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# Birth Certificate with a Benefit: Using LGBTQ Jurisprudence to Make the Argument for a Transgender Person's Constitutional Right to Amended Identity Documents

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# Birth Certificate with a Benefit: Using LGBTQ Jurisprudence to Make the Argument for a Transgender Person's Constitutional Right to Amended Identity Documents

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I want to thank all of the editors and staffers of the CUNY Law Review for editing my note, especially Malita Picasso for recognizing my voice and taking a chance on me. I would like to thank my Diverse Attorney Pipeline Program family for your constant support and encouragement throughout this process. Thank you Chasity Boyce and Tiffany Harper. I would also like to thank my support system at DePaul Law for encouraging me throughout this process, as well. I especially want to thank my friend and colleague Amanda Insalaco for her genuine support and critique of my work throughout the entire editing process. Additional thanks to Professor Terry Smith, Diamond Smith, Terrie Sullivan and Veronica Rodriguez for their feedback and support. Finally, I would like to thank the transgender community who I represent and fight for every day. We are resilient, we are visible, and we cannot be stopped from walking in our greatness.

**BIRTH CERTIFICATE WITH A BENEFIT: USING  
LGBTQ JURISPRUDENCE TO MAKE THE  
ARGUMENT FOR A TRANSGENDER PERSON’S  
CONSTITUTIONAL RIGHT TO AMENDED  
IDENTITY DOCUMENTS**

*Bryanna A. Jenkins*<sup>†</sup>

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## INTRODUCTION

My life began on November 5, 2015, when the State of Maryland Department of Health and Mental Hygiene issued me a birth certificate that listed my sex as female. Maryland's gender marker law became effective on October 1, 2015,<sup>1</sup> allowing transgender people to amend their birth certificates to reflect their gender identity.<sup>2</sup> To receive an amended birth certificate under Maryland's gender marker law, an individual must submit a letter from a licensed health care practitioner stating that the individual has received clinical treatment for gender transition that is individually appropriate for that person.<sup>3</sup> Once this law became effective, I immediately took advantage of the opportunity to amend my birth certificate, so that I could access a better life—one that would have remained far out of reach as long as I continued to have “male” listed on my birth certificate and my driver's license. As a black transgender<sup>4</sup> woman who neither needs nor desires any gender affirmation surgeries,<sup>5</sup> amending my birth certificate was the final step to validate my identity in my transition and to allow me to function in society as any other cisgender<sup>6</sup> woman.

My amended birth certificate has provided me with more freedom and security in my identity. I decided to move to Chicago for law school, so that I could pursue my legal career. I did not have to worry about being denied school housing or a legal job because my government-issued documents aligned with my physical appearance. While I have been personally granted security and liberation, I constantly worry about my community members who live in states that heavily restrict access to amended birth certificates. Currently, some states, such as Maryland, Delaware, New York, and Illinois, allow transgender people to amend their birth

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<sup>1</sup> MD. CODE ANN., HEALTH–GEN. § 4-211(b)(2) (West 2018).

<sup>2</sup> Press Release, Patrick Paschall, FreeState Legal, New Law Allowing Transgender Marylanders to Update Their Birth Certificates Takes Effect (Oct. 1, 2015), <https://perma.cc/FW8M-U9KE>.

<sup>3</sup> *Id.*; Olivia Adams, *That's Not My Name: What Maryland's New Law on Birth-Certificate Changes Means for the State's Transgender and Gender Nonconforming Communities*, BALT. CITY PAPER (July 21, 2015, 5:01 PM), <https://perma.cc/6UEK-GKHE>.

<sup>4</sup> *LGBTQ+ Definitions*, TRANS STUDENT EDUC. RESOURCES, <https://perma.cc/QZ4Q-MWHQ> (last visited Dec. 13, 2018) (“Transgender/Trans: [An] encompassing term of many gender identities of those who do not identify or exclusively identify with their sex assigned at birth.”).

<sup>5</sup> *Reconstructive Procedures: Gender Confirmation Surgeries*, AM. SOC'Y PLASTIC SURGEONS, <https://perma.cc/X4FA-75WH> (last visited Dec. 13, 2018) (describing the variations of gender confirmation surgeries).

<sup>6</sup> *LGBTQ+ Definitions*, *supra* note 4 (“Cisgender: [A] term for someone who exclusively identifies as their sex assigned at birth.”).

certificates without undergoing gender confirmation surgery.<sup>7</sup> Other states, such as Arizona, Missouri, and Georgia, allow transgender people to amend their birth certificates, but only with proof of gender confirmation surgery.<sup>8</sup> However, Kansas, Tennessee, and Ohio do not alter any birth certificates for transgender people.<sup>9</sup>

At a time when LGBTQ visibility has advanced in this country, all while transgender rights are being fiercely challenged, courts must engage with and address issues that specifically impact the lives of transgender people. Unfortunately, courts are currently ripe with litigation about transgender issues. For instance, young transgender students around the country are fiercely fighting for the right to use the bathroom that aligns with their gender identity.<sup>10</sup> If these students had government-issued documents that accurately reflected their gender identities, the issue would be circumvented altogether. Similarly, transgender people have taken the lead to fight back against burdensome gender marker laws that deny them access to birth certificates, and other identity documents, that reflect their accurate gender identity.<sup>11</sup> As Justice Kennedy has stated, “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>12</sup>

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<sup>7</sup> See TRANSGENDER LAW CTR., STATE-BY-STATE OVERVIEW: RULES FOR CHANGING GENDER MARKERS ON BIRTH CERTIFICATES (2017) (providing an overview of states policies for updating gender markers on birth certificates); *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <https://perma.cc/LQB6-7BCB> (last updated Sept. 17, 2018) (compiling legal authorities from each state to assist with the process of changing the sex on a birth certificate).

<sup>8</sup> See sources cited *supra* note 7. States make their own laws about birth certificates, and states have varied in their application of such laws to transgender people.

<sup>9</sup> See sources cited *supra* note 7. In addition, states are seeking to prevent transgender people from using bathrooms that match their gender identity. See Marka B. Fleming & Gwendolyn McFadden-Wade, *The Legal Implications Under Federal Law When States Enact Biology-Based Transgender Bathroom Laws for Students and Employees*, 29 HASTINGS WOMEN’S L.J. 157, 163 (2018) (citing Joellen Kralik, “Bathroom Bill” Legislative Tracking, NAT’L CONF. ST. LEGISLATURES (July 28, 2017), <https://perma.cc/5WU9-K4ZA>) (“[B]etween 2013 and 2017, approximately twenty-four states considered enacting transgender bathroom laws to restrict the use of public bathrooms to the individual’s biological sex.”).

<sup>10</sup> See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50, 1051-52 (7th Cir. 2017) (holding that denying transgender students from the restrooms of their choice violates both Title IX and the Equal Protection Clause). Furthermore, “[i]f a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification.”). *Id.* at 1051 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994)).

<sup>11</sup> See, e.g., Julie Moreau, *Four Transgender People Sue Ohio Over State’s Birth Certificate Policy*, NBC NEWS (Apr. 3, 2018, 12:12 PM), <https://perma.cc/R5A6-YNW2>.

<sup>12</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

The central argument of this note is that transgender people, particularly non-operative transsexual people, have the constitutional right to amend their birth certificates to reflect their accurate gender identity. In addition, this note argues that *Pavan v. Smith*—holding that same-sex couples have the constitutional right to be listed on their child’s birth certificate—will eventually advance the invalidation of inconsistent and antiquated gender marker laws across the country. Part I provides an overview of transgender-specific vocabulary that is used throughout this note. Part II expounds the importance of legally recognizing transgender identities. Part III discusses the U.S. Supreme Court’s LGBTQ jurisprudence, including the landmark *Obergefell v. Hodges* decision and the more recent *Pavan v. Smith* decision. Part IV argues that transgender people have the constitutional right to amend their birth certificates under the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause. This Part explains that the constitutional right of amended identity documents will help resolve inconsistencies in how different jurisdictions legally recognize transgender people on their identity documents. Finally, this Part shows that public policy strongly supports allowing transgender people to amend their identity documents; it allows transgender people to enjoy a better quality of life and to have equal access to public accommodations. Part V concludes that a court should find that a transgender person has the constitutional right to amended identity documents, so that this country can advance towards recognizing and validating transgender lives.

