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## How Strict Voter Registration Laws Will Affect Transgender Voters

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*Feature*  
**How Strict Voter Registration Laws  
 Will Affect Transgender Voters**

Angela Sukurs

In order to cast a vote in Indiana, you must present a photo ID.<sup>1</sup> The poll worker will check four criteria: is it your photo?<sup>2</sup> Does it display your name and does that name conform to your voter registration record?<sup>3</sup> Is the ID expired?<sup>4</sup> Was the ID issued by the State of Indiana or the U.S. Government?<sup>5</sup> While seemingly simple, these criteria can disenfranchise certain groups of voters who, for various reasons, face obstacles obtaining a government-issued photo ID.<sup>6</sup> One such group of potentially disenfranchised citizens is transgender voters.<sup>7</sup>

Transgender individuals who are transitioning or have already transitioned to a gender other than the one assigned at birth face certain complications in obtaining identification that reflects their current gender.<sup>8</sup> These complications in obtaining IDs cause problems that range from attaining a loan or mortgage, dealing with anxiety concerning harassment, to voting in an upcoming election.<sup>9</sup>

Voter ID laws vary from state to state.<sup>10</sup> While 34 states have enacted laws requiring voters to provide an *acceptable* form of ID to poll workers, other states require that voters present a *government-issued* photo ID in order to vote.<sup>11</sup> The states requiring government-issued IDs, also known as “strict voter

<sup>1</sup> Indiana Secretary of State website, *Photo ID Law*, available at <http://www.in.gov/sos/elections/2401.htm> [hereinafter *Photo ID Law*].

<sup>2</sup> *Photo ID Law*, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2014 General Election*, THE WILLIAMS INSTITUTE, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/voter-id-laws-september-2014.pdf>.

<sup>7</sup> Herman, *supra* note 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Voter Identification Requirements – Voter ID Laws*, NAT'L CONFERENCE OF STATE LEG., available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [hereinafter *Voter ID Laws*].

<sup>11</sup> *Voter ID Laws*, *supra* note 10.

ID states,” are predicted to hinder over 24,000 transgender voters from casting a vote in the November 2014 general election.<sup>12</sup>

### HISTORY OF U.S. VOTER ID LAWS

Strict photo ID requirements are a recent phenomenon.<sup>13</sup> Prior to 2006, no state required a government-issued photo ID in order to vote.<sup>14</sup> Soon after, state legislatures began raising concerns of voter fraud, such as voter impersonation, and began drafting and passing bills to increase the public’s assurance in the soundness of the election process.<sup>15</sup> In 2005, Indiana became the first state to enact a strict photo ID law, which the Supreme Court upheld the constitutionality of two years later.<sup>16</sup>

Some states opted to mandate registered voters show a government-issued photo ID, while in other states a utility bill or a bank statement is sufficient.<sup>17</sup> If voters cannot show a valid photo ID in the strict photo ID states, they are entitled to a provisional ballot.<sup>18</sup> In order for their vote to count, they must produce the required form of identification within a particular time frame.<sup>19</sup> This time frame varies from state to state, with Georgia mandating a voter return within three days after the election while Indiana requires a voter return by noon the Monday after the election.<sup>20</sup> The strict photo ID states currently include: Arkansas, Georgia, Indiana, Kansas, Mississippi, Tennessee, Texas, Virginia and Wisconsin.<sup>21</sup> Additional states, such as Colorado and Oklahoma, have considered strengthening voter ID laws in the past year.<sup>22</sup>

Non-strict voter ID states, by contrast, allow certain voters without acceptable identification to cast a vote which may be counted without further action on their part, as long as it passes the election official’s review.<sup>23</sup> On Election Day, these voters will complete an affidavit of identity and the poll workers

<sup>12</sup> Herman, *supra* note 6.

<sup>13</sup> Suevon Lee, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PROPUBLICA, available at <http://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

<sup>14</sup> Lee, *supra* note 13.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Voter ID Laws, supra* note 10.

<sup>18</sup> Lee, *supra* note 13, at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Herman, *supra* note 6, at 3.

<sup>22</sup> *Voter ID Laws, supra* note 10.

<sup>23</sup> *Id.*

can vouch for the voter.<sup>24</sup> Election officials will inquire as to the voter's registration status and eligibility and make a determination of whether to count the ballot or not.<sup>25</sup> The voter does not need to take any further action as they do in the strict ID states.<sup>26</sup>

Some exceptions exist within voter ID laws.<sup>27</sup> In Indiana and Tennessee, for example, indigent groups are exempted from showing a photo ID.<sup>28</sup> In other states, religious groups who have objections to being photographed are also exempted from showing an ID.<sup>29</sup> Wisconsin's law exempts victims of domestic abuse, sexual assault, or stalking who have a confidential listing.<sup>30</sup> If an exception applies to a voter, the election officials will execute an affidavit stating that the voter is eligible to vote.<sup>31</sup>

