

# THE EQUALITY ACT & CRIMINAL JUSTICE REFORM

The United States holds just five percent of the world's population, but incarcerates twenty-five percent of people in prisons and jails – roughly 2.2 million adults. Lesbian, gay, bisexual, transgender, and queer (LGBTQ) people – especially low-income and people of color – are disproportionately impacted by the criminal justice system. LGBTQ people face discrimination throughout the criminal system, including discriminatory police profiling, anti-LGBTQ bias on juries, and higher rates of conviction and harsher sentencing.

## OVERVIEW OF EQUALITY ACT AND TITLE VI

Title VI of the Civil Rights Act of 1964 currently prohibits recipients of federal financial assistance, such as state courts, law enforcement agencies, and victim services programs, from discriminating in services against individuals based on race, color, and national origin. Its application extends to all activities of a recipient of federal financial assistance, not just the particular activities receiving assistance.

The Equality Act prohibits discrimination based on an individual's sexual orientation or gender identity in the context of employment, housing, credit, education, public accommodations, and jury service. It also amends Title VI to include discrimination prohibitions based on sex, sexual orientation, and gender identity in programs receiving federal financial assistance.

Ultimately, The Equality Act would provide individuals and advocates with an additional tool to hold federally funded law enforcement agencies, prisons, detention facilities, other criminal justice system recipients of federal financial assistance accountable for the fair and equitable treatment of LGBTQ people.

## DISRUPTING THE DRIVERS OF INCARCERATION

LGBTQ individuals experience significantly higher rates of joblessness and poverty than the general population, leading many to turn to underground economies like sex work or drug sales for income. Additionally, the impact of schools' severe disciplinary policies, such as "zero tolerance," combined with discrimination, bullying, and harassment of LGBTQ students by their peers and school staff push more LGBTQ students out of schools and into the criminal legal system. Police bias, abuse and profiling of LGBTQ people—especially trans women of color—means more LGBTQ people are targeted by law enforcement. These factors, together with widespread discrimination and social marginalization, contribute to the significant overrepresentation of LGBTQ people in prisons and jails.

While incarcerated, LGBTQ prisoners are significantly more likely to be sexually assaulted, with 12% of gay and bisexual men and 40% of transgender people reporting a sexual assault in 2011. In a survey of LGBTQ inmates, 85% of respondents had been placed in solitary confinement—many purportedly for their own protection—and approximately half had spent two years or more in solitary. LGBTQ, and especially transgender inmates, are often denied needed medical care while incarcerated, including transition-related care, HIV-related care, and mental and behavioral health care.

In combination with existing legal protections, the Equality Act can reduce the impact of these drivers of incarceration for LGBTQ people by adding sex, sexual orientation, and gender identity to the protected classes under several federal civil rights laws. Enforcing these laws will decrease factors, like discrimination in employment and education settings, that result in LGBTQ people seeking underground economies or criminal activity to escape poverty, homelessness, and hunger.

## **FEDERAL FINANCIAL ASSISTANCE**

By amending Title VI, the Equality Act would prohibit discrimination by criminal justice system recipients of federal financial assistance against LGBTQ detainees, prisoners, and others involved in the system.

Discrimination against LGBTQ detainees and prisoners housed in federally funded facilities includes failure to provide necessary medications, unsafe housing assignments, and overuse of solitary confinement. Title VI covers law enforcement and prisons receiving federal financial assistance. See, e.g., *See Jones v. Gusman*, 296 F.R.D. 416 (E.D. La. 2013); *United States v. Maricopa Cty.*, 915 F. Supp. 2d (D. Ariz. 2012) (enforcing Title VI to prohibit national origin discrimination by detention housing facilities). The Equality Act would ensure that these protections extend to LGBTQ individuals as well.

Additionally, the Equality Act would prohibit discrimination against LGBTQ people by law enforcement during stops, arrests, and other police encounters. Courts already enforce Title VI protections against local and state law enforcement agencies that receive federal funds. See, e.g., *United States v. Cty. Of Maricopa*, 889 F.3d 648 (9th Cir. 2018) (holding that Title VI prohibits a county sheriff's office from conducting racially discriminatory traffic stops). The Equality Act would extend these protections against discriminatory policies and practices to LGBTQ people as well.

