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## **Tempering Glass Armor: A Demand for Improved Anti-Discrimination Housing Laws to Protect Homeless Transgender People**

Jack Beasley

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**TEMPERING GLASS ARMOR: A DEMAND FOR  
IMPROVED ANTI-DISCRIMINATION HOUSING LAWS  
TO PROTECT HOMELESS TRANSGENDER PEOPLE**

BY: JACK BEASLEY†

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ABSTRACT<sup>1</sup>

*Homelessness is a nationwide problem that affects hundreds of thousands of people a year. Lesbian, gay, bisexual, transgender, and queer individuals face unique, additional issues in their day-to-day lives that heterosexual and cisgender individuals do not. Homeless shelters across the country are full of transgender youth and adults who are subject to more sexual violence, criminal acts, and discrimination than other homeless individuals in the same shelters. The Obama administration's rule protecting homeless transgender people in shelters is in danger. In essence, Housing Secretary Ben Carson's proposed rule would put homeless transgender people at a higher risk of discrimination. Agency interpretations of federal statutes have taken on drastically different interpretations between the last administration and this one. Rules and regulations are not enough to protect transgender people, particularly at-risk youth, from discrimination. Clinging onto varying federal statutory interpretations of "sex" is not sustainable long-term, and recent Supreme Court cases like Bostock v. Clayton County show just how tenuous of a position that is.*

*Arguments opposing discrimination protections based on gender identity include the potential curtailing of parental rights and the doctor's freedoms. Cases for including discrimination against transgender people in the statutory definition of "sex," or proposing amendments to the Civil Rights Act of 1964, highlight why the issues that transgender people face in housing, health, employment, and other public sectors are so prevalent that each affect one another. This Note argues that Secretary Carson's proposed rule be retracted and recognizes that interpretation of protections for transgender people is not something that should be easily swayed each time the political pendulum swings from red to blue, or vice versa. Additionally, this Note waxes on how a sweeping amendment to all anti-discrimination laws would benefit transgender individuals.*

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1. Dear Reader: This Note was written during the latter half of the Trump administration. Although the administration has since changed, the issues discussed herein remain salient. Although President Biden's administration has rolled back some of President Trump's harmful anti-LGBTQ policies, there is much work to do. Thus, this Note still presents the issues as originally described in 2019.

## I. INTRODUCTION

As the political pendulum swings from party to party, so to do interpretations of the powers granted to each branch of government by the United States Constitution. Under Housing Secretary Ben Carson, the Department of Housing and Urban Development (“HUD”) proposed a new rule in 2019 that would roll back Obama-era protections of transgender<sup>2</sup> people in federally-funded homeless shelters.<sup>3</sup> During Julian Castro’s time as President Obama’s Housing Secretary, his department finalized The Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs Rule (“Equal Access Rule”), which provided increased protections for people from discrimination based on their gender identity in federally-funded Community Planning and Development Programs (“CPDP”).<sup>4</sup>

Among other protections, Secretary Carson’s proposed rule would allow federally-funded homeless shelters to discriminate against transgender individuals if their gender identity or expression conflicts with the shelter providers’ religious beliefs.<sup>5</sup> The proposed rule came as a surprise to many; just days before, Secretary Carson asserted that he would not attempt to rescind any protections for LGBTQ while in office.<sup>6</sup> While the proposed rule says that access to federally-funded programs is open to all<sup>7</sup>, access does not equal protection. Transgender individuals face significant hurdles in changing legal documents to reflect their gender identity or expression, such as changing passports, licenses, and other forms of identification.<sup>8</sup> The proposed rule would allow shelter providers to take all of a homeless individual’s personal

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2. Youth Homelessness Series, *Incidence and Vulnerability of LGBTQ Homeless Youth*, NATL. ALLIANCE TO END HOMELESSNESS (2010) (“Transgender is an umbrella term that can be used to describe people whose gender expression is non-conforming and/or whose gender identity is different from their assigned sex at birth. This term can include transsexuals, gender queers, cross-dressers, and others whose gender expression varies from traditional gender norms.”).

3. *HUD’s Equal Access Rule*, NATL. ALLIANCE TO END HOMELESSNESS (Aug. 12, 2019), <https://endhomelessness.org/resource/huds-equal-access-rule/>.

4. Equal Access Rule, 24 C.F.R. § 5.106 (2019).

5. Revised Requirements Under Community Planning and Development Housing Programs, Dept. of Housing and Urban Development (proposed Apr. 2019) [hereinafter Revised Requirements],

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>.

6. Katy O’Donnell, *Ben Carson defends transgender remarks, blames media ‘mischaracterizations’*, POLITICO (Sept. 20, 2019, 6:25PM),

<http://www.politico.com/story/2019/09/20/ben-carson-defends-transgender-remarks-1506883>.

7. Revised Requirements, *supra* note 5.

8. *Id.*

information into account when deciding whether to house them.<sup>9</sup> Even if the Biden administration rolls back Secretary Carson's work as Housing Secretary, there are still considerable gaps in protections for transgender people that need to be addressed, and this Note will address these in turn.

Transgender individuals have faced discrimination in schools, housing, and employment for a long time. Past studies on the living conditions of transgender people found that transgender people represent a disproportionate amount of total homeless shelter populations, and that those out of shelters often make less than \$10,000 a year or do not have stable work.<sup>10</sup> Many transgender people face issues outside of homeless shelters that make it easier for them to end up homeless, such as discrimination from landlords and housing providers, employers, and lack of financial or economic support from their families.<sup>11</sup> In 2015, the National Center for Transgender Equality published a survey detailing the experiences of transgender Americans in a variety of different areas.<sup>12</sup> Of the 27,715 transgender Americans interviewed, 30% had experienced homelessness at one point in their lives.<sup>13</sup> The survey broke this statistic down further, finding that 45% of those who said their families were unsupportive of their gender identity experienced homelessness at one point in their lives. In comparison, 27% of those with supportive families experienced homelessness.<sup>14</sup>

In 2016, the Center for American Progress and the Equal Rights Center conducted a national study about the preparedness of federally-funded homeless shelter workers to address the concerns of transgender people.<sup>15</sup> Over 100 shelters in four states (Washington, Tennessee,

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9. *Id.*

10. LISA MOTTET & JOHN M. OHLE, *TRANSITIONING OUR SHELTERS*, at 4–5 (2003). (“Hostility and insensitivity of housing staff and other residents were reported as the most common barriers to housing. Thirteen percent of respondents reported not feeling safe in their current housing. Fifteen percent reported losing a job due to discrimination in the workplace, and only 58% had paid employment.”).

11. *Id.* at 5.

12. Sandy E. James et. al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL., at 13, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (last visited Feb. 29, 2020).

13. *Id.*

14. *Id.* at 8.

15. Caitlin Rooney, Laura E. Durso, & Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, CTR. FOR AM. PROGRESS (Jan. 7, 2016, 9:06 am),

Connecticut, and Virginia) were called by prepared test callers who pretended to be transgender people seeking shelter.<sup>16</sup> The results were not promising—many of the shelter workers deflected the caller’s questions, suggested they reach out to another shelter (such as a women’s shelter), or asked probing questions about the caller’s surgery/therapy (if any) or other invasive questions.<sup>17</sup> The trend here is clear—transgender Americans are already at a high risk of homelessness—if finalized, Secretary Carson’s rule would put them at a further disadvantage.

Individual states provide varying levels of protection for the homeless transgender population. In the Human Rights Campaign’s (“HRC”) 2014 State Equality Index, only eighteen states prevent discrimination in housing and employment based on gender identity; seventeen provide protections in public accommodations; and fifteen in education.<sup>18</sup> These numbers increased when the HRC conducted the Index again—twenty-two states now provide housing protections for transgender people.<sup>19</sup> The number of states that provide protections for transgender people in other sectors also increased, showing a steady increase nationwide in state protections for transgender people.<sup>20</sup> It seems that states recognize that the lack of protections for transgender people is a problem that they must rectify, regardless of the action or inaction taken by the federal government. While progress is progress, the fact that anti-discrimination protection for homeless transgender people varies so highly from state to state is just as indicative of a need for better federal protections as having no state-level protections at all.

This Note first breaks down how legislatures have used “sex” in past and current legislation and how courts have interpreted “sex” over time. Part II focuses on several important pieces of legislation including the Civil Rights Act, the Fair Housing Act, and the Equal Credit

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<https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

16. *Id.*

17. *Id.*

18. *Understanding the Transgender Community*, HUMAN RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Feb. 29, 2020).

19. *States Total Scorecard 2018*, HUMAN RTS. CAMPAIGN (showing rights for LGBTQ people per state as of 2018),

[https://assets2.hrc.org/files/assets/resources/SEI-2018-NationalScorecard.pdf?\\_ga=2.131385417.732921020.1571358733-1585100206.1570725737](https://assets2.hrc.org/files/assets/resources/SEI-2018-NationalScorecard.pdf?_ga=2.131385417.732921020.1571358733-1585100206.1570725737) (last visited Feb. 29, 2020).

20. *Id.*

Opportunity Act. It then discusses several agency interpretations of “sex” and shines a light on how crucial they are for transgender people. Part II ends with a discussion on the most recent Supreme Court cases to tackle the definition of “sex”—*Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Funeral Homes v. EEOC*—hereinafter called the “2020 Trio.” Part III reviews the scope of executive power as it relates to Secretary Carson’s proposed rule and evaluates how his and President Trump’s rhetoric have harmed the transgender community, particularly in housing. Part IV compares and contrasts the oft-used cliché of *equal* rights versus *special* rights. Part V discusses this *glass armor* that transgender people have protecting them (using housing protections as the prime example), and determines what laws must be changed to temper that armor. Part VI concludes.