### I. OVERVIEW OF TRANSGENDER-SPECIFIC VOCABULARY

To more clearly understand the argument within this note, transgender-specific vocabulary must be defined. First, “transgender” is an umbrella term for people whose gender identity differs from the sex that they were assigned at birth.<sup>13</sup> Second, “sex” relates to an individual’s biological status, typically categorized as female, male, or intersex.<sup>14</sup> Third, “gender identity” is “[o]ne’s internal sense of being male, female, neither of these, both, or other gender(s).”<sup>15</sup> Fourth, “gender confirmation surgery,” or “gender affirming surgery,” refers to the surgical procedure or procedures by which a transgender person’s physical appearance, and the function of their existing sexual characteristics, are altered to resemble

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<sup>13</sup> *LGBTQ+ Definitions*, *supra* note 4.

<sup>14</sup> *Gender and Gender Identity*, PLANNED PARENTHOOD, <https://perma.cc/FA9P-AY6Q> (last visited Dec. 11, 2018) (“Sex is a label . . . that you’re assigned by a doctor at birth based on the genitals you’re born with and the chromosomes you have. It goes on your birth certificate.”).

<sup>15</sup> *LGBTQ+ Definitions*, *supra* note 4.

an appearance that is socially associated with their identified gender.<sup>16</sup> However, surgery is only one part of some transgender people's transition; in fact, many transgender people do not choose to, and cannot afford to, have genital surgery.<sup>17</sup> Fifth, a "transsexual person" is one whose gender identity differs from the sex that they were assigned at birth, so they seek medical intervention to permanently transition their body to their identified sex or gender.<sup>18</sup> Transsexual is generally considered to be a subset of transgender.<sup>19</sup> Lastly, a "non-operative transsexual person" is "a transsexual who has had hormonal [or] surgical treatments, but not genital surgery, and who either has no desire to proceed with the surgery or cannot proceed due to lack of funds."<sup>20</sup>

## II. THE IMPORTANCE OF LEGALLY RECOGNIZING TRANS IDENTITIES

As the transgender conversation has moved to the forefront of American consciousness, inaccurate stereotypes and misconceptions—bound with generalized conceptions of cisgender gayness or homosexuality—have replaced an understanding that is informed by scientific research and reflective of actual transgender narratives. This note will specifically advocate that non-operative transsexual persons have a constitutional right to access amended identity documents that accurately reflect their gender identity. It is this specific group of transgender people, *like myself*, who are disproportionately impacted by laws that require gender confirmation surgery. Specifically, these laws infringe on a non-operative transsexual person's autonomy to define and to affirm their gender on their own terms. Transgender people who reside in states that require them to undergo gender confirmation surgery, or in states that refuse to amend birth certificates altogether, are completely excluded from having their gender

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<sup>16</sup> See UNIV. OF S. CAL., LESBIAN GAY BISEXUAL TRANSGENDER (LGBT) RES. CTR., TRANSGENDER TERMINOLOGY (2005), <https://perma.cc/ATS8-KACW>.

<sup>17</sup> Kelly Burden Lindstrom, *Document Correction and the Fight for Equality in the Transgender Community*, A.B.A. (Oct. 13, 2017), <https://perma.cc/D7AB-PD5L>; see also Jill Filipovic, *From School to Society, the Intolerance Transgender People Face*, GUARDIAN (Mar. 20, 2013, 10:30 AM), <https://perma.cc/68JP-DJBM> (describing ways, other than surgery, that transgender people seek to match who they are on the inside with social, cultural, and physical markers on the outside).

<sup>18</sup> Christine Aramburu Alegria, *Transgender Identity and Health Care: Implications for Psychosocial and Physical Evaluation*, 23 J. AMER. ACAD. NURSE PRAC. 175 (2011).

<sup>19</sup> THOMAS E. BEVAN, THE PSYCHOBIOLOGY OF TRANSSEXUALISM AND TRANSGENDERISM: A NEW VIEW BASED ON SCIENTIFIC EVIDENCE 42 (Praeger 2014).

<sup>20</sup> *Non-Operative Transsexual*, DEFINITION-OF, <https://perma.cc/PB88-8JKX> (last visited Dec. 11, 2018); see also UNIV. OF S. CAL., LESBIAN GAY BISEXUAL TRANSGENDER (LGBT) RES. CTR., *supra* note 16 ("This person may then take steps to adapt or change their body, gender role or gender expression to achieve what they know their true gender to be.").

legally recognized in their home state. The consequence is that non-operative transsexual persons experience a unique kind of oppression and marginalization in this society. Non-operative transsexual persons are then faced with the decision to either consider gender confirmation surgery, or experience continued societal oppression and discrimination.

The transgender community knows that gender confirmation surgery is not necessary to affirm one's gender. However, states drastically differ as to how they allow transgender people to amend their identity documents, as some states do not allow transgender people to change any identity documents.<sup>21</sup> For instance, Kansas does not legally recognize transgender people, even after the individual has personally affirmed their gender or has taken steps to physically alter their body to reflect their gender identity.<sup>22</sup> Similarly, Ohio denies transgender individuals the option to amend their birth certificates to accurately reflect their gender identity.<sup>23</sup>

These restrictive laws are in stark contrast to state laws from my home state of Maryland,<sup>24</sup> Illinois,<sup>25</sup> and New York,<sup>26</sup> all of which allow transgender residents to amend their birth certificates without invasive and unwanted gender confirmation surgeries. States that have removed outdated prerequisites, such as surgery and court orders,<sup>27</sup> are in line with the current World Professional Association for Transgender Health (WPATH) guidelines. The WPATH guidelines state that gender confirmation surgery is not always necessary to affirm a transsexual person's gender identity because medical treatment is highly individualized for

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<sup>21</sup> See sources cited *supra* note 7.

<sup>22</sup> See *In re Estate of Gardiner*, 42 P.3d 120, 135 (Sup. Ct. Kan. 2002) (“The words ‘sex,’ ‘male,’ and ‘female’ in everyday understanding do not encompass transsexuals . . . . A male-to-female post-operative transsexual does not fit the definition of a female.”); see also Samantha Allen, *Trans People in Kansas Could Finally Get the Right Birth Certificates*, DAILY BEAST (Oct. 19, 2018, 4:47 AM), <https://perma.cc/7GZZ-CZ5K>.

<sup>23</sup> See *In re Ladrach*, 513 N.E.2d 828, 831 (Prob. Ct. Ohio 1987) (interpreting Ohio's birth certificate statute as a statute that does not correct sex on birth certificates for individuals who have changed their sex by surgical procedure). In addition, Ohio does not have *any* “statewide protections against discrimination on the basis of gender identity.” Ramona Peel, *Birth Certificate Policy is Ohio's Mark of Shame*, PRIZM (June 1, 2018), <https://perma.cc/XDV2-SMYM>.

<sup>24</sup> MD. CODE ANN., HEALTH-GEN. § 4-211(b)(2) (West 2018).

<sup>25</sup> 410 ILL. COMP. STAT. ANN. 535/17(1)(d) (West 2018).

<sup>26</sup> N.Y. COMP. CODES R. & REGS. tit. 10, § 35.2 (2018).

<sup>27</sup> *Maryland Becomes 7th State to Modernize Birth Certificate Access*, NAT'L CTR. FOR TRANSGENDER EQUALITY: BLOG (May 26, 2015), <https://perma.cc/Q3DL-8TDM> (explaining that Maryland's previous gender marker law required a court order and proof of sex reassignment surgery to amend the sex listed on a birth certificate).

transgender persons.<sup>28</sup> These states are also in line with the federal government, which has taken a more progressive approach by acknowledging a transgender person's identity on their government-issued documents. Previously, the State Department required transgender people to provide documentation of "sex reassignment surgery."<sup>29</sup> However, as of June 2010, a transgender person can obtain a passport that reflects their gender identity by submitting a statement from a licensed physician confirming that the patient has received appropriate clinical treatment for gender transition.<sup>30</sup> The federal government's approach aligns with states that consider relevant and accurate information about transgender individuals when legislating their identity document regimes.