## JURY SERVICE

The right to a jury of one's peers is fundamental to the American criminal justice system. However, this right is denied to many LGBTQ people because most states still allow jurors to be dismissed because of their sexual orientation or gender identity. In a 2012 survey conducted by Lambda Legal, at least 19% of respondents reported hearing discriminatory comments about sexual orientation or gender identity in court. This discrimination deprives LGBTQ defendants of a fair trial, including in cases when the stakes are highest. The Equality Act is a significant step towards ensuring a fair trial in federal court by including sexual orientation and gender identity as protected characteristics under the Jury Selection and Services Act.

NATIONAL LGBTQ TASK FORCE  
**ACTION FUND**



HUMAN  
RIGHTS  
CAMPAIGN®



116TH CONGRESS  
1ST SESSION

# H. R. 5

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IN THE SENATE OF THE UNITED STATES

MAY 20, 2019

Received; read twice and referred to the Committee on the Judiciary

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## AN ACT

To prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Equality Act”.

3 **SEC. 2. FINDINGS AND PURPOSE.**

4 (a) FINDINGS.—Congress finds the following:

5 (1) Discrimination can occur on the basis of the  
6 sex, sexual orientation, gender identity, or preg-  
7 nancy, childbirth, or a related medical condition of  
8 an individual, as well as because of sex-based stereo-  
9 types. Each of these factors alone can serve as the  
10 basis for discrimination, and each is a form of sex  
11 discrimination.

12 (2) A single instance of discrimination may  
13 have more than one basis. For example, discrimina-  
14 tion against a married same-sex couple could be  
15 based on the sex stereotype that marriage should  
16 only be between heterosexual couples, the sexual ori-  
17 entation of the two individuals in the couple, or  
18 both. Discrimination against a pregnant lesbian  
19 could be based on her sex, her sexual orientation,  
20 her pregnancy, or on the basis of multiple factors.

21 (3) Lesbian, gay, bisexual, transgender, and  
22 queer (referred to as “LGBTQ”) people commonly  
23 experience discrimination in securing access to pub-  
24 lic accommodations—including restaurants, senior  
25 centers, stores, places of or establishments that pro-  
26 vide entertainment, health care facilities, shelters,

1 government offices, youth service providers including  
2 adoption and foster care providers, and transpor-  
3 tation. Forms of discrimination include the exclusion  
4 and denial of entry, unequal or unfair treatment,  
5 harassment, and violence. This discrimination pre-  
6 vents the full participation of LGBTQ people in so-  
7 ciety and disrupts the free flow of commerce.

8 (4) Women also have faced discrimination in  
9 many establishments such as stores and restaurants,  
10 and places or establishments that provide other  
11 goods or services, such as entertainment or transpor-  
12 tation, including sexual harassment, differential pric-  
13 ing for substantially similar products and services,  
14 and denial of services because they are pregnant or  
15 breastfeeding.

16 (5) Many employers already and continue to  
17 take proactive steps, beyond those required by some  
18 States and localities, to ensure they are fostering  
19 positive and respectful cultures for all employees.  
20 Many places of public accommodation also recognize  
21 the economic imperative to offer goods and services  
22 to as many consumers as possible.

23 (6) Regular and ongoing discrimination against  
24 LGBTQ people, as well as women, in accessing pub-  
25 lic accommodations contributes to negative social

1 and economic outcomes, and in the case of public ac-  
2 commodations operated by State and local govern-  
3 ments, abridges individuals' constitutional rights.

4 (7) The discredited practice known as “conver-  
5 sion therapy” is a form of discrimination that harms  
6 LGBTQ people by undermining individuals sense of  
7 self worth, increasing suicide ideation and substance  
8 abuse, exacerbating family conflict, and contributing  
9 to second class status.

10 (8) Both LGBTQ people and women face wide-  
11 spread discrimination in employment and various  
12 services, including by entities that receive Federal fi-  
13 nancial assistance. Such discrimination—

14 (A) is particularly troubling and inappro-  
15 priate for programs and services funded wholly  
16 or in part by the Federal Government;

17 (B) undermines national progress toward  
18 equal treatment regardless of sex, sexual ori-  
19 entation, or gender identity; and

20 (C) is inconsistent with the constitutional  
21 principle of equal protection under the Four-  
22 teenth Amendment to the Constitution of the  
23 United States.

24 (9) Federal courts have widely recognized that,  
25 in enacting the Civil Rights Act of 1964, Congress

1        validly invoked its powers under the Fourteenth  
2        Amendment to provide a full range of remedies in  
3        response to persistent, widespread, and pervasive  
4        discrimination by both private and government ac-  
5        tors.