### CHALLENGES TO VOTER ID LAWS

Although legislative histories state that voter ID laws were implemented to prevent voter fraud, actual evidence of voter fraud in the past decade is scant.<sup>32</sup> Certainly, this is a partisan-issue with 36 percent of Republicans believing that voter fraud affects a few thousand or more votes versus 20 percent of independents and 7 percent of Democrats.<sup>33</sup> Many conservatives believe that voter fraud is widespread, and that strict voter ID laws will address this perceived problem.<sup>34</sup> The opposing side does not believe that voter fraud is an actual threat, and sees photo ID laws as too taxing on certain communities such as immigrants or transgender voters.<sup>35</sup> Political scientist Lorraine Minnite observes that prosecutions for migratory bird law violations were far more common than election fraud in 2005.<sup>36</sup> Even though voter fraud may be rare,

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Brendan Nyhan, *Voter Fraud is Rare, but Myth Is Widespread*, N.Y. TIMES, available at <http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html?ab=0002&cabg=1>.

<sup>33</sup> Nyhan, *supra* note 32, at 2.

<sup>34</sup> *Id.*

<sup>35</sup> Lee, *supra* note 13, at 4.

<sup>36</sup> Nyhan, *supra* note 32, at 2.

a poll shows that many voters believe it is widespread.<sup>37</sup> This is likely due to campaigns led by conservative groups that seek to raise concerns about fraud in order to tighten up voter ID laws.<sup>38</sup>

Several lawsuits have surfaced challenging these laws, generally claiming that the laws violate their respective state constitutions.<sup>39</sup> In October 2014, the U.S. Supreme Court struck down Wisconsin's voter identification law for the November 2014 general election.<sup>40</sup> The majority did not offer reasoning behind their decision, but rather published a one paragraph opinion simply granting the application to vacate the September 12, 2014 order of the Seventh Circuit.<sup>41</sup> Justice Alito was joined by Justices Scalia and Thomas in his dissent, claiming the timing and the logistics of absentee ballots made the state's request "difficult."<sup>42</sup>

In 2011, the Georgia Supreme Court upheld the state's law, holding that the requirement was a "minimal, reasonable, and nondiscriminatory restriction."<sup>43</sup> In contrast, the Missouri Supreme Court reasoned that there was "no compelling state interest to justify the burdens posed by the law."<sup>44</sup> The court noted that the state lacked any reports of voter impersonation fraud and also pointed to the fact that the law would not prevent any other type of voter fraud aside from impersonation.<sup>45</sup> Missouri attempted again in 2011 to pass a photo ID law, but its democratic governor subsequently vetoed the bill.<sup>46</sup> In 2014, a proposal to amend the state Constitution to include a photo ID requirement was rejected by a Missouri state judge.<sup>47</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Adam Liptak, *Courts Strike Down Voter ID Laws in Wisconsin and Texas*, N.Y. TIMES, available at [http://www.nytimes.com/2014/10/10/us/politics/supreme-court-blocks-wisconsin-voter-id-law.html?\\_r=0](http://www.nytimes.com/2014/10/10/us/politics/supreme-court-blocks-wisconsin-voter-id-law.html?_r=0).

<sup>40</sup> Liptak, *supra* note 37.

<sup>41</sup> *Frank v. Walker*, 135 S.Ct. 7, 7 (2014).

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

<sup>43</sup> Suevon Lee, *Pennsylvania is Just the Latest Ruling Upholding Voter ID Law*, PROPUBLICA, available at <http://www.propublica.org/article/pennsylvania-is-just-the-ruling-upholding-voter-id-law>.

<sup>44</sup> Lee, *supra* note 40.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

## HOW THESE LAWS WILL IMPEDE TRANSGENDER VOTERS

Identification documents are something a majority of Americans do not think twice about.<sup>48</sup> For the majority of citizens, obtaining a government-issued ID is nothing more than a minor nuisance due to infamously long lines at the Department of Motor Vehicles (DMV).<sup>49</sup> Transgender individuals, however, face obstacles in obtaining an ID.<sup>50</sup> Harper Jean Tobin, policy counsel at the National Center for Transgender Equality, claims that for transgender individuals government-issued IDs can act as, “. . . something akin to a scarlet letter, with the ‘F’ or ‘M’ designation contradicting the holder’s appearance and social identity and outing him or her as transgender.”<sup>51</sup> Government identification policies differ from state to state, causing a variety of issues for transgender individuals.<sup>52</sup>

Gender transitioning is different for each individual, but usually involves psychological as well as medical treatments.<sup>53</sup> Many states require proof of surgical treatment, such as gender reassignment or genital reconstructive surgeries, in order to update their ID documents.<sup>54</sup> This outdated system makes it extremely difficult for most transgender people to have a current, accurate ID because many have not undergone surgical treatment.<sup>55</sup> In fact, while a majority of transgender people go through hormone therapy, only a small minority actually undergo gender reassignment surgery.<sup>56</sup> Specifically, fewer than one in five transgender women and less than one in twenty transgender men undergo genital reconstructive surgeries.<sup>57</sup> The data reflects this problem of requiring proof of surgical treatment to update an ID, as the National Transgender Discrimination Survey shows that 27 percent of transitioned transgender people report to having no ID documents that reflect their current gender.<sup>58</sup>

A study conducted by the Williams Institute at University of California Los Angeles School of Law found that within the strict photo ID states, an

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<sup>48</sup> Harper Jean Tobin, *Fair and Accurate Identification for Transgender People*, LGBTQ POLICY JOURNAL AT THE HARVARD KENNEDY SCHOOL, available at <http://isites.harvard.edu/icb/icb.do?keyword=K78405&pageid=icb.page414493>.