## II. “ON THE BASIS OF SEX”: GLASS ARMOR FOR THE LGBTQ COMMUNITY

Since the 1960s, state and federal agencies have taken the word “sex” and expanded upon its original purpose in the Civil Rights Act to varying degrees. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution also requires states to provide equal protection to all regardless of sex.<sup>21</sup> In interpreting “sex,” lower courts disagree on whether the law protects people that identify as transgender. Similarly, federal agencies such as the Department of Education (“DE”) and the Equal Employment Opportunities Commission (“EEOC”) have varied from administration to administration in their interpretation of whether “sex” includes protections for transgender people. For example, the Patsy T. Mink Equal Opportunity in Education Act (more commonly known as Title IX) prohibits federally funded schools from discriminating on the basis of sex, with a few enumerated exceptions.<sup>22</sup> States have also varied in their approach; some provide protection while others do not. The FHA also prohibits discrimination on the basis of sex. State agencies and HUD, just as other agencies in their interpretations of sex, have been inconsistent in their approach to whether the FHA’s anti-sex discrimination prohibition covers transgender individuals. These inconsistent approaches still leave transgender individuals open to discrimination.

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21. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490–91 (1989).

22. Title IX, 20 U.S.C.A. §§ 1681, et seq. (Westlaw through Pub. L. No. 116-91).

### A. *The Civil Rights Act of 1964, Title VII*

Discussions about the meaning of “sex” at the federal level are sparse at best, leaving the interpretation of the word up to lower courts and agencies.<sup>23</sup> While some states provide protections in the areas mentioned above, there is considerable resistance to including gender identity in the definition of “sex.” Title VII of the Civil Rights Act of 1964 established that companies that employ fifteen or more persons could not discriminate on the basis of sex, religion, national origin, color, or race.<sup>24</sup> The inclusion of “sex” in Title VII was done so at the last moment, which Chief Justice Rehnquist noted during a subsequent case regarding sexual harassment.<sup>25</sup> In *Meritor Savings Bank v. Vinson*, the Supreme Court had to parse through failed amendments and arguments to determine whether sexual harassment would fit into the definition of “sex.”<sup>26</sup> It was only after the Court recognized that in some cases, sexual harassment and discrimination could be on par with racial or ethnic discrimination, that it agreed to read protection from sexual harassment in Title VII’s definition of “sex.”<sup>27</sup>

#### 1. *Price Waterhouse v. Hopkins*

In 1989, a plurality of Supreme Court justices held in *Price Waterhouse v. Hopkins* that gender stereotyping was a form of sex discrimination protected by Title VII of the Civil Rights Act.<sup>28</sup> Ann Hopkins was denied partnership by her employer, Price Waterhouse, on two separate occasions, and when she asked why, at least two of her superiors said she needed to walk, act, and dress more femininely.<sup>29</sup> While the Court’s opinion dives deeply into the standard-of-review issue that mired the lower courts, it was a landmark case because it opened up the discussion of what the definition of “sex” in Title VII could mean.<sup>30</sup> Justice Brennan, authoring the opinion of the Court,

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23. See generally National Center for Transgender Equality, Federal Case Law on Transgender Discrimination, <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited Feb. 29, 2020).

24. The Civil Rights Act, 42 U.S.C.A. §§ 1981, et seq. (Westlaw through Pub. L. No. 116-91).

25. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–65 (1984) (“we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”).

26. *Id.*

27. *Id.* at 66-67.

28. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–33 (1989).

29. *Id.* at 231.

30. *Id.* at 231–36.



stated that the Court was not traversing new ground by finding that sex discrimination occurred against Hopkins in her bid for partnership.<sup>31</sup> However, Brennan did recognize that sex discrimination could be veiled in attempts to coerce others to adhere to certain stereotypes, stating: “if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”<sup>32</sup>

## 2. Subsequent Cases

*Price Waterhouse* established a unique precedent that has opened up a world of possible interpretations of what exactly “sex” means in the statutory scheme. For example, the Sixth Circuit Court of Appeals held in *Smith v. City of Salem* that the definition of “sex” in Title VII included discrimination based on gender identity.<sup>33</sup> Smith was a transgender female<sup>34</sup> firefighter who, while transitioning from male to female after being diagnosed with gender dysphoria, was fired for not adhering to gender norms.<sup>35</sup> Her supervisors at the fire department allegedly worked to coerce her into resigning by subjecting her to routine meetings to discuss her feminine appearance, attending psychiatric visits to discuss her gender dysphoria, and suspending her for twenty-four hours for violating an unenacted municipal policy.<sup>36</sup> The court reasoned that *Price Waterhouse* eviscerated all of the contrary case law regarding gender expression and that gender expression was included in the definition of “sex” under Title VII.<sup>37</sup> Further, the court reiterated the but-for analysis the *Price Waterhouse* Court used by stating that Smith would not have been subject to the same discrimination (acting or dressing effeminately) but-for her sex.<sup>38</sup>

The Sixth Circuit’s holding in *Smith v. City of Salem* contrasts with its own precedent from 1992.<sup>39</sup> In *Dillon v. Frank*, the Sixth Circuit refused to expand the definition of “sex” to mean “because of anything relating to being male or female, sexual roles, or to sexual

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31. *Id.* at 248 (“In deciding as we do today, we do not traverse new ground.”).

32. *Id.* at 256.

33. *Smith v. City of Salem*, 378 F.3d 566, 567–68 (6th Cir. 2004).

34. The Sixth Circuit improperly refers to Smith using he/him pronouns in its opinion. The Author will not misgender the plaintiff in this Note.

35. *Smith* at 573.

36. *Id.* at 572.

37. *Id.*

38. *Id.* at 574.

39. *Dillon v. Frank*, 1992 U.S. App. LEXIS 766, at \*12 (6th Cir. 1992).

behavior.”<sup>40</sup> While working at a bulk mail facility in Michigan, Dillon was taunted with homophobic insults from coworkers who intended to cause Dillon to quit.<sup>41</sup> While Dillon was discriminated against for being gay, the statutory interpretation is similar to other Title VII cases—he argued that per *Price Waterhouse*, he was being sexually harassed for not adhering to the standard male societal expectations.<sup>42</sup> The *Dillon* court determined that homosexuality is a different function entirely than being male or female, as opposed to being a function of it.<sup>43</sup> The court admitted that despite Dillon not having protections under Title VII, he could still pursue other legal avenues for a remedy, such as suing for tortious interference with contract, or assault.<sup>44</sup>

Other courts have disagreed about expanding the definition of sex to include transgender people or varying forms of gender expression.<sup>45</sup> The Tenth Circuit Court of Appeals tackled this issue in *Etsitty v. Utah Transit Authority* and found that the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act did not protect against discrimination for transgender people.<sup>46</sup> Etsitty, although male-presenting at work, wore makeup and dressed as a woman at home.<sup>47</sup> When Etsitty met with her boss and human resources manager, she expressed that she was unable to complete sex reassignment surgery because it was too expensive and that she might want to use the women’s restroom in the future.<sup>48</sup> Utah Transit Authority put her on administrative leave, citing liability issues with allowing a biological male to use the women’s restrooms in their office.<sup>49</sup> The Tenth Circuit affirmed the lower court’s holding. It stated Etsitty did not have a cognizable claim under either Title VII or the Equal Protection Clause, and said that even if the Constitution protected her, it would be incredibly difficult for Etsitty to prove it.<sup>50</sup>

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40. *Id.*

41. *Id.* at \*2.

42. *See id.* at \*15.

43. *See id.*

44. *Id.*

45. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

46. *Id.* at 1218.

47. *Id.* at 1219.

48. *Id.*

49. *Id.*

50. *Id.* at 1218.

### 3. Equal Credit Opportunity Act

The Equal Credit Opportunity Act provides that, as long as someone can legally contract for credit or other financial services, creditors are not allowed to discriminate against giving credit to applicants on the basis of the same protected classes outlined in the Civil Rights Act.<sup>51</sup> In *Rosa v. Park West Bank*, the First Circuit Court of Appeals held that Rosa, “a biological man dressed in women’s clothing,” was discriminated against because he was denied a bank loan for the way he dressed.<sup>52</sup> Rosa applied for a bank loan at Park West Bank and presented three forms of identification that showed he was born male, and the loan officer argued that she could not recognize him in his typically female attire.<sup>53</sup> By interpreting Title VII’s definition of sex with the Equal Credit Opportunity Act, the court found that disparate treatment arose and that the banker discriminated against Rosa based on her appearance.<sup>54</sup> Disparate treatment is one of the most common and identifiable forms of discrimination and occurs when an employer treats someone less favorably than others because of sex.<sup>55</sup>

### B. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution has also provided a legal backbone for expanding the definition of sex.<sup>56</sup> In *Craig v. Boren*, the Supreme Court recognized that statutory classifications distinguishing men from women are constitutional only if they pass strict scrutiny.<sup>57</sup> To withstand strict scrutiny constitutional challenges, a statute must serve an important government interest and must be narrowly tailored to achieve that interest.<sup>58</sup> Summarizing Equal Protection Clause jurisprudence, the Court recognized that “archaic and overboard” generalizations of how women in particular acted or *should* act were unconstitutional, stating that a statute would be unconstitutional if it used gender discrimination as a “proxy for other, more germane bases of classification.”<sup>59</sup> One

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51. *Equal Credit Opportunity Act*, BOUVIER LAW DICTIONARY (8th ed. 2012).