6            (10) Discrimination by State and local govern-  
7        ments on the basis of sexual orientation or gender  
8        identity in employment, housing, and public accom-  
9        modations, and in programs and activities receiving  
10       Federal financial assistance, violates the Equal Pro-  
11       tection Clause of the Fourteenth Amendment to the  
12       Constitution of the United States. In many cir-  
13       cumstances, such discrimination also violates other  
14       constitutional rights such as those of liberty and pri-  
15       vacy under the due process clause of the Fourteenth  
16       Amendment.

17           (11) Individuals who are LGBTQ, or are per-  
18       ceived to be LGBTQ, have been subjected to a his-  
19       tory and pattern of persistent, widespread, and per-  
20       vasive discrimination on the bases of sexual orienta-  
21       tion and gender identity by both private sector and  
22       Federal, State, and local government actors, includ-  
23       ing in employment, housing, and public accommoda-  
24       tions, and in programs and activities receiving Fed-  
25       eral financial assistance. An explicit and comprehen-



1 sive national solution is needed to address such dis-  
2 crimination, which has sometimes resulted in vio-  
3 lence or death, including the full range of remedies  
4 available under the Civil Rights Act of 1964.

5 (12) Numerous provisions of Federal law ex-  
6 pressly prohibit discrimination on the basis of sex,  
7 and Federal agencies and courts have correctly in-  
8 terpreted these prohibitions on sex discrimination to  
9 include discrimination based on sexual orientation,  
10 gender identity, and sex stereotypes. In particular,  
11 the Equal Employment Opportunity Commission  
12 correctly interpreted title VII of the Civil Rights Act  
13 of 1964 in *Macy v. Holder*, *Baldwin v. Foxx*, and  
14 *Lusardi v. McHugh*.

15 (13) The absence of explicit prohibitions of dis-  
16 crimination on the basis of sexual orientation and  
17 gender identity under Federal statutory law has cre-  
18 ated uncertainty for employers and other entities  
19 covered by Federal nondiscrimination laws and  
20 caused unnecessary hardships for LGBTQ individ-  
21 uals.

22 (14) LGBTQ people often face discrimination  
23 when seeking to rent or purchase housing, as well as  
24 in every other aspect of obtaining and maintaining  
25 housing. LGBTQ people in same-sex relationships

1 are often discriminated against when two names as-  
2 sociated with one gender appear on a housing appli-  
3 cation, and transgender people often encounter dis-  
4 crimination when credit checks or inquiries reveal a  
5 former name.

6 (15) National surveys, including a study com-  
7 missioned by the Department of Housing and Urban  
8 Development, show that housing discrimination  
9 against LGBTQ people is very prevalent. For in-  
10 stance, when same-sex couples inquire about housing  
11 that is available for rent, they are less likely to re-  
12 ceive positive responses from landlords. A national  
13 matched-pair testing investigation found that nearly  
14 one-half of same-sex couples face adverse, differen-  
15 tial treatment when seeking elder housing. Accord-  
16 ing to other studies, transgender people have half  
17 the homeownership rate of non-transgender people  
18 and about 1 in 5 transgender people experience  
19 homelessness.

20 (16) As a result of the absence of explicit prohi-  
21 bitions against discrimination on the basis of sexual  
22 orientation and gender identity, credit applicants  
23 who are LGBTQ, or perceived to be LGBTQ, have  
24 unequal opportunities to establish credit. LGBTQ  
25 people can experience being denied a mortgage, cred-

1       it card, student loan, or many other types of credit  
2       simply because of their sexual orientation or gender  
3       identity.

4           (17) Numerous studies demonstrate that  
5       LGBTQ people, especially transgender people and  
6       women, are economically disadvantaged and at a  
7       higher risk for poverty compared with other groups  
8       of people. For example, older women in same-sex  
9       couples have twice the poverty rate of older dif-  
10      ferent-sex couples.

11          (18) The right to an impartial jury of one's  
12      peers and the reciprocal right to jury service are  
13      fundamental to the free and democratic system of  
14      justice in the United States and are based in the  
15      Bill of Rights. There is, however, an unfortunate  
16      and long-documented history in the United States of  
17      attorneys discriminating against LGBTQ individ-  
18      uals, or those perceived to be LGBTQ, in jury selec-  
19      tion. Failure to bar peremptory challenges based on  
20      the actual or perceived sexual orientation or gender  
21      identity of an individual not only erodes a funda-  
22      mental right, duty, and obligation of being a citizen  
23      of the United States, but also unfairly creates a sec-  
24      ond class of citizenship for LGBTQ victims, wit-  
25      nesses, plaintiffs, and defendants.