The failure of many states to adequately acknowledge gender in a uniform way creates burdensome and oppressive lived experiences for transgender individuals. Without access to amended identity documents, they are unable to live their most fulfilling lives. Whether a transgender person desires to have gender confirmation surgery or not should be an autonomous choice. All states should have unvarying laws that recognize and protect a transgender person's identity, no matter where they may fall on the gender spectrum.

### III. A SURVEY OF RELEVANT LGBTQ JURISPRUDENCE

The LGBTQ rights movement has solely centered on issues that affect the cisgender homosexual communities, mainly gay men and lesbian women.<sup>31</sup> Transgender issues are marginalized and disregarded within the larger LGBTQ community, in favor of issues that are more palatable for mainstream consumption.<sup>32</sup> Despite this, many transgender civil rights

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<sup>28</sup> WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 8-10 (7th version, 2011), <https://perma.cc/T7ZH-BHRF> (providing an overview of the therapeutic approaches to gender dysphoria and describing the advancement in the treatment of gender dysphoria).

<sup>29</sup> NAT'L CTR. FOR TRANSGENDER EQUALITY, UNDERSTANDING THE PASSPORT GENDER CHANGE POLICY (2014), <http://perma.cc/2EQU-PG4C>; see also Loren S. Schechter, 'Gender Confirmation Surgery': What's in a Name?, HUFFPOST, <https://perma.cc/RYX5-DGXB> (last updated Feb. 2, 2016) (describing that using the term gender confirmation surgery, as opposed to sex reassignment surgery, is more appropriate to use when referring to such procedures).

<sup>30</sup> NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 29; *Change of Sex Marker*, U.S. DEP'T ST., <https://perma.cc/YK46-SEQX> (last visited Dec. 11, 2018).

<sup>31</sup> See, e.g., Meredith Talusan, *45 Years After Stonewall, the LGBT Movement Has a Transphobia Problem*, AMERICAN PROSPECT (June 25, 2014), <http://perma.cc/9BYK-LEQ4>.

<sup>32</sup> See, e.g., Emily Greenhouse, *Dropping The "T": Trans Rights in the Marriage Era*, NEW YORKER (Apr. 5, 2013), <https://perma.cc/7TTA-SUYB>.

victories are advanced in tandem with same-sex victories. Thus, the next section addresses the Supreme Court's stance on same-sex constitutional issues, highlighting the hallmarks of the Court's landmark holding in *Obergefell* and its subsequent holding in *Pavan*.

#### A. Prior Supreme Court LGBTQ Jurisprudence

In 1986, the Supreme Court in *Bowers v. Hardwick* upheld a Georgia law that criminalized sodomy by holding that same-sex intimacy is not a fundamental right.<sup>33</sup> Ten years later, in *Romer v. Evans*, the Court invalidated a Colorado voter-instituted constitutional amendment that precluded laws that included sexual orientation as a protected class, reasoning that the action was not rationally related to the state's legitimate interest.<sup>34</sup> Rather, the Court determined that the amendment's purpose was based on animus towards homosexuals.<sup>35</sup>

By 2003, the Court invalidated *Bowers* in *Lawrence v. Texas* by ruling that people have the right to choose their own sexual partners for intimate conduct and that this choice is a liberty interest protected by the Fourteenth Amendment.<sup>36</sup> Additionally, the Court invalidated the Defense of Marriage Act (DOMA) in *United States v. Windsor* because the Act impermissibly disparaged same-sex couples who legally married in states that recognized same-sex marriage.<sup>37</sup> Although the Court was initially resistant to redefine precedent and to recognize homosexual rights,<sup>38</sup> a greater recognition of gays and lesbians' humanity resulted as they "began to lead more open and public lives."<sup>39</sup> The Court has improved its awareness of and treatment towards gay and lesbian members of the LGBTQ community, as evidenced by the Court's landmark decision in *Obergefell v. Hodges* and by its recent decision in *Pavan v. Smith*.<sup>40</sup>

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<sup>33</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

<sup>34</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>35</sup> *Id.* at 632.

<sup>36</sup> *Lawrence v. Texas*, 539 U.S. 558, 560 (2003); see also Doran Shemin, Comment, *My Body Is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex*, 24 AM. U.J. GENDER SOC. POL'Y & L. 491, 504 (discussing how transgender individuals should use sexual orientation jurisprudence to challenge sex reassignment surgery requirements).

<sup>37</sup> *United States v. Windsor*, 570 U.S. 744, 775 (2013).

<sup>38</sup> See, e.g., Kenji Yoshino, *Can the Supreme Court Change Its Mind?*, N.Y. TIMES, Dec. 5, 2002, <http://perma.cc/7YFA-AS6D>.

<sup>39</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

<sup>40</sup> *Id.* at 2584.

*B. Obergefell v. Hodges: Same-Sex Marriage as a Fundamental Right and an Equal Institution*

The Supreme Court expanded the definition of marriage to include same-sex couples in *Obergefell v. Hodges*,<sup>41</sup> which legalized same-sex marriage in the United States. In *Obergefell*, the Court held that the right to marry is a fundamental right inherent in the liberty of the person, and that same-sex couples may not be deprived of that liberty under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>42</sup> In addition, the Court held that States must recognize lawful same-sex marriages performed in other states.<sup>43</sup> Under a substantive Due Process approach, the Court analyzed four principles and traditions to demonstrate that marriage is a fundamental right under the Constitution and applies with equal force to same-sex couples.<sup>44</sup>

First, the Court reasoned that prior marriage cases, such as *Turner v. Safley*<sup>45</sup> and *Zablocki v. Redhail*,<sup>46</sup> expressed constitutional principles of broader reach in defining the right to marriage.<sup>47</sup> Specifically, these prior marriage cases identified essential attributes of the right to marriage based in history, tradition, and other constitutional liberties—like autonomy and individual dignity—that are inherent in the intimate bond of marriage.<sup>48</sup> Using reasoning from *Loving v. Virginia*,<sup>49</sup> the Court theorized that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>50</sup> Therefore, two men or two women who seek to marry share a dignified bond in their autonomy to make such profound choices.<sup>51</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2604.

<sup>43</sup> *Id.* at 2607-08.

<sup>44</sup> *Id.* at 2599.

<sup>45</sup> *Turner v. Safley*, 482 U.S. 78 (1987) (holding regulations limiting the privilege of prison inmates to marry abridged their right to marry).

<sup>46</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that a state law prohibiting fathers who were behind on child support from marrying unconstitutionally burdened the fundamental right to marry).

<sup>47</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>48</sup> *Id.*

<sup>49</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that interracial marriage bans are unconstitutional under the Due Process Clause).

<sup>50</sup> *Obergefell*, 135 S. Ct. at 2599.

<sup>51</sup> *Id.*

Second, the right to marry is fundamental because it supports a two-person union.<sup>52</sup> The Court relied on its prior holdings in *Griswold v. Connecticut*,<sup>53</sup> *United States v. Windsor*,<sup>54</sup> and, to a lesser extent, *Lawrence v. Texas*,<sup>55</sup> to illustrate that a two-person marriage is a previously protected intimate association.<sup>56</sup> In *Windsor*, the Court stated that the right to marry dignifies couples that “wish to define themselves by their commitment to each other” and responds to universal desires for long-term companionship.<sup>57</sup>

Third, the Court established that the right to marry is fundamental because it safeguards children and families.<sup>58</sup> Specifically, children of same-sex couples are harmed by laws that ban same-sex marriage because these children suffer the stigma, the harm, and the humiliation of knowing that their parents have less protected rights in society because of their sexual orientation.<sup>59</sup>

Lastly, the Court determined that prior cases, and this nation’s traditions, indicate that marriage has long been a keystone of the social order and the foundation of family and society.<sup>60</sup> As couples must support one another, society must also pledge to support the couple by “offering symbolic recognition and material benefits to protect and nourish the union.”<sup>61</sup> Throughout history, states have placed a significant value on the institution of marriage by providing material benefits for those who enter into such union, yet have denied such benefits to same-sex couples—which, as a result, has led them to experience an instability that opposite sex couples would find intolerable.<sup>62</sup>

Ultimately, after comparing the treatment of same-sex couples to that of opposite sex couples, the Court held that laws banning same-sex marriage impermissibly burden the liberties of same-sex couples and abridge

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<sup>52</sup> *Id.*

<sup>53</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the Connecticut statute forbidding the use of contraception violates the right of marital privacy).