<sup>49</sup> Tobin, *supra* note 45.

<sup>50</sup> *Id.*

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

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Herman, *supra* note 5, at 2.

estimated 84,000 transgender citizens will be eligible to vote in the November 2014 election.<sup>59</sup> About 28 percent of these eligible voters may not have up-to-date IDs that reflect their current gender.<sup>60</sup> While the provisional ballot is available to these citizens, it is speculated that a large number of these individuals will be prevented from returning to the site after Election Day to prove their identity due to issues such as low income jobs that may not allow them to take additional time off work.<sup>61</sup> Requiring this additional step creates a substantial barrier for voters and, coupled with the potential for harassment or embarrassment for presenting an ID with a different gender, will likely deter a large number of transgender individuals from voting entirely.<sup>62</sup>

#### HOW ORGANIZATIONS ARE GETTING INVOLVED

The National Center for Transgender Equality released a helpful “Voting While Trans Checklist” that is available on their website.<sup>63</sup> The checklist includes tips for before and on Election Day.<sup>64</sup> One checklist is available for transgender voters and another for poll workers and election officials.<sup>65</sup> For transgender voters, the tips included: knowing whether a photo ID is required in your state, ensuring that the ID matches the name and address on voter registration, and encourages transgender voters not to worry, “. . . if your gender presentation doesn’t match your name, photo, or gender marker, as that is not required by the law.”<sup>66</sup> It also gives information for using a provisional ballot on Election Day.<sup>67</sup>

Tips to poll workers and election officials include the statistic that 80 percent of transgender people have only updated some of their ID’s to reflect their lived-in gender.<sup>68</sup> It also informs officials that “different clothing and hairstyle on an ID is not a valid reason to deny a regular ballot.”<sup>69</sup> By creating these checklists, the National Center for Transgender Equality seeks to educate elec-

<sup>59</sup> *Id.*

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

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

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Voting While Trans Checklist*, NAT’L CTR. FOR TRANSGENDER EQUAL., available at <https://www.scribd.com/doc/113138456/Voting-While-Trans-Checklist> [hereinafter *Voting While Trans Checklist*].

<sup>64</sup> *Voting While Trans Checklist*, *supra* note 59.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

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

tion officials, poll workers and transgender individuals regarding transgender voting rights.<sup>70</sup> Whether or not the poll workers and election officials will see this checklist, it is nonetheless a positive step towards raising awareness.<sup>71</sup>

#### THE FUTURE FOR TRANSGENDER VOTERS IN AMERICA

Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) activists see eliminating the barrier for transgender people to obtain ID documents as a major step towards eliminating the voter ID problem.<sup>72</sup> Co-founder of Media Action Network Kristen Francis argues that, “Our country’s priorities are skewed when a small percentage of the public actually votes, yet we are making it harder for people to vote rather than focusing on why people aren’t voting.”<sup>73</sup> Rather than focusing on the voter ID laws on a state-by-state basis, Francis would, “like to see a grand change on ID documents to include ‘other’ in addition to ‘male’ and ‘female,’ which would all start at the DMV.”<sup>74</sup> Judge Nelva Gonzales Ramos from Texas raised a similar concern by ruling that voter ID law “creates an unconstitutional burden on the right to vote . . . and was imposed with an unconstitutional discriminatory purpose.”<sup>75</sup>

In addition to eliminating the binary gender identification system on government IDs, local governments can also eliminate the requirement that transgender people show proof of a surgical procedure in order to change the gender on their ID.<sup>76</sup> In 2006, the District of Columbia DMV enacted a policy where transgender individuals can fill out a form and have a medical or social service professional sign-off when they reach the point in their gender transition where a new ID is proper.<sup>77</sup> The form does not require proof of a medical treatment, and places the power in the hands of the transgender person and his or her medical professional rather than a government worker who may not be fully informed of gender transitioning issues.<sup>78</sup>

If voter ID laws are here to stay, each state should revise their ID registration policies to include “other,” as well as eliminating burdensome obstacles

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> Interview with Kristen Francis, Co-Founder, MEDIA ACTION NETWORK (October 25, 2014) [hereinafter Francis interview].

<sup>73</sup> Francis interview, *supra* note 68.

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

<sup>75</sup> Liptak, *supra* note 37.

<sup>76</sup> Tobin, *supra* note 42, at 5.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



for people to change the gender on their ID. This would allow transgender individuals to live in a place where their ID's accurately reflected their gender and where they can easily present an ID to vote for their political leadership. This is a world in which the majority of Americans already live, and a world that should be fully available to all citizens.