1           (19) Numerous studies document the shortage  
2       of qualified and available homes for the 437,000  
3       youth in the child welfare system and the negative  
4       outcomes for the many youth who live in group care  
5       as opposed to a loving home or who age out without  
6       a permanent family. Although same-sex couples are  
7       7 times more likely to foster or adopt than their dif-  
8       ferent-sex counterparts, many child placing agencies  
9       refuse to serve same-sex couples and LGBTQ indi-  
10      viduals. This has resulted in a reduction of the pool  
11      of qualified and available homes for youth in the  
12      child welfare system who need placement on a tem-  
13      porary or permanent basis. Barring discrimination  
14      in foster care and adoption will increase the number  
15      of homes available to foster children waiting for fos-  
16      ter and adoptive families.

17           (20) LGBTQ youth are overrepresented in the  
18      foster care system by at least a factor of two and  
19      report twice the rate of poor treatment while in care  
20      compared to their non-LGBTQ counterparts.  
21      LGBTQ youth in foster care have a higher average  
22      number of placements, higher likelihood of living in  
23      a group home, and higher rates of hospitalization for  
24      emotional reasons and juvenile justice involvement  
25      than their non-LGBTQ peers because of the high

1 level of bias and discrimination that they face and  
2 the difficulty of finding affirming foster placements.  
3 Further, due to their physical distance from friends  
4 and family, traumatic experiences, and potentially  
5 unstable living situations, all youth involved with  
6 child welfare are at risk for being targeted by traf-  
7 fickers seeking to exploit children. Barring discrimi-  
8 nation in child welfare services will ensure improved  
9 treatment and outcomes for LGBTQ foster children.

10 (b) PURPOSE.—It is the purpose of this Act to ex-  
11 pand as well as clarify, confirm and create greater consist-  
12 ency in the protections and remedies against discrimina-  
13 tion on the basis of all covered characteristics and to pro-  
14 vide guidance and notice to individuals, organizations, cor-  
15 porations, and agencies regarding their obligations under  
16 the law.

17 **SEC. 3. PUBLIC ACCOMMODATIONS.**

18 (a) PROHIBITION ON DISCRIMINATION OR SEGREGA-  
19 TION IN PUBLIC ACCOMMODATIONS.—Section 201 of the  
20 Civil Rights Act of 1964 (42 U.S.C. 2000a) is amended—

21 (1) in subsection (a), by inserting “sex (includ-  
22 ing sexual orientation and gender identity),” before  
23 “or national origin”; and

24 (2) in subsection (b)—

1 (A) in paragraph (3), by striking “sta-  
2 dium” and all that follows and inserting “sta-  
3 dium or other place of or establishment that  
4 provides exhibition, entertainment, recreation,  
5 exercise, amusement, public gathering, or public  
6 display;”;

7 (B) by redesignating paragraph (4) as  
8 paragraph (6); and

9 (C) by inserting after paragraph (3) the  
10 following:

11 “(4) any establishment that provides a good,  
12 service, or program, including a store, shopping cen-  
13 ter, online retailer or service provider, salon, bank,  
14 gas station, food bank, service or care center, shel-  
15 ter, travel agency, or funeral parlor, or establish-  
16 ment that provides health care, accounting, or legal  
17 services;

18 “(5) any train service, bus service, car service,  
19 taxi service, airline service, station, depot, or other  
20 place of or establishment that provides transpor-  
21 tation service; and”.

22 (b) PROHIBITION ON DISCRIMINATION OR SEGREGA-  
23 TION UNDER LAW.—Section 202 of such Act (42 U.S.C.  
24 2000a–1) is amended by inserting “sex (including sexual

1 orientation and gender identity),” before “or national ori-  
2 gin”.

3 (c) RULE OF CONSTRUCTION.—Title II of such Act  
4 (42 U.S.C. 2000a et seq.) is amended by adding at the  
5 end the following:

6 **“SEC. 208. RULE OF CONSTRUCTION.**

7 “A reference in this title to an establishment—

8 “(1) shall be construed to include an individual  
9 whose operations affect commerce and who is a pro-  
10 vider of a good, service, or program; and

11 “(2) shall not be construed to be limited to a  
12 physical facility or place.”.