52. *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 214 (1st Cir. 2000).

53. *Id.* at 215.

54. *Id.*

55. *Id.*

56. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

57. *Craig v. Boren*, 429 U.S. 190, 198 (1976).

58. *Id.*

59. *Id.* at 199.

could argue that the Court's willingness to expand the definition of sex past "archaic and overbroad" meanings is not a new trend.<sup>60</sup>

In 2011, the Eleventh Circuit Court of Appeals tackled the issue of expanding the definition of sex in *Glenn v. Brumby*.<sup>61</sup> Glenn was fired by her employer, Brumby, when she expressed that she suffered from gender identity disorder, a psychological condition associated with gender dysphoria.<sup>62</sup> Glenn filed two separate claims against her employer, alleging both discrimination based on her gender identity and discrimination based on her medical condition.<sup>63</sup> The *Brumby* court reasoned that the Equal Protection Clause protected gender identity and non-conforming behavior, and gave several affirmative examples from case law where employers wrongfully terminated cisgender employees because they did not conform to sex-based stereotypes.<sup>64</sup> Using standard constitutional methods of interpretation, the Eleventh Circuit found that because the Equal Protection Clause should protect everyone, it cannot serve to deny protections to transgender people.<sup>65</sup>

Perhaps it bodes well that the Eleventh Circuit maintained this position in 2020 in *Adams v. School Board of St. John's County*. Here, the court stated that, based on its own interpretation in *Glenn* and the Supreme Court's increasing desire to "eliminate discrimination on the basis of gender stereotypes,"<sup>66</sup> there was even more proof that the definition of "sex" includes gender identity and expression.<sup>67</sup> Citing the 2020 Trio, the Eleventh Circuit saw fit to expand anti-discrimination protections outside of Title VII and Equal Protection Claims into Title IX claims.

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60. *Id.*

61. *Glenn*, 663 F.3d at 1312.

62. *Id.* at 1313–14.

63. *Id.*

64. *Id.* at 1318–19 ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that is too effeminate, carrying a serving tray too gracefully, or taking too active a role in child-rearing. An individual cannot be punished because of his or her perceived gender-nonconformity.").

65. *Id.*

66. *Adams v. Sch. Bd.*, 968 F.3d 1286, 1296 (11th Cir. 2020).

67. *Id.*

### C. Agency Interpretations

#### 1. The Department of Education

In 2015, the Department of Education's Office of Civil Rights interpreted Title IX to say that if a school provided separate facilities on the basis of sex, then they should also allow transgender students to access the facilities that align with their gender identity.<sup>68</sup> During the Obama administration, the Department of Education ("DE") implemented further protections for transgender students under Title IX, which was introduced to schools and faculty in 2016 as the "Dear Colleague" letter.<sup>69</sup> The "Dear Colleague" letter detailed the Administration's stance that educators and school districts could not discriminate against any given student's gender identity or sexual orientation. The DE gave information on how faculty and staff could educate themselves and their students on how to handle transgender youth in their schools.<sup>70</sup> The letter drew both cheers and jeers by declaring that transgender students must be included in classes or groups of the gender they identify with, as well as use bathrooms and other facilities on all school campuses.<sup>71</sup> In 2017, the DE under Secretary Betsy DeVos submitted a full retraction of the 2016 "Dear Colleague" letter, formally withdrawing any guidance on how to handle transgender students.<sup>72</sup> The Trump administration's viewpoint is that state and local governments should determine school policies for transgender students, not the federal government.

In *G.G. v. Gloucester County School Board*, the Fourth Circuit Court of Appeals handled one of the first instances of a transgender student seeking protection under Title IX and the Equal Protection Clause.<sup>73</sup> When G.G. was a sophomore in high school, he and his mother requested that his school allow him to access the school's

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68. See 34 C.F.R. § 106.33 (2019) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."); see also U.S. Dep't of Educ., "Dear Colleague" Letter (Feb. 22, 2017) ("the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved.").

69. Erica Green, Katie Benner, & Robert Pear, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?searchResultPosition=2>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016).

facilities designated for male students, and the school complied.<sup>74</sup> After several weeks, several family members of G.G.’s fellow students made the Gloucester County School Board aware of this, hoping to propose a resolution that would ban transgender students from accessing the facilities of the gender they identify with.<sup>75</sup> The resolution gained traction within the School Board and the community, and so G.G. sought help from the courts.<sup>76</sup> Using *Auer* deference, the Fourth Circuit found that there was enough ambiguity in Title IX’s language—while “sex” likely meant “biological” sex, there was no mention of transgender individuals.<sup>77</sup> The court refused to adhere to a strict interpretation of the rule, and found that the ambiguity of “sex” as it applied to transgender people provided G.G. Title IX protection.<sup>78</sup>

Similarly, in *Whitaker v. Kenosha Unified School District*, the Seventh Circuit Court of Appeals held that a school’s denial of a transgender student’s access to the bathroom respective to their gender identity was discriminatory under Title IX.<sup>79</sup> Whitaker was a transgender male youth whose school denied him access to restrooms, locker rooms, and other school facilities on campus, which led to depression, social anxiety, and school sanctions for violating policies.<sup>80</sup> The court reasoned that Whitaker had a redressable grievance because of the adverse effects that acting contrary to school policy had on him.<sup>81</sup> The court further recognized that sex had not been defined in either Title IX or Title VII of the Civil Rights Act, but case law guided its decision.<sup>82</sup>

## 2. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (“EEOC”) has interpreted the word “sex” in Title VII to include protections for all LGBTQ people in the workplace, citing *Price Waterhouse*.<sup>83</sup> While

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74. *Id.* at 715.

75. *Id.*

76. *Id.*

77. *Id.* at 720.

78. *Id.* at 722.

79. *Whitaker v. Kenosha United Sch. Dist.*, 858 F.3d 1034, 1054–55 (7th Cir. 2017).

80. *Id.* at 1041.

81. *Id.* at 1042.

82. *Id.*

83. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP’T OPPORTUNITIES COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Feb. 29, 2020).

there is a circuit split on what protections (if any) Title VII may provide transgender people in the workplace, the Supreme Court held in 1998 that same-sex harassment could be sex discrimination.<sup>84</sup> Writing for a unanimous Court in *Oncale v. Sundowner Offshore Services*, Justice Antonin Scalia stated:

Assuredly [this is] not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discrimination . . . because of . . . sex.” [This] . . . must extend to sexual harassment of any kind that meets the statutory requirements.<sup>85</sup>

*Oncale* expanded the definition of “sex” in harassment cases, further showing that the Court was willing to develop its understanding of the statute to combat discriminatory practices.

### 3. *The Department of Labor*

The Department of Labor (“DL”) continues to adhere<sup>86</sup> to Executive Orders 11478 and 11246, as amended by President Obama in 2014, which expanded workplace protections for contractors and contracted employees from discrimination based on gender identity or sexual orientation.<sup>87</sup> President Obama’s amendments to the President Johnson-era Orders included substituting the language “sex or national origin,” with “sex, sexual orientation, gender identity, and national origin.”<sup>88</sup> Citing recent Supreme Court case law<sup>89</sup>, the Trump administration’s DL stated that it would seek to amend section 204(c) of Executive Order 11246 to exempt religious contractors from discrimination suits if they do not hire someone that does not conform

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84. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998).

85. *Id.*

86. *Frequently Asked Questions: Sexual Orientation and Gender Identity*, U.S. DEP’T OF LABOR, [https://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html) (last updated April 8, 2015).

87. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 17, 2014).

88. *Id.*

89. *Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption*, DEP’T OF LABOR (proposed Sept. 2019) [hereinafter Religious Exemption Rule], <https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption> (last visited Feb. 29, 2020) (citing to recent Supreme Court cases like *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm’n* (2018), *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), and *Burwell v. Hobby Lobby Stores, Inc.* (2014) to show a trend in exceptions for religious freedom in employment).

to his religious beliefs.<sup>90</sup> The Federal Contract Compliance Programs Office seeks to define “particular religion” to allow for contractors to “prefer” to hire people that are of the same religion and also to condition employment based on whether or not an employee adheres to the tenets of their respective religion.<sup>91</sup> As of this Note’s publishing, the rule is still only proposed,<sup>92</sup> but like in housing matters, transgender people would receive less protection from discrimination if the Religious Exemption Rule became final.

