murdered every three days in the world, with the majority of these murders occurring in Latin America.”²⁴ A transgender person’s decision to migrate is sometimes driven by a need for safety.²⁵ Historically, however, migrant detainees were unsafely housed based on their sex assigned at birth, which led to a high number of reports of sexual assault and other forms of mistreatment that disproportionately affected transgender women.²⁶ In response, the United States encouraged detention facilities to separate transgender women out of male holding cells to improve safety and reduce the number of sexual assault incidents.²⁷

This separation, however, led to the use of solitary confinement as the primary alternative.²⁸ While the United States issued updated guidance in 2015 for how to provide a safe environment for transgender detainees, there is still no standard set of procedures that must be followed housing transgender migrants.²⁹ For example, the 2015 guidance memo states that Enforcement and Removal Operations should consider facilities that “maintain a functioning Transgender Classification and Care Committee”; facilities that “operate a Protective Custody Unit (PCU) for transgender detainees”; or facilities that “demonstrate best practices in the care of . . . transgender . . . detainees”³⁰ Placement in these facilities is not required, however, and if it is not practicable, any facility may be

²⁴ Laura P. Minero, Sergio Domínguez Jr., Stephanie L. Budge & Bamby Salcedo, *Latinx trans immigrants’ survival of torture in U.S. detention: A qualitative investigation of the psychological impact of abuse and mistreatment*, 23 INT’L J. TRANSGENDER HEALTH 36, 36 (2022),

<https://www.tandfonline.com/doi/pdf/10.1080/26895269.2021.1938779>.

²⁵ *Id.*; see also Kristen A. Gonzalez, Roberto L. Abreu, Cristalís Capielo Rosario, Jasmine M. Koech, Gabriel M. Lockett & Louis Lindley, “A center for trans women where they help you”: Resource needs of the immigrant Latinx transgender community, 23 INT’L J. TRANSGENDER HEALTH 60, 60 (2020),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8986257/>.

²⁶ Hermaszewska et al., *supra* note 14, at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Memorandum from Thomas Homan, Exec. Assoc. Dir., U.S. Immigrations and Customs Enft, to Assistant Dirs., Deputy Assistant Dirs., Field Office Dirs., Deputy Field Office Dirs., Assistant Field Office Dirs. & ICE Health Serv. Corps, U.S. Immigrations and Customs Enft on Further Guidance Regarding the Care of Transgender Detainees (June 19, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf> [hereinafter Guidance Memo].

³⁰ *Id.* at 4 (emphasis added).

chosen as long as the field director “ensures the facility can appropriately care for the individual.”³¹ The updated guidance also does not prohibit placing a transgender detainee in solitary confinement (labeled as “administrative segregation”) and states that it may be used as a last resort when no other temporary housing option exists.³²

Solitary confinement is generally not considered an appropriate way to ensure the protection of transgender persons.³³ In fact, international organizations and human rights experts have stated that prolonged solitary confinement may amount to cruel and inhumane treatment that would constitute a human rights violation due to the psychological harm it causes.³⁴ The Mandela rules, a set of policies published by the United Nations, regards solitary confinement for more than 15 consecutive days as a form of torture.³⁵

Currently, such practices are allowed in U.S. immigration detention facilities, as placement in a dedicated transgender unit or facility is not practicable or even possible.³⁶ The last remaining facility with a dedicated transgender unit transferred all transgender detainees to other facilities in 2020 after falling under scrutiny for inadequate medical treatment (including accusations that high blood pressure medications were refused).³⁷

The death of two transgender women while in U.S. immigration custody in recent years highlighted the unique circumstances faced by

³¹ *Id.* (emphasis added).

³² *Id.*

³³ See U.N. High Comm’r for Refugees, Guidelines on International Protection No. 9, at 7 & n.51 (Oct. 23, 2012), <http://www.unhcr.org/50ae466f9.pdf>.

³⁴ Press Release, Special Procedures, U.N. Human Rights Office of the High Comm’r, U.S.: prolonged solitary confinement amounts to psychological torture, says UN expert (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture>.

³⁵ *Id.*; accord G.A. Res. 70/175, the Nelson Mandela Rules, at 16, 17 (Jan. 8, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement>.

³⁶ See Mica Rosenberg & Ted Hesson, *Exclusive: Serious health care lapses found in U.S. detention center housing transgender migrants*, REUTERS: U.S. NEWS (Mar. 2, 2022 12:44 PM), <https://www.reuters.com/article/us-usa-immigration-transgender-exclusive/exclusive-serious-health-care-lapses-found-in-u-s-detention-center-housing-transgender-migrants-idUSKBN20P1OT>.