<sup>54</sup> *United States v. Windsor*, 570 U.S. 744, 775 (2013) (holding that DOMA is unconstitutional for directing its restrictions and restraints towards lawful same-sex marriages).

<sup>55</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the Texas statute criminalizing same-sex sodomy was unconstitutional).

<sup>56</sup> See *Obergefell*, 135 S. Ct. at 2600.

<sup>57</sup> *Id.* (quoting *Windsor*, 570 U.S. at 763).

<sup>58</sup> *Id.* at 2590; see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that requiring all children to attend public school is unconstitutional as it violates the Due Process Clause); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1973) (quoting *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923)) (“[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”).

<sup>59</sup> *Obergefell*, 135 S. Ct. at 2590.

<sup>60</sup> *Id.* at 2601.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

central precepts of equality.<sup>63</sup> In denying same-sex couples the right to marry, states create a continuing harm that only serves to undermine and to subordinate gays and lesbians.<sup>64</sup> However, new insights and societal understandings have revealed this unjustified inequality to same-sex couples; an unjustified inequality, found within our country's most fundamental institutions, that once passed unnoticed and unchallenged.<sup>65</sup>

*C. Pavan v. Smith: The Extension of Obergefell to Birth Certificates as Part of the “Constellation of Benefits” Afforded to Married Persons*

In the wake of the Supreme Court's monumental decision in *Obergefell*, states continued to find ways to push back against the national recognition of same-sex marriage and to deny the benefits associated with such marriage.<sup>66</sup> For instance, after *Obergefell*, Arkansas continued to enforce Arkansas Code § 20–18–401, which permitted only a same-sex birth mother's name to be listed on their child's birth certificate.<sup>67</sup> However, the Court ultimately invalidated this statute in *Pavan v. Smith* because the statute treated same-sex couples differently from opposite-sex couples.<sup>68</sup> The petitioners in *Pavan* were two married lesbian couples: Leigh and Jana Jacobs, who married in Iowa in 2010, and Terrah and Marisa Pavan, who married in New Hampshire in 2011.<sup>69</sup> Both couples gave birth to a child in Arkansas in 2015, but the Arkansas Department of Health issued birth certificates bearing only the birth mother's name pursuant to Arkansas Code § 20–18–401.<sup>70</sup>

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<sup>63</sup> *Id.* at 2604.

<sup>64</sup> *Id.*

<sup>65</sup> *Obergefell*, 135 S. Ct. at 2603.

<sup>66</sup> Richard Wolf, *Gay Marriage Victory at Supreme Court Triggering Backlash*, USA TODAY (May 29, 2016, 4:32 PM), <https://perma.cc/PAS8-9P99>.

<sup>67</sup> ARK. CODE ANN. § 20–18–401 (2018). In addition, “[s]everal of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates.” *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (citing *DeBoer v. Snyder*, 772 F.3d 338, 398-99 (6th Cir. 2014)).

<sup>68</sup> *Pavan*, 137 S. Ct. at 2078.

<sup>69</sup> *Id.* at 2077.

<sup>70</sup> *Id.* The Arkansas statute provides that “[f]or the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child.” ARK. CODE ANN. § 20–18–401(e) (2018). Further, “[i]f the mother was married at the time of either conception or birth the name of [her] husband shall be entered on the certificate as the father of the child . . . .” ARK. CODE ANN. § 20–18–401(f)(1). In *Pavan*, the court noted that “[t]here are some limited exceptions to the latter rule—for example, another man may appear on the birth certificate if the ‘mother’ and ‘husband’ and ‘putative father’ all file affidavits vouching for the putative father's paternity. But as all parties agree, the requirement that a married woman's husband appear on her child's birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor.” *Pavan*, 137 S. Ct. at 2077 (citing ARK. CODE ANN. § 9–10–201(a) (2018)).

The Court reasoned that Arkansas’ “differential treatment infringes [on] *Obergefell*’s commitment to provide same-sex couples ‘the constellation of benefits that the states have linked to marriage.’”<sup>71</sup> A same-sex couples’ right to be listed on “birth and death certificates” is protected in the “rights, benefits, and responsibilities” of marriage.<sup>72</sup> The Court also acknowledged that birth certificates are about more than genetics.<sup>73</sup> For instance, Arkansas allowed opposite-sex couples to include a birth mother’s husband, but not a birth mother’s wife, on the birth certificate of a child conceived through an anonymous sperm donation.<sup>74</sup> The petitioners in *Pavan* demonstrated to the Court that Arkansas chose to use birth certificates for more than “a mere marker of biological relationships,” but also to give married parents a form of legal recognition that is not available to unmarried parents.<sup>75</sup> As a result of that choice, the Court, consistent with *Obergefell*, concluded that Arkansas may not deny married same-sex couples that right and benefit of marriage.<sup>76</sup>

While transgender rights were subsumed within the LGBTQ movement,<sup>77</sup> the Court’s LGBTQ jurisprudence has evolved to create a landscape where transgender people can use this precedent to justify the recognition of our constitutional rights.

#### IV. A TRANSGENDER PERSON’S CONSTITUTIONAL RIGHT TO AN AMENDED BIRTH CERTIFICATE

“*Obergefell* . . . marks passing the torch from ‘LGB’ to ‘T.’ The next civil rights frontier belongs to transgender people.”<sup>78</sup> Using this momentum, transgender people should have the constitutional right to access amended birth certificates that reflect their accurate gender identity because: (1) states create due process and equal protection issues, similar to those addressed in *Obergefell* and *Pavan*; (2) a Supreme Court ruling will help resolve inconsistency in enforcement amongst the states and the fed-

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<sup>71</sup> *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

<sup>72</sup> *Id.* at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2079.

<sup>77</sup> Marisa Pogofsky, Comment, *Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733, 746 (2018).

<sup>78</sup> Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 508 (2016).

eral government, as in *Obergefell* and *Pavan*; and (3) public policy supports legally acknowledging the valid identities of transgender and gender non-conforming people.<sup>79</sup>

This section explains that states violate the Fourteenth Amendment when they deny transgender people access to amended birth certificates. In addition, this section discusses that antiquated gender marker laws create state and federal inconsistencies throughout the country. Lastly, this section addresses that states create public policy concerns when denying transgender people access to amended birth certificates because their access to public accommodations is limited.

### A. Fourteenth Amendment Constitutional Claims

In denying non-operative transsexual people access to amended birth certificates, states continuously create constitutional due process and equal protection issues, similar to those in *Obergefell* and *Pavan*. Specifically, restrictive gender marker laws violate the Due Process Clause by infringing on transgender people's ability to make autonomous bodily decisions about how to express their gender.<sup>80</sup> In addition, restrictive gender marker laws violate the Equal Protection Clause by targeting transgender people and denying them access to accurate basic documents that would vastly improve their quality of life.<sup>81</sup> Furthermore, transgender people experience rampant discrimination within society without access to amended identity documents.<sup>82</sup>

#### 1. Substantive Due Process Arguments

Antiquated gender marker laws violate the right to privacy and to bodily autonomy under the Fourteenth Amendment's Due Process Clause because they force all transgender people to either unnecessarily disclose their gender identity—and explain why it does not match their birth certificate—or to alter their bodies, exposing us to further discrimination and

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<sup>79</sup> See Stephanie Markowitz, Note, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 *CARDOZO J.L. & GENDER* 705, 715 (2008) (“Promoting the emotional well-being of all citizens is undoubtedly a public policy issue.”).

<sup>80</sup> See Pogofsky, *supra* note 77, at 736.

<sup>81</sup> See *id.* at 755-56.