#### *D. Glass Armor, Defined*

Exploring case law to see if federal statutes cover gender identity and expression is confusing, at best, and disappointing, at worst. If the previous subsections of this Note highlight anything, it is that transgender people are in danger of discrimination in a variety of public spheres. Post-2020 Trio, the Eleventh Circuit has continued to hold that transgender people already receive discrimination protection under Title VII and Title IX.<sup>93</sup> Other courts now have to shape their decisions based on the 2020 Trio in Title VII claims, but fair housing discrimination claims are still open for interpretation. The upshot is that many rules and regulations have had a positive effect in different jurisdictions, whereas the Fair Housing Act, unfortunately, lacks the same level of protective jurisprudence that other statutes may have.<sup>94</sup>

##### *1. The Fair Housing Act*

The Fair Housing Act (“FHA”), first enacted in 1968 and amended twice in 1974 and 1988, was the first step in providing statutory protections against discriminatory practices in housing.<sup>95</sup> A work product of the Civil Rights Era, the FHA was added on to the Civil Rights Act of 1964 as Titles VIII-X, and provided protections against

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90. Tim Fitzsimons, *Labor Dept. proposes expanding ‘religious exemption’ in hiring*, NBC NEWS (Aug. 14, 2019, 4:26 pm EDT), <https://www.nbcnews.com/feature/nbc-out/proposed-rule-trump-administration-would-allow-more-businesses-discriminate-n1042416>.

91. *Id.*

92. Religious Exemption Rule, *supra* note 89.

93. See Section II(B), *supra*.

94. See generally *Federal Case Law on Transgender Discrimination*, NAT’L CENTER FOR TRANSGENDER EQUAL., <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited Feb. 29, 2020).

95. *The Fair Housing Act of 1968*, BOUVIER LAW DICTIONARY (6th ed. 2006).



discrimination in housing against groups of people at the highest risk.<sup>96</sup> Several classes, such as families and people with disabilities, used to be excluded from protection, but subsequent amendments included them.<sup>97</sup> In its current capacity, the FHA prohibits discriminatory practices in the buying, selling, renting, or advertising of private and public property, on the basis of sex, religion, handicap, race, national origin, color, age, and familial status.<sup>98</sup>

Courts have interpreted the FHA to show that legal intent, rather than any passive or active malice, is all that is required to prove a discriminatory claim.<sup>99</sup> Courts have been reluctant to read “sex” in the FHA to include transgender people, but the Equal Access Rule bans receivers of federal housing funds from discriminating against transgender people.<sup>100</sup> The FHA arms HUD with the ability to promulgate rules that can provide greater protection for members of a particular class. For example, the FHA affords people living with HIV or AIDS protections because both conditions are considered disabilities.<sup>101</sup>

Similarly, a group of Texas agencies sued the federal government after several federal agencies promulgated rules that prohibited discrimination against transgender people in schools, at work, and in housing.<sup>102</sup> In *Texas v. United States*, Texas’s Northern District Court enjoined federal agencies, specifically the Department of Education, from enforcing the Obama-era protections for transgender people in schools and other public places.<sup>103</sup> Applying *Auer* deference, the court found that the term “sex” was not ambiguous and was limited to biological sex, not gender identity or expression.<sup>104</sup> The court further found that there was no irreparable harm to transgender people if they

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96. Fair Housing Act of 1973, 42 U.S.C.A. §§ 3601-3619 (Westlaw through Pub. L. No. 116-91).

97. BOUVIER LAW DICTIONARY, *supra* note 95.

98. *Id.*

99. *See* U.S. v. Scott, 788 F. Supp. 1555, 1562 (D. Kan. 1992); *see also* McNeil v. McDonough, 515 F. Supp. 113, 129 (D.N.J. 1980) (stating that discrimination “may be the consequence of the highest and most salutary motives, but the legal ‘intent,’ not the motive, is what controls.”), *aff’d*, 648 F.2d 178 (3d Cir. 1981).

100. *Know Your Rights*, ACLU, <https://www.aclu.org/know-your-rights/lgbtq-rights/> (last visited Feb. 29, 2020).

101. *Id.*

102. *Tex. v. U.S.*, 201 F. Supp. 3d 810, 815–16 (N.D. 2011 Tex. 20162011).

103. *Id.* at 836.

104. *Id.* at 832–33.

were not allowed to use all of the public facilities they wanted to, based on their gender identity.<sup>105</sup>

Texas's Northern District Court employed a balancing test to weigh the hardship experienced by transgender people against the interests of the public sector and found that the needs of many outweighed the needs of a few.<sup>106</sup> In *Texas*, the court created a false dilemma by saying that the state agencies had to pick between two options: either work against the federal law and negatively impact the public's interest or work with the federal law and possibly violate state statutes or Texas's constitution.<sup>107</sup> The state agencies only made allegations of violating state law and did not proffer any specific examples of how the federal rules conflicted with Texas law.<sup>108</sup> The *Etsitty* court did not make the same faulty presumption but managed to come to a similar conclusion.<sup>109</sup> Although both of these cases are indeed damning,<sup>110</sup> they do not comport with the recent trend in federal case law which ushered American jurisprudence into a new era of circuit splits over what, if any, protection transgender people have against discrimination.<sup>111</sup>

## 2. The Equal Access Rule

The Equal Access Rule was the first housing rule that provided protections for transgender people, aligning with the Obama-era policy that transgender people are at heightened risk of discrimination by housing providers.<sup>112</sup> The rule followed up on a proposed rule from 2011 that found that transgender people (and LGBTQ people as a community) did not have the same access to housing as other

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105. *Id.* at 834–35.

106. *Id.* at 834; *see also* *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364 (5th Cir. 2008) (The court used a balancing test to weigh harms against the infringed rights of people and the burden put on the government to make accommodations for those rights.).

107. *Texas*, 201 F. Supp. 3d at 835.

108. *Id.*

109. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007).

110. The Fifth Circuit dismissed the federal government's appeal of *Texas* in 2017. *See Tex. v. U.S.*, No. 16-11534 2017 WL 7000562 (5th Cir. Mar. 3, 2017).

111. *See generally Federal Case Law on Transgender Discrimination*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination> (last visited Feb. 29, 2020).

112. National Fair Housing Alliance, *STATEMENT: Advocacy Groups Condemn Carson for Misleading Congress Over Equal Access Rule*, NAT'L FAIR HOUSING [hereinafter *STATEMENT*] (May 23, 2019), <https://nationalfairhousing.org/2019/05/23/equal-access-rule/>.

communities in the country.<sup>113</sup> The Obama administration understood that transgender people are subject to discrimination in housing, healthcare, employment, and schooling, and made it a goal to align all of the related agencies on the same level and allow for the same protections.<sup>114</sup> Young and black transgender people are at even more of a risk of discrimination in housing, and enacting the Equal Access Rule was seen as a big step forward in eradicating that issue.<sup>115</sup> The Obama-era HUD reiterated its position on including gender identity as a protected class, citing the logic of *Price Waterhouse* as outcome determinative.<sup>116</sup>

#### E. The 2020 Trio

Three cases recently argued in front of the Supreme Court could shape what the future holds for federal protection for transgender people: *Altitude Express, Inc. v. Zarda, R.G. & G.R. Funeral Homes v. EEOC*, and *Bostock v. Clayton County*.<sup>117</sup> All three plaintiffs alleged that their employers terminated them because of being either transgender or homosexual.<sup>118</sup> While on its face there is quite a difference between workplace discrimination and housing discrimination, the root of the issue is still the same: there was a circuit split about what the statutory definition of “sex” is that needed to be addressed in order to determine if LGBTQ people could be discriminated against.<sup>119</sup> The need for a singular, far-reaching definition of “sex” at the federal level would benefit more people than it would harm, and by including gender identity as a protected class, all claims, ranging from direct malice to disparate impact, would have a legal basis.<sup>120</sup>

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113. Equal Access Rule, 77 Fed. Reg. 5,662 (2012).

114. NAT'L FAIR HOUSING, *STATEMENT*, *supra* note 112.

115. *Id.*

116. *See* *Quid Pro Quo and Hostile Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act*, 81 Fed. Reg. 63,054, 63,058 (Sept. 14, 2016).

117. Amy Howe, *Justices divided on federal protections for LGBT employees*, SCOTUSBLOG (Oct. 8, 2019, 2:14 PM) <https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/>; *see also* Ian Millhiser, *The Supreme Court showdown over LGBTQ discrimination, explained*, VOX (Oct. 9, 2019, 3:19PM CDT), <https://www.vox.com/2019/10/2/20883827/supreme-court-lgbtq-discrimination-title-vii-civil-rights-gay-trans-queer>.

118. *See id.*

119. *See id.*

120. Millhiser, *The Supreme Court showdown over LGBTQ discrimination, explained*, *supra* note 93; *see also* *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*,

In an opinion authored by Justice Gorsuch, the Supreme Court held that Title VII's definition of "sex" included discrimination protection for people based on their sexual orientation or gender identity.<sup>121</sup> Finding the answer relatively clear cut, Justice Gorsuch noted that when an employer fires someone because of their sexual orientation or gender identity, the employer "fires that person for traits or actions it would not have questioned in members of a different sex."<sup>122</sup> Using a traditional but-for causation analysis, the majority determined that people fired because of their sexual orientation are fired for two distinct reasons: sex, and who they are attracted to.<sup>123</sup> Regardless of which reason is implemented, Title VII would protect those people from termination because either may loop back to the "because of sex" statutory language.<sup>124</sup> The majority did open up a channel for future sexual orientation/gender identity cases by noting that the Religious Freedom Restoration Act, in its capacity as a "super statute," could supersede claims of discrimination in cases where religious freedom is substantially burdened.<sup>125</sup> This could prove dangerous for members of the LGBTQ community now and in the future, and echoes the call for greater protections from discrimination.