³⁷ *Id.*

many transgender migrants³⁸ and nudged some policymakers to support alternatives to detention for transgender individuals.³⁹

III. THE SOLUTIONS

A. *Detention is not the only option for many transgender migrants arriving to the U.S.*

United States immigration law does not require the detention of all migrants who enter the United States without prior approval.⁴⁰ Under the Immigration and Nationality Act (“INA”), the Department of Homeland Security (“DHS”) is required to detain certain individuals for criminal reasons such as aggravated felonies, membership in a terrorist organization, drug crimes, and other crimes involving “moral turpitude” or acts that are considered depraved or otherwise violate accepted standards).⁴¹ Migrants who are waiting for deportation must also be detained under most conditions.⁴²

In many cases, however, the DHS may decide whether to detain the migrant or opt for an alternative program such as supervised release while a deportation decision is pending.⁴³

It is unknown how many transgender detainees are currently in immigration custody in the United States, but U.S. Immigration and Customs Enforcement (“ICE”) published a report that showed 124 total transgender migrants had been detained for the 2022 fiscal year, with 18 in custody as of September 26, 2022.⁴⁴ The report reveals that ICE facilities placed vulnerable persons in segregation (including transgender individuals as well as those with mental health disorders and those on suicide watch) for the first three quarters of fiscal year

³⁸ See Tina Vásquez, *Organizers say ending trans detention is a matter of life and death*, PRISM: IMMIGRATION (June 28, 2022), <https://prismreports.org/2022/06/28/ending-trans-detention-life-or-death/>.

³⁹ See Press Release, Congressman Mike Quigley Representing the 5th District of Ill., Quigley Advocates for Trans Immigrants During ICE Hearing (May 13, 2021), <https://quigley.house.gov/media-center/press-releases/quigley-advocates-trans-immigrants-during-ice-hearing>.

⁴⁰ See generally HILLEL SMITH, CONG. RESEARCH SERV., THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION, IF11343 (last updated Sept. 1, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11343>.

⁴¹ *Id.* (citing INA § 236(c)).

⁴² *Id.* (citing INA § 241(a)).

⁴³ *Id.* (citing INA § 236(a)).

⁴⁴ U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FY 2022 DETENTION STATISTICS, found under [Trans. Detainee Pop. FY22 YTD](#) (2022), <https://www.ice.gov/detain/detention-management> (last updated Jan. 19, 2023).

2022 in 835 instances (for both disciplinary and non-disciplinary reasons).⁴⁵

The 2015 ICE guidance memo encouraged DHS field directors to exercise discretion when deciding whether a transgender individual should be detained if the person is not subject to mandatory detention.⁴⁶ Since 2004, ICE has provided alternatives to detention, such as technological tracking to supervise activities of non-detained migrants awaiting immigration hearings.⁴⁷

B. Transgender migrants may qualify for asylum in the United States.

Asylum is a form of protection that allows an individual to remain in the United States when the person has suffered persecution or fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion.⁴⁸ Transgender individuals have applied and qualified for asylum in the United States as a member of a particular social group since 2000, as seen in the case of *Hernandez-Montiel v. INS* from the 9th Circuit.⁴⁹

In that case, Hernandez-Montiel was a gay man with a feminine personality who began expressing himself as female at age 12 in his home country of Mexico.⁵⁰ He faced reprimands from family and school officials, death threats from parents of schoolmates, rape and sexual assault from police officers at age 14, and a knife attack from young men in his community that required hospitalization.⁵¹ He fled to the United States at age 15 in 1993, but was arrested and returned to Mexico, where he was enrolled in a conversion program to “cure” him of his gender orientation.⁵² He then made numerous attempts to seek refuge in the United States, and finally succeeded in applying for

⁴⁵ *Id.* (found under Vulnerable & Special Population).

⁴⁶ Guidance Memo, *supra* note 29, at 1.

⁴⁷ *Alternatives to Detention*, ICE, <https://www.ice.gov/features/atd> (last updated Dec. 23, 2022).

⁴⁸ *Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (last updated Sept. 19, 2022).

⁴⁹ *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (holding that sexual orientation and sexual identity can be the basis for establishing a particular social group for the purposes of granting asylum and trans people are members of a qualifying particular social group), *overruled on other grounds by* *Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005).

⁵⁰ *Id.* at 1087.

⁵¹ *Id.* at 1088.