<sup>82</sup> Andrew Cray & Jack Harrison, *ID Accurately Reflecting One's Gender Identity Is a Human Right*, *CTR. FOR AM. PROGRESS* 3 (Dec. 18, 2012), <https://perma.cc/FCR7-ZZUY> (discussing that transgender persons who presented inaccurate identification experienced harassment, were physically assaulted, asked to leave, and discriminated against in housing and hiring).

societal stigmatization.<sup>83</sup> In holding that same-sex marriage is a fundamental right, the Court in *Obergefell* established baseline protections that could evolve to protect LGBTQ people in contexts outside of marriage.<sup>84</sup> Specifically, the Court in *Obergefell*, relying on principles surrounding marriage as a keystone of social order, reasoned that the institution of marriage itself has evolved over time, superseding rules related to consent, race, and gender.<sup>85</sup> The Court in *Pavan* demonstrated the importance of validating couples' identities and their family structure, while also ensuring that they were not denied recognition on their child's birth certificate.<sup>86</sup> The Court can use this precedent to expand these protections and to grant transgender people recognition on their own birth certificates.

A transgender complainant could argue that gender marker laws requiring invasive and expensive gender confirmations surgeries, or laws failing to recognize transgender identities at all, violate the right to bodily autonomy.<sup>87</sup> Restrictive gender marker laws serve the only purpose of forcing transgender people to alter their bodies in order to receive legal recognition in their state.<sup>88</sup> For this type of claim to be successful, the Court must recognize that the right to define and to affirm one's gender identity is captured in prior decisions that address the fundamental right to autonomy.<sup>89</sup>

If the Court recognizes that the right to define one's gender is included in the fundamental right to autonomy, then it must recognize that

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<sup>83</sup> See, e.g., Ranjani Chakraborty, *How ID Laws Can Put Trans People in Danger*, VOX (Aug. 16, 2018, 12:30 PM), <http://perma.cc/7PK5-FXHQ>.

<sup>84</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965)) ("The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity . . ."); J. Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, N.Y. TIMES (July 16, 2015), <https://perma.cc/23H8-2Y8G> (explaining that *Obergefell* is a victory for the transgender community and that transgender advocates believe that Due Process liberties should extend beyond same-sex marriage to include the right to change the gender marker on a birth certificate, or to use a restroom that matches one's gender identity).

<sup>85</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>86</sup> See *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (holding that denying same-sex couples recognition on their child's birth certificates infringes on *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits" that the states have linked to marriage).

<sup>87</sup> Shemin, *supra* note 36, at 503.

<sup>88</sup> See *id.* Doran Shemin argues that state requirements for sex reassignment surgery violates "transgender individuals' ability to make autonomous decisions" and "force[s] transgender people to make irreversible changes that can drastically alter the course of their lives." *Id.*

<sup>89</sup> See *id.*; see also *Obergefell*, 135 S. Ct. at 2597-98; *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

transgender persons have the right to access amended birth certificates because: (1) an accurate birth certificate dignifies the identity of a transgender person, just as access to the institution of marriage—and the subsequent recognition on the birth certificate of a child from the marriage—dignifies the union of same-sex and opposite-sex married couples alike;<sup>90</sup> (2) an amended birth certificate safeguards a transgender person from social harm, stigma, and discrimination that results from misidentification of their gender identity, just as the Court found that the right to marry for same-sex couples safeguards families and children from social harm and stigma;<sup>91</sup> and (3) amended birth certificates promote the social order by retaining current and accurate detailed records of all residents,<sup>92</sup> just as the Court found that validating same-sex marriage is a “keystone of our social order.”<sup>93</sup>

First, an amended birth certificate dignifies a transgender person’s identity by allowing that person to choose their identity and to receive legal recognition of their transgender identity.<sup>94</sup> The Court has found dignity to be derived from, in part, an individual’s ability to make personal autonomous choices; the state should not be able to impede upon this right in this circumstance.<sup>95</sup> The Court has recognized that the state cannot make choices, or prevent one from making choices, that permanently affect a person’s body.<sup>96</sup> When a state requires a transgender person to undergo gender confirmation surgery to receive an amended birth certificate, the state violates a transgender individual’s ability to make their own decisions about their body and how to express their gender identity.<sup>97</sup> As

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<sup>90</sup> See *Pavan*, 137 S. Ct. at 2078-79.

<sup>91</sup> *Obergefell*, 135 S. Ct. at 2600-01.

<sup>92</sup> See Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois’ Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647, 654-55 (2017) (citing DAVID LYON, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE 22-23 (2009)). Governments and states have relied on identity documents “to more easily identify, surveil, include, exclude, police, and punish their residents.” *Id.* at 655 (citing LYON, *supra*). For example, at the turn of the twentieth century, the government relied on ID cards for the purposes of “colonization, crime control, and war.” *Id.* (citation omitted). Furthermore, “[t]he United States adopted national citizen registration systems . . . for the purposes of identifying citizens for the draft, tracking international travelers, and identifying potential enemies of the state on the basis of their country of origin.” *Id.* (citation omitted).

<sup>93</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>94</sup> See *id.* at 2589.

<sup>95</sup> See Shemin, *supra* note 36, at 499, 500.

<sup>96</sup> *Id.* For analogies on bodily integrity jurisprudence similar to that of a transgender complainant, see generally *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding implicitly that a complete restriction a woman’s decision to terminate her pregnancy keeps women from exercising control over their own bodies) and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating a law that forced sterilization of people who were considered habitual criminals).

<sup>97</sup> See Shemin, *supra* note 36, at 503.

a result, transgender people who do not want to undergo surgery are pressured to consider either altering their bodies to receive uniform identity documents or remaining with documents that do not accurately reflect their gender identity. A transgender person's dignity is preserved when they can make their own decisions about their transition process, and amend their birth certificate without oppressive surgery requirements. Transgender people are then empowered to define their own gender identity, to use government-issued documents that reflect their defined gender identity, and to rectify societal misconceptions of what a transgender person's transition process must replicate.

Second, an amended birth certificate safeguards a transgender person from social harm by allowing them to maintain privacy about their transgender identity. Transgender people who are forced to present incongruent identification constantly risk outing themselves, which can cause transphobic abuse and discrimination.<sup>98</sup> When identity documents do not match a person's gender identity, it can create barriers to access basic services and societal benefits, such as employment and housing.<sup>99</sup> Thus, an amended birth certificate creates an expectation of privacy for a transgender person, along with the freedom to access spaces and services without public intrusion of their gender. As a result, congruent documentation, specifically birth certificates, will further safeguard transgender people from the stigma and the rampant discrimination that results from misidentification.

Lastly, amended birth certificates promote the social order because states can properly and accurately record transgender people's identities, recognizing their validity as residents and, thus, bringing them in from the margins of society. Birth certificates play an important role in personal identification in this country.<sup>100</sup> Specifically, birth certificates are important to obtain other types of identity documents, such as drivers licenses and passports, which require proof of a person's identity.<sup>101</sup> This country's has used identity documents as a tool to recognize and to track the all people that are citizens of this country.<sup>102</sup> Transgender people are

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<sup>98</sup> Cray & Harrison, *supra* note 82, at 2 (“Transgender people who may otherwise move through the world undetected by those who would discriminate against them are often ‘outed’ by an old gender marker, an old name, or an old photograph.”).

<sup>99</sup> Shemin, *supra* note 36, at 504-05.

<sup>100</sup> *Id.* at 495.

<sup>101</sup> *Id.* at 496; see *Change of Sex Marker*, *supra* note 30 (listing requirements for changing one's gender on a passport).

<sup>102</sup> See Mulligan, *supra* note 92, at 654-55 (citation omitted); see also Jamilah King, *The Next Battleground for Trans Rights Isn't Bathrooms – It's Birth Certificates*, BUS. INSIDER (June 9, 2016, 9:05 AM), <http://perma.cc/9A4Z-P3CW> (quoting M. Dru Levasseur, director of Transgender Rights Project at Lambda Legal) (“It's in everybody's interest for people to

more racially and ethnically diverse than the general population of people that live in this country,<sup>103</sup> and our existence needs to be accurately documented. For a transgender person, an amended birth certificate allows and encourages them to fully participate in the public aspects of life as a valid state resident.