In one of two dissenting opinions, Justice Thomas joined Justice Alito in stating "[what] the court has done today [is] legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive."<sup>126</sup> Justice Alito stated that one of the main reasons the Court should not have incorporated gender identity and expression into "sex" is because three bills, both dead and alive, have tried to make it through the House of Representatives and none have passed.<sup>127</sup> Before making a horoscope-based analogy,<sup>128</sup> Justice Alito took notice of the fact that the majority delineated between

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135 S.Ct. 2507, 2525 (2015), ("disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.").

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

122. *Id.*

123. *Id.* at 1741.

124. *Id.*

125. *Id.* at 1754.

126. *Id.* at 1755.

127. *Id.*

128. *Id.* at 1762 ("Title VII allows employers to decide whether two employees are 'materially identical.' Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.").

sex and gender identity and expression to show that the term was, in fact, ambiguous.<sup>129</sup> Because of this, Justice Alito argued that the Court should have deferred to the original meaning using standard statutory interpretation.<sup>130</sup>

In a separate dissent, Justice Kavanaugh wrote that the argument that “sex” includes gender identity and sexual orientation is a new attempt to incorporate them into statutes.<sup>131</sup> While Justice Kavanaugh reiterated that gays and lesbians should not be considered social outcasts, he recognized that the power to prevent that behavior rests with Congress.<sup>132</sup> Justice Kavanaugh determined that it is improper to associate the LGBTQ rights movement with the womens’ rights movement, stating that “Seneca Falls was not Stonewall.”<sup>133</sup> To equate the two, according to Justice Kavanaugh, is “a mistake of history and sociology.”<sup>134</sup>

October 2020 brought LGBTQ discrimination to the forefront. As Justices Alito, Thomas, and Kavanaugh may have hoped for, the 2020 Trio and many other cases relating to LGBTQ rights may be at risk of getting overturned. Title VII jurisprudence appears to be only the beginning. If so, transgender people are even more at risk of losing their rights than ever before. In a certiorari denial in 2020, Justices Thomas and Alito joined forces again to dismiss the idea of legislating from the bench to provide rights to LGBTQ individuals.<sup>135</sup> Although agreeing with the Court to deny certiorari on other grounds, Justice Thomas wrote that cases like *Obergefell v. Hodges* read “novel constitutional rights” for LGBTQ individuals and that, now, the Court is the only one able to “fix” this problem.<sup>136</sup> Referring to *Masterpiece Cake Shop* and his dissent in *Obergefell*, Justice Thomas argued that increasing protections for LGBTQ individuals adversely affects religious people under the First Amendment.<sup>137</sup> While this line of reasoning may only explicitly state Justice Thomas’s concerns with *Obergefell*, this

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129. *Id.*

130. *Id.*

131. *Id.* at 1824.

132. *Id.* (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018) (“gay and lesbian Americans ‘cannot be treated as social outcasts or as inferior in dignity and worth.’”)).

133. *Id.* at 1828.

134. *Id.* at 1829.

135. *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 3, 208 L. Ed. 2d 137 (2020).

136. *Id.*

137. *Id.*

rationale may be imputed to his dissents in the Supreme Court cases discussed in this Note.

Now that the Senate has confirmed Amy Coney Barrett to the Supreme Court, seminal cases like *Bostock*, *Obergefell*, *Price Waterhouse*, and *Glenn* may hang in the balance even more.<sup>138</sup> Indeed, Justice Barrett's confirmation hearings were full of questions about LGBTQ rights, where she identified sexual orientation as a "sexual preference."<sup>139</sup> At a Jacksonville University lecture in 2016, then Judge Barrett stated that it would be a "strain" to read gender identity protections for transgender students into "sex" in Title IX.<sup>140</sup> It is worth noting that even when the Court had a conservative majority and denied certiorari to Kim Davis's case, only Justice Alito joined Justice Thomas in his discussion of *Obergefell*.<sup>141</sup> While we may never know their reasoning, it is interesting and important to note that Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh did not join in Justice Thomas's statement.<sup>142</sup>

As previously stated, the Civil Rights Act, the FHA, and other relevant statutes and rules echo each other in laying out which classes of people receive discrimination protection.<sup>143</sup> Just as the DE did a bait-and-switch with Title IX once Secretary DeVos got her hands on it, so too could other federal agencies with their interpretations of anti-discrimination statutes.<sup>144</sup> For these reasons, sweeping legislation that does not allow room for either federal agency or court interpretations to reject discrimination protections for transgender people is necessary.

### III. HEPHAESTUS SHRUGGED: BROKEN EXECUTIVE PROMISES

The rights of transgender people have waxed and waned at the federal level between the Obama administration and the Trump

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138. Abby Livingston, *U.S. Senate confirms Amy Coney Barrett's nomination to Supreme Court, with Texans Cornyn and Cruz in favor*, TEX. TRIBUNE (Oct. 26, 2020), <https://www.texastribune.org/2020/10/26/texas-senators-support-amy-coney-barrett-supreme-court-confirmation/>.

139. Elinor Aspegren, *'Very threatening' for LGBTQ community; Same-sex marriage defendant, plaintiff join forces to oppose Amy Coney Barrett's nomination*, USA TODAY (Oct. 20, 2020, 3:32 p.m. ET), <https://www.usatoday.com/story/news/2020/10/20/amy-coney-barrett-confirmation-could-threaten-lgbtq-rights-equality/3666505001/>.

140. *Id.*

141. *See* *Ermold v. Davis*, 936 F.3d at 429.

142. *See id.*

143. *The Fair Housing Act of 1968*, BOUVIER LAW DICTIONARY (6th ed. 2006).

144. *See* Section II(C)(1), *supra*.

administration.<sup>145</sup> Some may view Secretary Carson's proposed rule as merely a return to "equal" protection for all people. Secretary Carson has stated that he does not believe that transgender people should receive any additional rights or protections in housing.<sup>146</sup> To others, Secretary Carson's proposed rule may just be a power play that takes advantage of the momentum of the swinging political pendulum. And finally, some may believe that Secretary Carson is acting out of malice for transgender people.<sup>147</sup> No matter which lens we examine this through, Secretary Carson's actions could harm more people than it may help.

#### A. The Proposed Rule

Secretary Carson's proposed rule would change the Obama-era policies that would provide protections for transgender people in federally-funded homeless shelters and CPDPs.<sup>148</sup> The proposed rule would allow homeless shelter providers with single-sex restroom policies to make decisions about letting someone into their facilities and make use of their single-sex areas.<sup>149</sup> A noteworthy change this proposed rule would make is that it would allow discrimination against transgender people if: (1) the transgender person violates or conflicts with the shelter provider's religious beliefs, and (2) there are no protections for transgender people against discrimination in the shelter's state or city.<sup>150</sup> Shelter providers would effectively have the freedom to determine what a person's sex is,<sup>151</sup> and could base this on the applicant's appearance, dress, mannerisms, or legal identification, which may conflict. Allowing a homeless shelter provider to decide for

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145. Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST: POLITICS (Jan. 20, 2018), [https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm\\_term=.d36b45cd8bbb](https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.d36b45cd8bbb).

146. Tracy Jan & Jeff Stein, *HUD Secretary Ben Carson makes dismissive comments about transgender people, angering agency staff*, WASH. POST: BUSINESS (Sept. 19, 2019), <http://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/>.

147. See Katy O'Donnell, *Ben Carson defends transgender remarks, blames media 'mischaracterizations'*, POLITICO (Sept. 20, 2019), <http://www.politico.com/story/2019/09/20/ben-carson-defends-transgender-remarks-1506883>.

148. *Revised Requirements Under Community Planning and Development Housing Programs*, DEPT. OF HOUSING AND URBAN DEVELOPMENT (proposed Apr. 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>.

149. *Id.*

150. *Id.*

151. *Id.*

a transgender person what identity they have is troubling, in part because not everyone has the same idea of what gender expression or gender identity is or should be. On its face, this proposed rule may be neutral; in its application, there is likely to be a disparate impact on the transgender community, especially in states with traditionally conservative values. As it stands now, with no federal statutory protections for transgender people in housing, transgender people do not have any legal claim to show discrimination based on actual malice or disparate impact.

### *B. Ultra Vires*

The campaign trail is full of grandiose promises and bright ideas to remedy severe problems. Once the elections are over, however, the sword of change is sheathed, and the pen of action is drawn. In his first run for office, President Trump made a lot of promises to the LGBTQ community while campaigning; the image of him brandishing a gay pride flag during a speaking event comes to mind almost immediately.<sup>152</sup> Since his election, however, he has acted both openly and behind closed doors to slash through many Obama-era protections for LGBTQ people.<sup>153</sup> As soon as President Trump was inaugurated, the White House removed any mention of LGBTQ individuals or issues from its website.<sup>154</sup> The day after Jeff Sessions was sworn in as Attorney General of the United States, the Department of Justice announced its refusal to enforce the Obama-era guidance for protecting transgender students under Title IX.<sup>155</sup> That March, President Trump signed an executive order allowing Attorney General Sessions discretion in doling out licenses to discriminate to federal agencies.<sup>156</sup> The people President Trump has nominated for positions of power in

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152. Gwynn Guilford, *Donald Trump's "support" of LGBT communities in one image*, QUARTZ (Oct. 31, 2016), <https://qz.com/823649/donald-trump-unfurled-a-rainbow-flag-with-lgbt-written-on-it-at-a-rally-in-greeley-colorado-to-express-his-so-called-support/>.