⁵² *Id.*

asylum in February of 1995.⁵³ While he was deemed credible by the courts, he was initially denied asylum.⁵⁴ After a number of appeals, the Ninth Circuit determined that he should be granted asylum because he should not be forced to change his “sexual orientation or identity,” a fundamental characteristic of his identity.⁵⁵

Many other transgender migrants have been granted asylum since the case of Hernandez-Montiel, including Monserrath Lopez, the transgender Honduran woman who was introduced at the beginning of this article.⁵⁶ Asylum is not the only form of protection for a transgender person entering the United States without permission.⁵⁷ As an alternative to asylum, an individual can apply for Withholding of Removal, which can allow the applicant to remain in the United States and work lawfully (though the person will not be able to qualify for a green card).⁵⁸ To qualify for withholding of removal, a transgender individual must show “that [it] is more likely than not that [they] will suffer future persecution” based on their status as a transgender person.⁵⁹

IV. RECOMMENDATIONS

Considering the lifelong trauma experienced by many transgender people and the abuse they face in detention when attempting to seek refuge in the United States, it is necessary to consider ways to improve the immigration and detention process in the interest of safety and human rights.

First, we must remember that immigration detention is civil detention and not criminal detention. While some enter the United States with criminal backgrounds that require mandatory detention, many have no criminal background or have only minor, non-felony convictions, and have fled to the United States in search of safety.

Because of the increased risk to transgender persons generally, ICE must exercise its discretion in the interest of the safety of the transgender individual and order supervised release where detention

⁵³ *Id.* at 1089.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1095.

⁵⁶ Frankel, *supra* note 1, at iv.

⁵⁷ *Types of Asylum*, U.N. HIGH COMM’R FOR REFUGEES: HELP, <https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/> (last visited Feb. 3, 2023).

⁵⁸ *Id.*

⁵⁹ *Id.*

is not mandatory by law. Transgender detainees who are not required to be detained by law should be released from custody, enrolled in an alternate supervision program, and provided a list of legal resources to assist in applying for asylum or withholding of removal.

Second, where detention is mandatory, there should be a prohibition of solitary confinement for non-disciplinary reasons (such as separating a transgender woman from male cell mates). Immigration agencies must otherwise be required to follow the standards set forth in the 2015 guidance for transgender detainees. Further, the public must call for increased training of detention center staff and supervisors who supervise transgender individuals in order to increase recognition of the unique circumstances faced by transgender detainees and improve medical care. For example, a detainee who was receiving hormone therapy when taken into custody must have continued access to that therapy.

Finally, each of us should recognize and embrace our cultural shift toward the greater inclusion of transgender persons. While the United States has made progress in its embrace of LGBTQ rights in comparison to governments that criminalize gender nonconformity or turn a blind eye to hate crimes targeting transgender persons, there remains deeply entrenched stigma, discrimination, prejudice, and sometimes hatred in many communities. This influences not only who we elect and the policies we adopt, but also our own individual levels of acceptance and respect for those who are different from us. We must all recognize that those who do not conform to socially accepted—and expected—gender norms and express themselves in non-conforming ways are not inherently dangerous just because they are different from the majority.

V. CONCLUSION

Transgender persons from other countries often seek safety in the United States because of mistreatment, barriers to education and the workforce, and the poverty that results. They often arrive carrying the burden of a lifetime of trauma, which can lead to mental health issues and addiction. When immigration agents opt to place them in detention, they are often subject to further mistreatment. These circumstances often lead to human rights violations.

Because the United States identifies as a country that values human rights, we must end the detention of transgender migrants where it is not mandatory, improve standards for transgender migrants where

detention is required, and support policies and practices that include transgender persons in our daily lives.

The following is a supplementary infographic for *Issues Faced by Transgender Migrants in U.S. Detention Centers* created to promote legal comprehension.

Suggested citation:

Rebecca L. Warren, *Issues Faced by Transgender Migrants in U.S. Detention Centers*, ACCESSIBLE LAW, Spring 2023, at 32 app. illus.

Transgender Migrants in U.S. Detention Centers



A transgender person is someone whose gender identity, gender expression, or behavior does not conform to social or cultural expectations based on their sex assigned at birth.¹



A transgender person may also be referred to as a gender nonconforming person.²



1 murder every 3 days.³

A trans person is murdered every three days in the world. The majority of these murders occur in Latin America.



A need for safety may drive a transgender person to migrate.⁴

Transgender individuals face unique challenges.



Transgender individuals may be diagnosed with gender dysphoria, which can lead to mental health challenges, such as anxiety, depression and post-traumatic stress disorder.⁵



27,700

Transgendered people surveyed reported:

40%

attempted suicide

82%

considered suicide during their lifetime⁶



77% of transgender students surveyed reported negative experiences in grades K-12:

54% verbal harassment

24% physical attacks

13% sexual violence.⁷



Transgender people are more likely to be rejected by family.⁸



Transgender people in the U.S. are 4 times more likely to be a victim of a crime.⁹



Many transgender people live in fear and poverty due to barriers to housing and employment.¹⁰

Transgender immigrants suffer trauma in detention.