13 **SEC. 4. DESEGREGATION OF PUBLIC FACILITIES.**

14 Section 301(a) of the Civil Rights Act of 1964 (42  
15 U.S.C. 2000b(a)) is amended by inserting “sex (including  
16 sexual orientation and gender identity),” before “or na-  
17 tional origin”.

18 **SEC. 5. DESEGREGATION OF PUBLIC EDUCATION.**

19 (a) DEFINITIONS.—Section 401(b) of the Civil Rights  
20 Act of 1964 (42 U.S.C. 2000c(b)) is amended by inserting  
21 “(including sexual orientation and gender identity),” be-  
22 fore “or national origin”.

23 (b) CIVIL ACTIONS BY THE ATTORNEY GENERAL.—  
24 Section 407 of such Act (42 U.S.C. 2000c–6) is amended,  
25 in subsection (a)(2), by inserting “(including sexual ori-

1 entation and gender identity),” before “or national ori-  
2 gin”.

3 (c) CLASSIFICATION AND ASSIGNMENT.—Section 410  
4 of such Act (42 U.S.C. 2000c–9) is amended by inserting  
5 “(including sexual orientation and gender identity),” be-  
6 fore “or national origin”.

7 **SEC. 6. FEDERAL FUNDING.**

8 Section 601 of the Civil Rights Act of 1964 (42  
9 U.S.C. 2000d) is amended by inserting “sex (including  
10 sexual orientation and gender identity),” before “or na-  
11 tional origin,”.

12 **SEC. 7. EMPLOYMENT.**

13 (a) RULES OF CONSTRUCTION.—Title VII of the  
14 Civil Rights Act of 1964 is amended by inserting after  
15 section 701 (42 U.S.C. 2000e) the following:

16 **“SEC. 701A. RULES OF CONSTRUCTION.**

17 “Section 1106 shall apply to this title except that for  
18 purposes of that application, a reference in that section  
19 to an ‘unlawful practice’ shall be considered to be a ref-  
20 erence to an ‘unlawful employment practice’.”.

21 (b) UNLAWFUL EMPLOYMENT PRACTICES.—Section  
22 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–  
23 2) is amended—



1           (1) in the section header, by striking “SEX,”  
2           and inserting “SEX (INCLUDING SEXUAL ORIENTA-  
3           TION AND GENDER IDENTITY),”;

4           (2) except in subsection (e), by striking “sex,”  
5           each place it appears and inserting “sex (including  
6           sexual orientation and gender identity),”; and

7           (3) in subsection (e)(1), by striking “enter-  
8           prise,” and inserting “enterprise, if, in a situation in  
9           which sex is a bona fide occupational qualification,  
10          individuals are recognized as qualified in accordance  
11          with their gender identity,”.

12          (c) OTHER UNLAWFUL EMPLOYMENT PRACTICES.—  
13          Section 704(b) of the Civil Rights Act of 1964 (42 U.S.C.  
14          2000e–3(b)) is amended—

15               (1) by striking “sex,” the first place it appears  
16               and inserting “sex (including sexual orientation and  
17               gender identity),”; and

18               (2) by striking “employment.” and inserting  
19               “employment, if, in a situation in which sex is a  
20               bona fide occupational qualification, individuals are  
21               recognized as qualified in accordance with their gen-  
22               der identity.”.

23          (d) CLAIMS.—Section 706(g)(2)(A) of the Civil  
24          Rights Act of 1964 (2000e–5(g)(2)(A)) is amended by

1 striking “sex,” and inserting “sex (including sexual ori-  
2 entation and gender identity),”.

3 (e) EMPLOYMENT BY FEDERAL GOVERNMENT.—Sec-  
4 tion 717 of the Civil Rights Act of 1964 (42 U.S.C.  
5 2000e–16) is amended—

6 (1) in subsection (a), by striking “sex,” and in-  
7 serting “sex (including sexual orientation and gender  
8 identity),”; and

9 (2) in subsection (c), by striking “sex” and in-  
10 serting “sex (including sexual orientation and gender  
11 identity),”.