153. *How Trump is rolling back Obama's legacy*, WASH. POST, [https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm\\_term=.d36b45cd8bbb](https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.d36b45cd8bbb) (last visited Feb. 29, 2020).

154. @HRC, TWITTER (Jan. 20, 2017), <https://twitter.com/HRC/status/822545849901346819>.

155. Chris Johnson, *DOJ nixes request to halt order against trans student protections*, WASH. BLADE (Feb. 10, 2017, 9:05 pm EST), <https://www.washingtonblade.com/2017/02/10/doj-withdraws-request-halt-order-trans-student-protections/>.

156. *Trump Lays Groundwork for #LicensetoDiscriminate*, HRC (May 4, 2017), <https://www.hrc.org/news/president-donald-trump-lays-groundwork-for-licensetodiscriminate>.



the executive branch, qualified or not, have worked to achieve the unspoken goal of rolling back Obama's LGBTQ protections.<sup>157</sup>

Before becoming President, Donald Trump endorsed changes to the Civil Rights Act that would provide protections for people based on their sexual orientation.<sup>158</sup> He argued that amending current laws would provide LGBTQ people with similar protections to heterosexual people, and this would be the fairest option for all Americans.<sup>159</sup> However, since becoming President, Trump's administration has changed its tune by arguing that bills like the Equality Act would undermine parental rights and authorities afforded to people under current laws.<sup>160</sup> But the issue of parental rights should not undermine an act that would have far-reaching implications in transgender rights, especially in regard to healthcare. An oft-used hypothetical about why parents of transgender kids would lose their rights to make medical decisions for their kids is that, in the event of a transgender youth wanting to start hormone therapy to begin transitioning, the parents would have no say in their transition.<sup>161</sup>

Two questions come to mind about whether or not HUD's rules are valid: did President Obama exceed his executive authority by prohibiting discrimination based on gender identity with the Equal Access Rule, and did President Trump exceed his executive authority by proposing to rescind those same protections? The Constitution allows the President of the United States to execute the laws faithfully.<sup>162</sup> Title VII, Title IX, and the FHA are all federal laws with far-reaching authority. Did either president exceed their authority by interpreting the language of the statute where the legislature is silent? If so, could it be argued that both exceeded their authority by interpreting federal law contrary to legislative intent? Any answer to these questions may shed light on the future of anti-discrimination statutes and their scope.

In analyzing the above questions, it is worth to discussing the drastic shift in political ideals between administrations in the context

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157. Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST, (2018) [https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm\\_term=.d36b45cd8bbb](https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.d36b45cd8bbb) (last visited Feb. 29, 2020).

158. *An Equality Act*, H.R. 5, 116th Cong. (2019).

159. *Id.*

160. *Id.*

161. Chris Johnson, *Trump Comes Out Against Equality Act*, WASH. BLADE, (May 13, 2019), <https://www.washingtonblade.com/2019/05/13/exclusive-trump-comes-out-against-equality-act/>.

162. U.S. CONST. art. II, § 3.

of executive authority. *Chevron U.S.A. v. National Resources Defense Council, Inc.* established a two-step test for courts to determine whether or not they will give deference to a particular agency's interpretation of a statute.<sup>163</sup> Step 'zero' of Chevron deference asks whether the agency has the effect of law.<sup>164</sup> HUD has enacted rules and regulations based on the FHA since the bill became law, so it would be difficult to argue that the agency does not have the effect of law here.<sup>165</sup> The 'first' step, then, is to ask if Congress has spoken to the question at issue.<sup>166</sup> Here, the answer may be no. While Congress has a few bills in the pipeline that would protect homeless transgender people from discrimination, there are no current laws that do so.<sup>167</sup> But "speaking" to a precise issue is difficult to pinpoint. If we were to include transgender people as a protected class on the basis of "sex," then it could be argued that Congress *has* spoken to the precise issue. The proposed rule would be dead in the water here. But, based on the inherent conflict between Gender Identity Rule and Carson's proposed rule, a court may disagree with this Note's position. Assuming Congress has, in fact, not spoken to the precise issue of transgender people (excluding them from the definition of "sex"), this takes us to the final step of Chevron deference—asking whether the agency's interpretation of the statute was permissible.<sup>168</sup> While case law has provided an interpretation of both Acts, there is nothing to say that the HUD's proposed interpretation of the Acts would be impermissible constructions. If American courts follow a similar thought process, this could be disastrous for transgender people trying to escape homelessness, because protection from discrimination based on gender identity could easily sway back and forth as new administrations come into power. This Note takes the position that courts would be doing transgender people a disservice if they continued to allow agencies like HUD to interpret "sex," whenever the current administration wants to expand or contract the definition. Courts should not give the executive branch more power to propose rules like Secretary Carson's that harm transgender people.

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163. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–43 (1984).

164. Cass R. Sunstein, *Chevron Step Zero*, 92 VAL. L. REV. 187, 189–191 (2006).

165. *Chevron*, 467 U.S. at 842–43.

166. *Id.*

167. See generally, Federal Case Law on Transgender Discrimination, NAT'L CTR FOR TRANSGENDER EQUAL. (last visited Feb. 29, 2020), <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>.

168. *Chevron*, 467 U.S. at 842–43.

#### IV. EQUAL RIGHTS VERSUS SPECIAL RIGHTS

Secretary Carson has opined, on more than one occasion, that the LGBTQ community should not receive so-called “special rights” to reach perceived equality.<sup>169</sup> This rhetoric is damaging for two reasons. One, because the assumption that the road to equal rights demands “special” rights burdens the journey. Two, Secretary Carson’s assumption that providing transgender people equal rights and protection from discrimination in housing would hinder or reduce protections for other people is false. Secretary Carson veils his personal beliefs behind the common equality-versus-equity fallacy<sup>170</sup>; assuming that transgender people would receive more benefits at the expense of others is a significant roadblock for homeless transgender people. The various impacts to the LGBTQ community that rhetoric like Secretary Carson’s can have and how those impacts are a reflection of society, as well as perceived impacts on cisgender people, are discussed below.

##### *A. Harm to the LGBTQ Community*

In an intra-office email, Secretary Carson described transgender people as “big, hairy men” that are trying to lie or cheat their way into women’s restrooms in homeless shelters.<sup>171</sup> In a verbal exchange with staffers, Carson expressed his frustration that society no longer understands what men and women are.<sup>172</sup> HUD backed up Carson’s dismissal of any claims of derogatory comments about transgender people and reiterated that Carson believes in equal rights, not special rights.<sup>173</sup> Carson’s position is this: allowing transgender people to use restrooms and facilities in homeless shelters would increase the rate of crime against cisgender people of the gender the transgender person identifies with. For example, transgender women may commit sexual or violent crimes against cisgender women if allowed free access to women’s facilities.<sup>174</sup> However, this statement is unsubstantiated.<sup>175</sup> There is an identifiable concern that by allowing transgender people to

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169. Tracy Jan & Jeff Stein, *HUD Secretary Ben Carson makes dismissive comments about transgender people, angering agency staff*, WASH. POST (Sept. 19, 2019), <http://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/>.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Amira Hasenbush et al. *Gender Identity Nondiscrimination Laws in Public Accommodations*, 16 SEXUALITY RES. & SOC. POL’Y 70, 70–71 (2019).

access the bathrooms of the gender they identify with, there will be an increase in crime and sexual harassment of cisgender individuals.<sup>176</sup> In one of the first empirical studies conducted on crime rates and city ordinances that allow transgender people to access the restroom of the gender they identify as, there were no increases in crime—violent or sexual.<sup>177</sup>

Secretary Carson's rhetoric has reinvigorated the dialogue that courts, legislatures, and agencies have struggled with since gender identity issues started to arise—what protections, if any, are currently offered by statute or rules, and where do they fall short? Secretary Carson assumes that transgender people are more likely to be sexual deviants and engage in sexually aggressive behavior with cisgender people if they were to expose their genitals in a homeless shelter bathroom.<sup>178</sup> However, transgender people often feel similar shame about their bodies and are just as shy about exposing their genitals as cisgender people, regardless of the bathroom they are in.<sup>179</sup> Under Secretary Carson, HUD maintained that it would be costly for homeless shelters to implement policies to provide protections for transgender people, but this is a mistaken belief.<sup>180</sup> Small changes like installing locks or hardware on multi-stall bathroom doors could assist in individual residents' right to privacy.<sup>181</sup>

Transgender youth are at an unusually high rate of risk for becoming homeless and suffering in homeless shelters if rules and policies like Secretary Carson's are implemented. Shelter providers take on a parental role with homeless youth and often require them to wear certain clothes, follow strict schedules and guidelines, and separate themselves from the other sex.<sup>182</sup> Carson's proposed rules could have a proportionally disparate impact on youth because they have fewer freedoms than adults do, even transgender adults.<sup>183</sup> If transgender people were provided federal protection in civil rights

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176. *Id.*

177. *Id.* at 80.

178. *Id.*

179. LISA MOTTET & JOHN M. OHLE, *TRANSITIONING OUR SHELTERS*, 13–14 (2003).

180. Katy O'Donnell, *Ben Carson Defends Transgender Remarks, Blames Media 'Mdefends transgender remarks, blames media 'ischaracterizations'*, POLITICO (Sept. 20, 2019),

<http://www.politico.com/story/2019/09/20/ben-carson-defends-transgender-remarks-1506883>.