In my own personal experience, I felt societal and community pressure to undergo a gender confirmation surgery before Maryland changed its gender marker law. Even before I had a full understanding of my gender identity, I perceived that I needed a gender confirmation surgery to access a higher quality of life as a woman, and to receive full recognition and protections under the law. As long as I remained in my queer body, I felt that my life was not worthy of the same protections as a cisgender woman. However, when Maryland announced that it would change this law, I was relieved that I could finally maintain control of my body and my gender identity, and privately navigate society as a woman, free from social stigma and discrimination.

## 2. Equal Protection Arguments

In addition to due process concerns, restrictive gender marker laws raise equal protection issues because: (1) transgender people are treated on less-than-equal terms, compared to their cisgender counterparts, in states where all transgender people are prohibited from amending their birth certificates,<sup>104</sup> and (2) non-operative<sup>105</sup> and pre-operative<sup>106</sup> trans-

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have identity documents that really reflect who they are in the world – the interest of security, the TSA, [and] the police.”).

<sup>103</sup> See ANDREW R. FLORES ET AL., UCLA SCH. OF LAW, WILLIAMS INST., RACE AND ETHNICITY OF ADULTS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 9 (2016), <https://perma.cc/2EFF-B4B6> (“We find that adults who identify as transgender are more racially and ethnically diverse than the U.S. population.”).

<sup>104</sup> See Scott Skinner-Thompson, *Why Trans People Have a Constitutional Right to Change Their Birth Certificates*, SLATE (Apr. 27, 2017, 9:02 AM), <https://perma.cc/6G99-KZJN>. States have also prohibited transgender people from amending their driver’s licenses. *K.L. v. State, Dep’t of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI, 2012 WL 2685183, at \*1, \*3 (Super. Ct. Alaska Mar. 12, 2012). These suits argue that the birth certificate policies discriminate on the basis of sex-based characteristics and transgender status in contravention of constitutional equal protection guarantees.

<sup>105</sup> “Non-operative” is a term to describe “transgender, transsexual or gender variant individuals who have not attained and may not desire to attain gender [confirmation] surgery. For many individuals, self-identification and self-expression alone achieve harmony between one’s body and one’s gender identity.” UNIV. OF S. CAL., LESBIAN GAY BISEXUAL TRANSGENDER (LGBT) RES. CTR., *supra* note 16.

<sup>106</sup> “Pre-operative” is a term to describe “transgender, transsexual or gender-nonconforming individuals who have not completed gender [confirmation] surgery but who desire to and are seeking that as an option.” *Id.*

sexual persons are treated on less-than-equal terms, compared to post-operative<sup>107</sup> transsexual persons, in states that allow only post-operative transsexual persons to amend their birth certificates.<sup>108</sup> In *Obergefell*, the Court specifically held that state laws banning same-sex marriage are unconstitutional because they abridge central precepts of equality.<sup>109</sup> After a long history of having their relationships disapproved, same-sex marriage bans created a continuing harm that served to disrespect and to subordinate gays and lesbians.<sup>110</sup> In *Pavan*, the Court extended this reasoning and held that denying same-sex spouses the right to be listed on their child's birth certificate infringes on *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage."<sup>111</sup>

Similarly, a transgender complainant could argue that antiquated gender marker laws classify groups into categories that do not pass the constitutional muster under the Equal Protection Clause. In fact, such laws uphold a gender binary system,<sup>112</sup> where cisgender people are legally recognized and prioritized over transgender people.<sup>113</sup> Similarly, states with laws that require gender confirmation surgery create a two-tier system within the transgender community: post-operative and pre-operative

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<sup>107</sup> "Post-operative" is a term to describe "transgender, transsexual or gender-nonconforming individuals who have completed gender [confirmation] surgery, and/or other surgeries to change their bodies to more closely match their gender identity." *Id.*

<sup>108</sup> There are currently no cases that address how gender marker laws create two classes within the transgender community. However, this dilemma seems most analogous to the disparate treatment of lighter skinned African-Americans versus darker skinned African-Americans. *Cf. Leland Ware, "Color Struck": Intragroup and Cross-Racial Color Discrimination*, 13 CONN. PUB. INT. L.J. 75, 78 (2013). Since lighter skin is close in proximity to the status quo of "whiteness," light skinned Black persons receive preferential treatment under the law and in society. *See id.* The same can be said for transgender people who alter their bodies to conform to the status quo of gender to receive preferential treatment under the law. Thus, allowing post-op transgender persons to navigate society with an ease and privilege that "non-op" and "pre-op" transgender persons cannot.

<sup>109</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

<sup>110</sup> *Id.*

<sup>111</sup> *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (quoting *Obergefell*, 135 S. Ct. at 2601).

<sup>112</sup> A Gender Binary is "[a] system of viewing gender as consisting solely of two, opposite categories, termed 'male and female,' in which no other possibilities for gender or anatomy are believed to exist. This system is oppressive to anyone who defies their sex assigned at birth, but particularly those who are gender-variant or do not fit neatly into one of the two standard categories." *LGBTQ+ Definitions*, *supra* note 4.

<sup>113</sup> *See Shemin, supra* note 36, at 508 ("States that require [gender confirmation] surgery or issuance of new documentation are trying to force transgender individuals into the historic gender binary."); Samantha Riedel, *Op-Ed: Cis People's Feelings Must Not Take Precedence Over Trans Rights*, THEM (Oct. 23, 2018), <https://perma.cc/9K94-8LDG> ("It is pointless to pretend that our society is not set up to prioritize cis people's needs and comforts over our basic right to declare our existence.").

transsexual persons receive societal benefits and protections for conforming their bodies to align with their states' definition of gender, whereas non-operative transsexual persons are stigmatized and denied basic benefits and protections because their unique gender does not align with their states' chosen definition of gender. Depending on which level of scrutiny the Court would apply to the class of transgender people, at a minimum, a state will have to show a legitimate state interest, and that its gender marker law is rationally related to advance that interest.<sup>114</sup> States typically justify its requirement for gender confirmation surgery on grounds of fraud prevention, the permanence of transition, and concerns about sex-specific facilities.<sup>115</sup> However, despite these state interests, it is unlikely that a state can prove that denying transgender people amended identity documents is rationally related to advance those state interests.<sup>116</sup> Issuing amended identity documents to transgender people creates less harm to society.<sup>117</sup>

The Court must realize, as in *Pavan*, that birth certificates serve a greater purpose than a static document of birth. Moreover, *Pavan* highlights that governments and institutions cannot solely rely on biology and genetics as a way to discriminate against marginalized groups of people.<sup>118</sup> Therefore, a similar argument can be made on behalf of the

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<sup>114</sup> Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH J. GENDER & L. 373, 422 (2013). Heightened scrutiny has been applied for discrimination against transgender individuals. See *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (determining that discrimination against transgender individuals on the basis of their gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause, which receives heightened scrutiny). In addition, the Department of Justice released a report saying that all LGBT people should receive heightened scrutiny. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 33 (2011), <https://perma.cc/Z2LT-Q6SU> (“[W]e note that a number of factors weigh in favor of applying heightened scrutiny in the context of discrimination by law enforcement on the basis of sexual orientation and gender identity, including a long history of animus and deeply-rooted stereotypes about lesbian, gay, bisexual, and transgender (‘LGBT’) individuals.”).

<sup>115</sup> Mottet, *supra* note 114, at 413-22.

<sup>116</sup> *Id.* at 422.

<sup>117</sup> See *id.* at 415. Lisa Mottet explains that: (1) “there are particularly strong arguments that security and law enforcement agencies’ ability to protect the public is *enhanced* by having gender marker policies that are not based on surgeries, but are instead based upon the gender to which a person has transitioned;” (2) “polic[ies] allowing a larger majority of people to have accurate birth certificates should not be dismissed due to conjecture concerning outliers who may change their gender more than once, especially because there is no articulation of the harm to society caused by multiple gender corrections;” and (3) “[u]ltimately, transgender women using or living in sex-segregated facilities do not create or increase threats to non-transgender women . . . .”). *Id.* at 415, 417, 421.

<sup>118</sup> See *Pavan*, 137 S. Ct. at 2078.

transgender community, who need access to these documents as any other person in this country. Contemporary science shows that gender extends beyond biology.<sup>119</sup> Thus, birth certificates should not only be used for their biological purposes, but also for government agencies to validate a transgender person's identity when being used to access social benefits, services, or other forms of identification.