Historically, transgender migrants were detained based on their sex assigned at birth and reported sexual assaults and mistreatment.¹¹



Guidance encouraged detention facilities to separate transgender women from male holding cells for safety.¹²

Guidance also encouraged that:



Facilities operating a Protective Custody Unit for transgender detainees or that demonstrate best practices should be *considered*.



Field director can choose any facility that can ensure appropriate care for the detainee.



Solitary confinement became the primary alternative.¹³



The United Nations considers solitary confinement for more than 15 days a form of torture.¹⁴



U.S. immigration law does not require the detention of all migrants who enter illegally.¹⁵

Detention is required for individuals with aggravated felonies, terrorist organization affiliation, drug crimes or crimes of moral turpitude, or people waiting for deportation.¹⁶

Detention Alternatives if Detention Not Required¹⁷



Transgender migrants may be released from detention if they qualify for asylum or withholding of removal.

Asylum: recognizes transgender migrants as members of a particular social group who may qualify if they have suffered persecution or fear of persecution.¹⁸

Withholding of Removal permits the applicant to remain in the U.S. and work if they prove that it is more likely than not that they will suffer future persecution based on their transgender status.¹⁹



Technology Tracking



Supervision Program

Recommendations for Detention Policies



Prohibit Solitary Confinement for Non-Disciplinary Reasons



Increase Medical and Transgender Training for Staff



Embrace greater inclusion of transgender persons.

Source • *Issues Faced by Transgender Migrants In U.S. Detention Centers* by Rebecca L. Warren. Infographic created by Astrid Fuentes, Staff Editor (2022-2023).

References

- Mayo Clinic Staff, *Transgender Facts*, MAYO CLINIC (July 23, 2021), <https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-facts/art-20266812>.
- Id.*
- Laura P. Minero, Sergio Domínguez Jr., Stephanie L. Budge & Bamby Salcedo, *Latinx trans immigrants' survival of torture in U.S. detention: A qualitative investigation of the psychological impact of abuse and mistreatment*, 23 INT'L J. TRANSGENDER HEALTH 36, 36 (2022), <https://www.tandfonline.com/doi/pdf/10.1080/26895269.2021.1938779>.
- Id.*; see also Kristen A. Gonzalez, Roberto L. Abreu, Cristalís Capielo Rosario, Jasmine M. Koech, Gabriel M. Lockett & Louis Lindley, "A center for trans women where they help you": Resource needs of the immigrant Latinx transgender community, 23 INT'L TRANSGENDER HEALTH 60, 60 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8986257/>.
- Transgender: Ensuring Mental Health*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/21963-transgender-ensuring-mental-health>, (last reviewed Oct. 10, 2021).
- SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (Dec. 2016), <https://calculators.io/national-transgender-discrimination-survey/>.
- Id.*
- Susannah Hermszewska, Angela Sweeney, B. Camminga, Riley Botelle, Kate Elliott, & Jacqueline Sin, *Lived experiences of transgender forced migrants and their mental health outcomes: systematic review and meta-ethnography*, BJPSYCH OPEN, May 2022, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9169499/>.
- Press Release, Rachel Dowd, UCLA School of Law Williams Institute, Transgender people over four times more likely than cisgender people to be victims of violent crime (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-release/>.
- Quick Guide to the Criminalization of Transgender Non-Conforming People*, TRANSFORMATIVE JUST. L. PROJECT ILL., <https://chartreuse-roadrunner-rpssquarespace.com/s/Quick-Guide-to-the-Criminalization-of-Trans-People.pdf> (last visited Jan. 28, 2023).
- Hermszewska et al., *supra* note 8, at 2.
- Memorandum from Deputy Thomas Homan, Exec. Assoc. Dir., U.S. Immigration and Customs Enf't, to Assistant Dirs., Deputy Assistant Dirs., Field Office Dirs., Deputy Field Office Dirs., Assistant Field Office Dirs. & ICE Health Serv. Corps, U.S. Immigrations and Customs Enf't on Further Guidance Regarding the Care of Transgender Detainees (June 19, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf> [hereinafter Guidance Memo].
- Hermszewska et al., *supra* note 8, at 2.
- See U.N. High Comm'r for Refugees, Guidelines on International Protection No. 9, at 7 & n.51 (Oct. 23, 2012), <http://www.unhcr.org/50ae466f9.pdf>.
- See generally HILLEL SMITH, CONG. RESEARCH SERV., THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION, IF11343 (last updated Sept. 1, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11343>.
- Id.* (citing INA § 236(c), 241(a)).
- Id.* (citing INA § 236(a)).
- Asylum, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (last updated Sept. 19, 2022).
- Types of Asylum, U.N. HIGH COMM'R FOR REFUGEES: HELP, <https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/> (last visited Feb. 3, 2023).