181. MOTTET & OHLE, *TRANSITIONING OUR SHELTERS*, at 13–14.

182. *Id.* at 27.

183. *Id.*

statutes, then disparate impact claims would be justiciable under federal law.<sup>184</sup>

Parents denying their children's gender expression, or deciding against hormone therapy or treatment for gender dysphoria, directly contribute to the overrepresentation of transgender youth in homeless shelters.<sup>185</sup> In several national surveys of homeless youth, over a third identified as something other than cisgender and heterosexual.<sup>186</sup> The LGBTQ Homeless Youth Provider Survey, conducted from 2011-2012, assessed LGBTQ homelessness in 354 agencies across the United States and found that 94% of the shelter providers surveyed had assisted transgender youth in the past year.<sup>187</sup> A survey by the University of California-Los Angeles found that 46% of LGBTQ youth ran away from home because of how their parents reacted to their sexual orientation or gender identity, and another 43% ran away because they were forced out by their parents against their will.<sup>188</sup>

In a survey conducted by True Colors United addressing the needs of transgender youth, stable housing was the most prevalent concern, with healthcare ranking much lower.<sup>189</sup> For President Trump's administration to say that providing transgender people with equal protection from discrimination would hinder parental rights regarding healthcare seems to be unfounded.<sup>190</sup>

### *B. Moving Beyond the Community*

In a group of *amici* filed with the Supreme Court on behalf of the employees in *Bostock, R.G.*, and *Zarda*, several women's rights groups recognized that cisgender, heterosexual women could suffer if the definition of "sex" only qualified biological sex and not identity or

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184. See generally *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

185. *New Report on Youth Homelessness Affirms that LGBTQ Disproportionately Experience Homelessness*, HUMAN RTS. CAMPAIGN, <https://www.hrc.org/news/new-report-on-youth-homeless-affirms-that-lgbtq-youth-disproportionately-ex> (last visited May 14, 2021).

186. *Id.*

187. Laura E. Durso & Gary J. Gates, *Serving Our Youth*, UCLA, 3–5 (2012).

188. *Id.*

189. *Our Issue*, TRUE COLORS UNITED, [https://truecolorsunited.org/our-issue/?gclid=Cj0KCQjwi7DtBRCLARIsAGCJWBp27hXjCgk2AJsRKRofGaAFGW8gF4Et4v53Si\\_0n1TahJvCGCW1igaAmj4EALw\\_wcB](https://truecolorsunited.org/our-issue/?gclid=Cj0KCQjwi7DtBRCLARIsAGCJWBp27hXjCgk2AJsRKRofGaAFGW8gF4Et4v53Si_0n1TahJvCGCW1igaAmj4EALw_wcB) (last visited Feb. 29, 2020).

190. Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the U.S. Not Protected by State Discrimination Laws*, WMS. INST. OF L. UCLA (2020).

expression.<sup>191</sup> The *amici* point out a compelling legal and logical loophole presented in *Price Waterhouse*. If Price Waterhouse had fired Hopkins because her employers perceived her to be a lesbian based on her gender expression instead of finding that she did not comport with societal expectations of how a woman should act, she would have had no legal recourse available to her.<sup>192</sup> Men who act ‘effeminately’ and women who act ‘manly’ are sometimes perceived to be gay; if a person’s gender expression does not conform to society’s idea of gender expression and they were fired or denied opportunities because of it, they may not have protection under federal law.<sup>193</sup> Courts would apply this law irregularly—those who conformed more to society’s expectation of gender expression would have a lower likelihood of being fired because of it, transgender or not.<sup>194</sup> This is damaging to many transgender people, especially those that do not “pass,” meaning their expression does not meet the standards of society’s concept of gender.<sup>195</sup> Those who did not conform, both cisgender and transgender people, would not have the same opportunities. In essence, a law that can be irregularly applied in such a way should not exist at all, especially when it has such a negative impact on people of different minority communities.<sup>196</sup>

Since the FHA was drafted to follow the Civil Rights Act’s suit,<sup>197</sup> “shoehorning” gender identity into the statutory definition of “sex” would likely have a domino effect on other anti-discrimination statutes. Additionally, some women’s rights groups believe that expanding the definition of “sex” federally would hinder, rather than help, cisgender women that the statutes are designed to protect. Others argue that expanding the definition of sex to include transgender people would be a bad policy move. They argue it would have a direct and cognizable effect on women who have been subjected to sexual violence—seeing

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191. See *Brief of the National Women’s Law Center and Other Women’s Rights Groups as Amici Curiae Supporting the Employees*, *Bostock v. Clayton Cty., R.G. & G.R. Funeral Homes v. EEOC, and Altitude Express, Inc., v. Zarda* No. 17-1618, 17-1623, 18-107 (2019) (SupremeCourt.gov) [hereinafter Women’s Rights Amici].

192. *Id.* at 27.

193. *Id.*

194. *Id.* at 26–27.

195. Alecia D. Anderson, et al., “Your Picture Looks the Same as My Picture”: An Examination of Passing in Transgender Communities, 37 *Gender Issues* 44, 48 (July 24, 2019).

196. Women’s Rights Amici, *supra* 191 at 27.

197. *History of Fair Housing*, Dept. of Housing and Urban Dev., [\(https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20\(of%201968\)\)](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20(of%201968)) (last visited May 14, 2021).

male genitalia in a homeless shelter with a single-sex restroom policy could cause the woman to relive traumatic events of her past.<sup>198</sup> One such article found 130 examples of men “masquerading” as women to get into single-sex women’s restrooms, and the author argued that this was damning enough evidence to show that gender policy mandates are bad law.<sup>199</sup> But banning access for transgender people into homeless shelters, single-sex restrooms, or any other public housing facility would harm an already at-risk group of people who share many of the same needs and experiences as their cisgender counterparts.

Some federal courts have already found that allowing transgender people to access the facilities of the gender they identify as infringes upon the rights of cisgender people. In *Cruzan v. Special School District Number 1*, the Eighth Circuit rejected the argument that allowing transgender faculty members to use the restrooms of the gender they identify as did not have a foreseeable effect on the privacy rights of other faculty members.<sup>200</sup> Even though the school district had already taken the necessary precautions to provide for transgender faculty members, when teacher Debra Davis came out as transgender, fellow teacher Carla Cruzan sued the district for violating her right to privacy when she saw Davis exit the women’s restroom.<sup>201</sup> The court ultimately disagreed with Cruzan’s arguments and said that nothing about the school district’s accommodations for transgender faculty members violated the terms of her employment.<sup>202</sup> The Third Circuit used a similar approach in *Doe v. Boyertown Area School District* ten years later.<sup>203</sup> Citing *Cruzan*, the court found that allowing transgender students access to locker rooms and other single-sex facilities at school was not a violation of any other students’ constitutional rights.<sup>204</sup>

Access to private facilities is crucial for all people, not just transgender individuals. Case law has provided that the right to privacy of cisgender people is not infringed upon when employers and schools take steps to provide access to said public facilities for transgender people, so why should homeless shelters be any different? From *G.G.* to *Brumby*, and from *Cruzan* to *Doe*, this Note posits that transgender

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198. Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL’Y 309, 323–24 (2018).

199. *Id.*

200. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983 (8th Cir. 2008).

201. *Id.*

202. *Id.* at 984.

203. *Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179, 183 (3rd Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).

204. *Id.*

people have a right to access facilities of their identifying gender. Housing is the next crucial step in this evolution.

## V. THE FORGE

The complicated interactions between the Equal Protection Clause, the FHA, the Civil Rights Act, and subsequent litigation have created a ticking time bomb recognized by actors on both sides of the aisle. Federal protections for transgender people wax and wane as different administrations, with different viewpoints and ideas, come into power. This creates great discomfort in the transgender community every time a new President assumes office, especially when the political pendulum swings the other direction. While proposing a new rule or arguing for rescinding Secretary Carson's proposed rule is viable in the short-term, there are more significant steps that the government must take to protect transgender people from the whims of each new administration.

### A. Analysis of Proposed Bills

In response to Secretary Carson saying, under oath, that he would not remove any Obama-era rules for transgender people in homeless shelters, Congresswoman Jennifer Wexton (D-WA) introduced the Ensuring Equal Access to Shelter Act ("Shelter Act"), which would act to nullify Carson's proposed rule from taking effect.<sup>205</sup> Wexton identified that transgender people are an at-risk population, and by gutting the Equal Access Rule implemented during the Obama administration, it would put transgender people at higher risk for harm.<sup>206</sup> In essence, the Shelter Act seeks to enjoin the HUD from finalizing the proposed rule, but does not go further—it does not attempt to legislate or add any new protections for homeless transgender people.<sup>207</sup>

Throughout his failed bid for the presidency in 2016, his subsequent nomination by President Trump, and his tenure as Housing Secretary, Secretary Carson has frequently espoused that agencies should not establish anti-discrimination protection for transgender

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205. Press Release, *Congresswoman Jennifer Wexton, Wexton Introduces Bill to Block HUD's Proposed Rule*, Wexton(May 23, 2019), <https://wexton.house.gov/media/press-releases/wexton-introduces-bill-block-hud-s-proposed-rule-targeting-transgender-people>,

206. *Id.*

207. *Id.*



people based on their regulatory authority.<sup>208</sup> With President Trump's transgender military ban,<sup>209</sup> for example, Carson stated that platoons are not supposed to be laboratories for social experiments.<sup>210</sup> When Carson was asked about transgender students receiving protections under Title IX in schools, he argued that extra rights should not be granted to people if it requires that everyone else reshape their thinking and understanding.<sup>211</sup> These presumptions are dangerous because they further the narrative that people are not able to change their thinking and that moral codes are rigid and inflexible.