Transgender people need legal protections to safeguard our identities and our participation in society. Specifically, transgender people cannot be denied a “constellation of benefits” that are linked to the legal recognition of one's gender identity on a birth certificate, just as the Court found that same-sex couples cannot be denied a constellation of benefits linked to marriage—including the recognition of such marriage on their child's birth certificate.<sup>120</sup> A transgender person needs an amended birth certificate to enjoy the benefits of living secure in their affirmed identity and participating in the necessary mundane activities, such as applying for jobs, searching for and securing housing, enrolling in school, opening a bank account, or going through airport security.<sup>121</sup> Furthermore, an amended birth certificate can help transgender people avoid the risk of harassment and discrimination—by a state or by individuals within a state—that results from possessing incongruent identity documents.<sup>122</sup>

The Court's will inevitably use its reasoning in *Pavan* to invalidate antiquated gender marker laws for the same reason as it was used to invalidate the exclusion of same-sex couples from the birth certificates of children born into their marriage. As stated above, the Court will have to acknowledge that upholding antiquated gender marker laws would serve to invalidate the identities of transgender people and to maintain barriers that prevent transgender people from accessing a fair quality of life.

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<sup>119</sup> See Robin Marantz Henig, *How Science Is Helping Us Understand Gender*, NAT'L GEOGRAPHIC: MAG. (Jan. 2017), <https://perma.cc/7CMM-WKF9> (“Gender is an amalgamation of several elements: chromosomes (those X's and Y's), anatomy (internal sex organs and external genitals), hormones (relative levels of testosterone and estrogen), psychology (self-defined gender identity), and culture (socially defined gender behaviors). And sometimes people who are born with the chromosomes and genitals of one sex realize that they are transgender, meaning they have an internal gender identity that aligns with the opposite sex—or even, occasionally, with neither gender or with no gender at all.”).

<sup>120</sup> See *Pavan*, 137 S. Ct. at 2078.

<sup>121</sup> Lindstrom, *supra* note 17.

<sup>122</sup> See *id.* As a result of having non-matching documents, many transgender people are excluded from engaging in basic activities that are necessary to function in society. *Id.* Additionally, this “puts the transgender population at much greater risk of poverty, unemployment, and homelessness than the general population.” *Id.*

Recently, in *Karanoski v. Trump*, a complainant challenged President Trump's transgender military ban.<sup>123</sup> The Western District of Washington ruled that:

[B]ecause transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care, and will be subject to the Court's "strict scrutiny." This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.<sup>124</sup>

If more district and appellate courts reason that transgender people are indeed a protected class of people, it is likely that the Supreme Court will strike down restrictive gender marker laws that violate the constitutional due process and equal protection rights of transgender people based upon the analysis above.

#### *B. State & Federal Inconsistencies in Permitting the Amendment of Identification*

A Supreme Court ruling that non-operative transsexual persons have the constitutional right to access amended birth certificates, without gender confirmation surgery, will resolve the inconsistency with how states and the federal government legally recognize transgender people on their identity documents. The federal government has been more inclusive and progressive in recognizing new and expanded concepts of gender identity by issuing amended passports and social security cards to transgender people.<sup>125</sup> However, individual states are still free to burden the lives of transgender people in this country, which is unfair and promotes indifference towards transgender lives. The *Obergefell* opinion alluded to this federalism issue in the context of same-sex marriage when it stated that "while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."<sup>126</sup>

An analogous argument can also be made for transgender individuals who desire amended birth certificates that reflect their gender identity.

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<sup>123</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*1 (W.D. Wash. Apr. 13, 2018), *appeal docketed*, No. 18-35347 (9th Cir. Apr. 30, 2018).

<sup>124</sup> *Id.*

<sup>125</sup> See NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 29; *Change of Sex Marker*, *supra* note 30 (listing requirements for changing one's gender sex on a passport).

<sup>126</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

While states should be free to manage the ways in which transgender people access amended birth certificates, states cannot simply deny a transgender person the right to an amended birth certificate that reflects their gender identity. This gives states the power to burden the lives of transgender people in this country; it serves unfairness and promotes indifference towards transgender lives. Transgender individuals are severely burdened by having their gender identity legally recognized in one state, but completely disregarded in another state, just as same-sex couples that legally married in one state were once refused marriage recognition in another state.<sup>127</sup> The absence of legal recognition in every state infringes on transgender people's personal autonomy, dignity, and ability to freely and to safely travel within the country.<sup>128</sup>

The legal issue of validating transgender identities has always been implicitly intertwined with a court's authority to deem marriages valid.<sup>129</sup> For decades, transgender people have been permitted to marry someone of the opposite sex; however, issues arise when the marriage requires a court order to determine its validity.<sup>130</sup> State courts have relied on the "true sex" model to define sex for the purposes of marriage validation where one spouse is transgender.<sup>131</sup> However, reliance on the "true sex" model—a legal fiction—leads to absurd results; the male/female dichotomy is a flawed portrayal of sexuality and is biologically unsound. An accurate birth certificate, as opposed to the "true sex" model, would secure a pathway to legally recognize transgender people who have entered into a marriage union—as individuals and as a couple. Rationally, states should want to validate transgender people's identity, just as the federal

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<sup>127</sup> See *id.* at 2607.

<sup>128</sup> See, e.g., Gina Duncan, *Flying While Trans? Things to Know Before You Go*, HUFFPOST (May 9, 2017, 11:30 AM), <https://perma.cc/L3VM-FL4Q>.

<sup>129</sup> Wolf, *supra* note 66.

<sup>130</sup> See *Obergefell*, 135 S. Ct. at 2590; see also *In re Marriage of Simmons*, 355 Ill. App. 3d 942, 954 (App. Ct. 2005) (holding that a transsexual male's marriage to his wife was invalid as a same sex marriage and that he could not be declared the de facto parent of the minor child); *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (holding that the law does not provide for or allow a post-operative female-to-male transsexual person to marry a female and that their marriage was void ab initio); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that Littleton did not have standing to bring a malpractice action as a surviving spouse suit because the marriage was not valid).

<sup>131</sup> See Audrey C. Stirnitzke, Note, *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285, 286 (2011). "True Sex" was a test that came from the first transsexual marriage case in England. *Id.* (citing *Corbett v. Corbett*, [1971] P. 83 (Eng.)). "If chromosomes, gonads, and genitals . . . were all 'congruent,' then that congruence formed the person's 'true sex,' which was the person's sex for purposes of marriage despite operative intervention." *Id.* at 294 (citing *Corbett*, [1971] P. 83 at 106). According to medical testimony at the time of *Corbett*, sex was unchangeable. *Id.* (citing *Corbett*, [1971] P. 83 at 100).

government, in a way that allows them to participate in societal institutions like marriage, as they have already done for years prior to *Obergefell*.<sup>132</sup>

If states are permitted to continue defining gender according to outdated notions of gender and sex, despite valid medical and scientific evidence and the narratives of transgender people,<sup>133</sup> then the laws will serve no purpose other than to erase and to suppress people for failing to conform to a state's narrow gender binary of what a "man" and a "woman" is supposed to be. Similar to the issue of same-sex marriage, the Supreme Court will eventually have to resolve whether the federal government's approach preempts the individual approaches of the states, and, as a result, the inconsistencies in how states define, recognize, and enforce gender.

### C. Public Policy Concerns

Lastly, denying non-operative transsexual people the ability to amend their birth certificates is against public policy.<sup>134</sup> Public policy supports legally acknowledging the valid identities all transgender individuals and removing barriers so that marginalized people can access basic documents and services.<sup>135</sup> If the Court uses *Pavan* to hold that transgender people have the constitutional right to amend the gender on their identity documents, the Court would also contribute to alleviating other issues that transgender people encounter as a result of problematic public accommodation policies, such as anti-transgender bathroom laws—which mainly criminalize transgender bodies that challenge the gender binary social construct.<sup>136</sup> Further, if antiquated gender marker

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<sup>132</sup> Parker Marie Molloy, *Two Trans Men Come Away with Major Court Victories*, ADVOCATE (Aug. 14, 2014, 2:12 PM), <https://perma.cc/86QN-JST2>; see also *Beatie v. Beatie*, 333 P.3d 754, 755 (Ariz. Ct. App. 2014) (holding that a transgender man and his wife could obtain a divorce despite the state's ban on same-sex marriage.); *Miller v. Angel*, No. GD053180 (Cal. Sup. Ct. Aug. 6, 2014) (holding that a transgender man is legally male and that Louisiana law would recognize his marriage as one between a man and a woman).

<sup>133</sup> See Henig, *supra* note 119.

<sup>134</sup> See, e.g., *Gonzalez*, 305 F. Supp. 3d at 333-34 (holding that the Demographic Registry of the Commonwealth of Puerto Rico must permit transgender individuals to change the gender marker on their birth certificates in light of, among other things, its public policy prohibiting discrimination in providing services based on gender identity).

<sup>135</sup> See, e.g., Molloy, *supra* note 132 (discussing a court decision that allowed two transgender men to divorce after being initially denied this service).

<sup>136</sup> See Katy Steinmetz, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, TIME (July 28, 2015), <https://perma.cc/6FNA-DA94> (“[B]athroom bills’ . . . mandate that people use the bathroom that matches the sex on their birth certificate. That’s a marker that is difficult for most transgender people to change, as well as one that, for them, is a bureaucratic indicator decided by someone else that should not be weighed against their innate sense of self.”); see also Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 16 (2017) (“The most direct way that

laws continue to stand, they will continue to jeopardize the safety and well-being of transgender people in this country, while also inhibiting our access to basic public accommodations, such as secure housing and employment.<sup>137</sup>

Injustice at Every Turn<sup>138</sup> has reported that forty percent of those who presented identification that did not match their gender identity or expression reported being harassed, and three percent reported being attacked or assaulted.<sup>139</sup> In addition, fifteen percent reported being asked to leave the setting where they had presented incongruent identification.<sup>140</sup> On the other hand, transgender people who have had some type of gender confirmation surgery were able to change their gender marker over six times, more frequently—at thirty-nine percent—than those without surgery—at six percent.<sup>141</sup> Additionally, twenty percent “have been denied the change even with some type of surgery,” while thirty-eight percent have not tried to change their birth certificate.<sup>142</sup> Governments and local institutions that deny transgender people accurate birth certificates are ultimately complicit in denying transgender people the right to access benefits and public accommodations that could improve the quality of our lives.

In *Grimm v. Gloucester County School Board*, a case that will likely reach the Supreme Court and alter transgender rights in this country, the District Court of the Eastern District of Virginia denied a school district’s motion to dismiss a transgender student’s Title IX and Equal Protection Claims based on the district’s bathroom policy.<sup>143</sup> The policy provided

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proposed bathroom laws criminalize the trans community is by explicitly establishing a new criminal offense category for trans individuals who use bathrooms consistent with their gender identities.”).

<sup>137</sup> See Peel, *supra* note 23 (“According to a 2015 study by the National Center for Transgender Equality, 34 percent of transgender and nonbinary Ohioans reported being fired, denied a promotion or experiencing some other form of mistreatment in the workplace . . . . Twenty-five percent have experienced some form of housing discrimination in the previous year . . . because of their gender identity.”).

<sup>138</sup> Injustice at Every Turn is a 2011 joint national report conducted by the National LGBTQ Task Force and The National Center for Transgender Equality that captures data concerning the discrimination of transgender and gender-nonconforming individuals in the United States. The survey consisted of more than 6,450 transgender and gender non-conforming people across the United States. See JAIME M. GRANT ET AL., NAT’L GAY & LESBIAN TASK FORCE, NAT’L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), for general findings on the impact of injustice and discrimination against transgender people on a massive scale.

<sup>139</sup> *Id.* at 139.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 143.

<sup>142</sup> *Id.*

<sup>143</sup> See *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 741 (E.D. Va. 2018).

that bathrooms and locker rooms “shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternate appropriate facility.”<sup>144</sup> The court relied on Sixth and Seventh Circuit decisions, which held that excluding transgender boys and girls from restrooms that align with their gender identity may subject them to discrimination because of their sex under Title IX, the Equal Protection Clause, or both.<sup>145</sup> In addition, the court relied on district court decisions that reached the same conclusion.<sup>146</sup> The court concluded that the plaintiff sufficiently pled that the school district’s anti-transgender bathroom policy subjected him to sex discrimination under a gender stereotyping theory.<sup>147</sup> District court cases like *Grimm* will be a part of a wave of litigation that illustrates how antiquated gender marker laws, and the burdensome restrictions to amend those gender markers, only work to reinforce gender stereotypes that deny transgender people access to congruent-identity documents, such as birth certificates and driver’s licenses. Therefore, such restrictive laws violate public policy by denying us fair access to public accommodations and services, and subjecting us to further stigma and discrimination because of our gender identity.

#### CONCLUSION

For lifetimes, transgender and transsexual people, like me, have survived and endured in silence, while cisgender people have had the privilege to create laws about how to define transgender bodies and transgender narratives.<sup>148</sup> The lack of transgender representation in public office is dangerous to our community because, all too often, our voices

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<sup>144</sup> *Id.* at 737.

<sup>145</sup> *See id.* at 741; *see also* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049-51 (7th Cir. 2017); Dodds v. U.S. Dep’t of Educ., 845 F.3d 217, 221 (6th Cir. 2016).

<sup>146</sup> *Grimm*, 302 F. Supp. 3d at 741; *see also* A.H. v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (holding that the transgender complainant sufficiently stated a claim for violation of Title IX and Equal Protection Clause); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 267-68 (W.D. Pa. 2017) (holding that transgender complainants were likely to succeed on the merits of their Equal Protection claim); Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 850 (S.D. Ohio 2017) (holding that the transgender complainant was likely to succeed on the merits of their Title IX and Equal Protection claims).

<sup>147</sup> *Grimm*, 302 F. Supp. 3d at 746-47.

<sup>148</sup> In 2017, Danica Roem became the first openly transgender woman to serve in a state legislature. Antonio Olivo, *Danica Roem of Virginia to Be First Openly Transgender Person Elected, Seated in a U.S. Statehouse*, WASH. POST (Nov. 8, 2017), <https://perma.cc/AU6Z-9L5W>. In addition, Andrea Jenkins became the first openly transgender black woman elected to a public office in the United States. Marwa Eltagouri, *Meet Andrea Jenkins, the First Openly Transgender Black Woman Elected to Public Office in the U.S.*, WASH. POST. (Nov. 8, 2017), <http://perma.cc/2XK5-6M6R>.

are marginalized and disregarded, as if we do not exist.<sup>149</sup> The hardest part about living as a transsexual person is that society strips us of our individual dignity and self-worth if we do not conform to our state's rigid gender binary standards of gender. While it is estimated that approximately 1.4 million adults in the United States classify as transgender,<sup>150</sup> 41 percent live without identification that matches their affirmed gender identity.<sup>151</sup> I am very fortunate to come from the State of Maryland, where I had the ability to amend my birth certificate and to define my gender on my own terms.

My hope is that all of my community members, in every state throughout this country, will experience the same privilege that I have had: to live with amended my birth certificate and to move on with the next steps of my life. While *Obergefell* gave me hope that who we love matters, *Pavan* gives me more hope, knowing that the Court can use its precedent to grant legal recognition to the unique people we are, even when states are attempting to infringe on that right. "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>152</sup> I am confident that when the Supreme Court addresses the important issue of whether transgender people have a right to access amended identity documents, such as birth certificates, it will listen to the lived experiences of actual transgender people and understand that we deserve access to benefits and protections, as every other person that lives in this country.

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<sup>149</sup> See Eltagouri, *supra* note 148 ("African-American trans-identified wom[e]n . . . know firsthand the feeling of being marginalized, left out, thrown under the bus . . . . Those days are over. We don't want a seat at the table, we want to set the table.") (quotations omitted).

<sup>150</sup> Pogofsky, *supra* note 77, at 738 (citing Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <https://perma.cc/JD7D-U84R>).

<sup>151</sup> GRANT ET AL., *supra* note 138, at 5.

<sup>152</sup> *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).