In 2015, Representative David Cicilline (D-RI) introduced the H.R. 3185, called the Equality Act, which would have amended the Civil Rights Act to include protections for gender identity, sexual orientation, and broadened protections for the definition of sex.<sup>212</sup> His bill died with the House Subcommittee on the Constitution and Civil Justice, while an identical version of the bill, proposed by Senator Jeff Merkley (D-OR), met a similar fate by the Senate's hand.<sup>213</sup> A newer version of the bill was reintroduced in the House in 2019, again by Representative Cicilline, which enumerated specific issues faced by LGBTQ people and also addressed concerns of religious freedom, doctor's rights, and parental rights that the first iteration did not address.<sup>214</sup> This bill passed the Democrat-controlled House and the Senate received the bill in March, 2021.<sup>215</sup> Both bills proposed amending the FHA to include sexual orientation and gender identity in the definition of "sex."<sup>216</sup>

This Note takes the position that, like the Religious Freedom Restoration Act,<sup>217</sup> the FHA and the Civil Rights Act are both *super-statutes*. Super-statutes are considered "fundamental law" and "quasi-

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208. Tracy Jan & Jeff Stein, *HUD Secretary Ben Carson makes dismissive comments about transgender people, angering agency staff*, WASH. POST (Sept. 19, 2019), <http://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/>.

209. *Id.*

210. *Id.*

211. *Id.*

212. Equality Act, H.R. 3185, 114th Cong. (2015).

213. Equality Act, S. 1858, 114th Cong. (2015).

214. An Equality Act, H.R. 5, 116th Cong. (2019).

215. Rachel Dowd, *Impact Report 2019*, WILLIAMS INST. OF L., UCLA (Mar. 12, 2019).

216. Equality Act, H.R. 3185, 114th Cong. (2015); An Equality Act, H.R. 5, 116th Cong. (2019).

217. *Bostock*, 140 S. Ct. at 1754 (Justice Neil Gorsuch described the Religious Freedom Restoration Act as a "super statute").

constitutional” in their breadth and scope.<sup>218</sup> Super-statutes, though unlike Article V constitutional amendments, are given great deference and respect by lawmakers and the judiciary.<sup>219</sup> However, legitimate changes to super-statutes rarely happen quickly because they require significant work and research to effectuate.<sup>220</sup> This makes sense because one of the grandest constitutional axioms—that our Constitution protects “We the People”—almost requires that we craft these super-statutes to play a more active role in self-governance and determination. Although Eskridge and Ferejohn first explained super-statutes in 2001 during the Rehnquist Court, they aptly noted that the Supreme Court is trending more towards a formalist, textualist approach to statutory interpretation—one that eschews reading broad, policy-based arguments in statutes and adheres to “original” meanings.<sup>221</sup> Taking those observations into account, it makes sense that the legislative and judicial branches are not keen on attempting to mold the FHA to fit the public policies of today. Perhaps that is why Representative Cicilline’s bills have not made as much traction in the past. In a post-*Bostock* era, an about-face response seems unlikely.

### *B. Tempering Glass Armor*

Any solution to alleviating the issues faced by homeless transgender people must be two-fold. First, either Secretary Carson’s proposed rule should be fully repealed, or Congresswoman Wexton’s bill should pass, banning the rule from becoming final. Congresswoman Wexton’s bill is unsubstantial and would not prevent this problem from ever happening again, so it is quite short-sighted, both in theory and in action as well. Second, the noticeable gap in federal and state laws, the growing trend in statewide protections for transgender people, and the current cases before the Supreme Court call for a new bill to pass that would finally codify discrimination protections for transgender people based on gender identity and expression. But amending the FHA would not be enough. The cacophony of differing interpretations and definitions of sex is too amorphous and unpromising to protect transgender people—the societal understanding of gender identity and expression is growing and attempting to utilize “sex” as an umbrella term is insufficient to

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218. William Eskridge & Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1216–17 (2001).

219. *Id.*

220. *Id.*

221. *Id.* at 1228.

protect a large group of people. The most significant check on the executive branch's authority in promulgating agency rules is for the legislature to act, just as Representative Cicilline has attempted to do.

To incorporate sexual orientation and gender identity into the FHA, Representative Cicilline opted to modify "sex," to say, "sex (including sexual orientation and gender identity)," anywhere the term "sex" appears.<sup>222</sup> This is both a good choice and a bad one. It is a good choice because using the phrase "including," could pave the way for FHA statutory interpretation in future court cases and would not place unrealistic or unfortunate limitations on the definition of "sex." The House Office of the Legislative Counsel ("OLC") has published a guide on drafting legislation. It has a specific section that focuses on phrasing conventions, and state that using words like "including" or "includes" allows for other phrases or terms to be read into the statutory language if necessary.<sup>223</sup> If "sex" were kept as-is, then any interpretation could control the rights owed to LGBTQ people. As mentioned earlier, Representative Cicilline's proposed bills include wide-spread changes to a wide range of statutes and the agencies that statutes established. The OLC discusses the difference between the purpose and effects of both free-standing bills and amendments to existing legislation. Drafting a piece of legislation declaring that sexual orientation and gender identity should be protected classes in all civil rights statutes, while momentous in theory, would likely not provide the outcome this Note hopes to achieve.

Throwing parenthetical statements into legislation could also have a negative result, especially on the House and Senate floors. As discussed in Part II, *supra*, the definition of "sex" has a long and tumultuous history.<sup>224</sup> Only fifteen years after the Civil Rights Act passed did the Supreme Court tackle the definition of "sex" in *Price Waterhouse*.<sup>225</sup> This Note takes the position that *Price* remains good law because it expanded upon the definition of sex in a different way than sexual orientation and gender identity because it focused on expression. Augmenting "sex" to include outward expression was a step in the right direction, but will the Court continue to expand the statutory definition of one simple word? "Sex" has been stuck in a

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222. Equality Act, H.R. 3185, 114th Cong. (2015); An Equality Act, H.R. 5, 116th Cong. (2019).

223. *HOLC Guide to Legislative Drafting*, U.S. HOUSE OFF. LEGIS. COUNS., [https://legcounsel.house.gov/HOLC/Drafting\\_Legislation/Drafting\\_Guide.html#VA](https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html#VA) (last visited Feb. 29, 2020).

224. *See generally* Part II, *supra*.

225. *See generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

recursive loop ever since, resulting in conflicting legislation and circuit splits, to the detriment of transgender people. While Representative Cicilline's general sweep of civil rights statutes is the proper implementation method, its effect falls short of what adding sexual orientation and gender identity as standalone terms would have. Including gender identity and expression as their own, unique classes of people that statutes must protect would both benefit the LGBTQ community as well as negate any arguments from opponents of expanding the definition of "sex."<sup>226</sup>

This Note takes the position that including gender identity and expression in the definition of "sex" is short-sighted at best. The rationale of *Price Waterhouse* remains good law, but it is limited in its application. What happens if *Price Waterhouse* is overturned? Sex discrimination, cisgender or otherwise, would not have much of a leg to stand on in American jurisprudence. Enumerating transgender people or gender identity in federal statutes would circumvent this problem and would prevent the executive and judicial branches from interpreting otherwise.

## VI. CONCLUSION

The Trump administration's continued attacks on the LGBTQ community will not stop if both federal agencies and courts continue to have the free reign to interpret "sex" in contrast with the Obama administration. It is evident that the rhetoric of President Trump's picks for top agency positions, such as Secretary Carson, has bled into many areas of the executive branch that transgender people rely on. A sweeping generalization, be it through legislation, regulations, or case law, may not enough for long-term protections for transgender people. The Equal Access Rule and Representative Cicilline's efforts fail here—they are short-term, feel-good actions that do not and could not help a historically marginalized people.

Homeless transgender people should not be at the mercy of the few and in no way should they be at the mercy of the people who would have the ability to hide their bigotry behind a thin veil of legality. Equal rights are not special rights, and Secretary Carson is mistaken by conflating the two. Adding gender identity as a line item on federal anti-discriminatory statutes would not be giving transgender people

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226. See *Guide to Legislative Drafting*, Part VI(B).

rights at the expense of cisgender people. It is the beginning of a long-term effort in equity that transgender people deserve.<sup>227</sup>

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227. As we move forward, it is worth noting that even though the aforementioned “political pendulum” has already swung again, the Biden administration has its work cut out for it. Although only confirmed in March 2021, Housing Secretary Marcia Fudge has spent her time working to undo the policies that former Secretary Ben Carson set in place as well as plotting a course to handle the COVID-19 pandemic’s effects on housing and homelessness, particularly for people of color. However, the issues discussed in this Note have yet to be addressed in any detail by the Biden administration or by Secretary Fudge. It remains to be seen how the administration will address these important issues. This author is optimistic about the Biden administration’s efforts to reduce homelessness and improve fair housing in the future. See April Ryan, *HUD Sec. Fudge meets with civil rights leaders to address pandemic housing challenges*, THE GRIO (Mar. 26, 2021), <https://thegrio.com/2021/03/26/hud-fudge-civil-rights-leaders-pandemic-housing/>.