12 (f) GOVERNMENT EMPLOYEE RIGHTS ACT OF  
13 1991.—The Government Employee Rights Act of 1991  
14 (42 U.S.C. 2000e–16a et seq.) is amended—

15 (1) in section 301(b), by striking “sex,” and in-  
16 serting “sex (including sexual orientation and gender  
17 identity),”; and

18 (2) in section 302(a)(1), by striking “sex,” and  
19 inserting “sex (including sexual orientation and gen-  
20 der identity),”; and

21 (3) by adding at the end the following:

22 **“SEC. 305. RULES OF CONSTRUCTION AND CLAIMS.**

23 “Sections 1101(b), 1106, and 1107 of the Civil  
24 Rights Act of 1964 shall apply to this title except that  
25 for purposes of that application, a reference in that section

1 1106 to ‘race, color, religion, sex (including sexual orienta-  
 2 tion and gender identity), or national origin’ shall be con-  
 3 sidered to be a reference to ‘race, color, religion, sex, sex-  
 4 ual orientation, gender identity, national origin, age, or  
 5 disability’.”.

6 (g) CONGRESSIONAL ACCOUNTABILITY ACT OF  
 7 1995.—The Congressional Accountability Act of 1995 (2  
 8 U.S.C. 1301 et seq.) is amended—

9 (1) in section 201(a)(1) (2 U.S.C. 1311(a)(1))  
 10 by inserting “(including sexual orientation and gen-  
 11 der identity),” before “or national origin,”; and

12 (2) by adding at the end of title II (42 U.S.C.  
 13 1311 et seq.) the following:

14 **“SEC. 208. RULES OF CONSTRUCTION AND CLAIMS.**

15 “Sections 1101(b), 1106, and 1107 of the Civil  
 16 Rights Act of 1964 shall apply to section 201 (and reme-  
 17 dial provisions of this Act related to section 201) except  
 18 that for purposes of that application, a reference in that  
 19 section 1106 to ‘race, color, religion, sex (including sexual  
 20 orientation and gender identity), or national origin’ shall  
 21 be considered to be a reference to ‘race, color, religion,  
 22 sex (including sexual orientation and gender identity), na-  
 23 tional origin, age, or disability’.”.

24 (h) CIVIL SERVICE REFORM ACT OF 1978.—Chapter  
 25 23 of title 5, United States Code, is amended—

1 (1) in section 2301(b)(2), by striking “sex,”  
 2 and inserting “sex (including sexual orientation and  
 3 gender identity),”;

4 (2) in section 2302—

5 (A) in subsection (b)(1)(A), by inserting  
 6 “(including sexual orientation and gender iden-  
 7 tity),” before “or national origin,”; and

8 (B) in subsection (d)(1), by inserting “(in-  
 9 cluding sexual orientation and gender iden-  
 10 tity),” before “or national origin,”; and

11 (3) by adding at the end the following:

12 **“SEC. 2307. RULES OF CONSTRUCTION AND CLAIMS.**

13 “Sections 1101(b), 1106, and 1107 of the Civil  
 14 Rights Act of 1964 shall apply to this chapter (and reme-  
 15 dial provisions of this title related to this chapter) except  
 16 that for purposes of that application, a reference in that  
 17 section 1106 to ‘race, color, religion, sex (including sexual  
 18 orientation and gender identity), or national origin’ shall  
 19 be considered to be a reference to ‘race, color, religion,  
 20 sex (including sexual orientation and gender identity), na-  
 21 tional origin, age, a handicapping condition, marital sta-  
 22 tus, or political affiliation’.”.

23 **SEC. 8. INTERVENTION.**

24 Section 902 of the Civil Rights Act of 1964 (42  
 25 U.S.C. 2000h–2) is amended by inserting “(including sex-

1 ual orientation and gender identity),” before “or national  
2 origin,”.

3 **SEC. 9. MISCELLANEOUS.**

4 Title XI of the Civil Rights Act of 1964 is amended—

5 (1) by redesignating sections 1101 through  
6 1104 (42 U.S.C. 2000h et seq.) and sections 1105  
7 and 1106 (42 U.S.C. 2000h–5, 2000h–6) as sections  
8 1102 through 1105 and sections 1108 and 1109, re-  
9 spectively;

10 (2) by inserting after the title heading the fol-  
11 lowing:

12 **“SEC. 1101. DEFINITIONS AND RULES.**

13 “(a) DEFINITIONS.—In titles II, III, IV, VI, VII, and  
14 IX (referred to individually in sections 1106 and 1107 as  
15 a ‘covered title’):

16 “(1) RACE; COLOR; RELIGION; SEX; SEXUAL  
17 ORIENTATION; GENDER IDENTITY; NATIONAL ORI-  
18 GIN.—The term ‘race’, ‘color’, ‘religion’, ‘sex’ (in-  
19 cluding ‘sexual orientation’ and ‘gender identity’), or  
20 ‘national origin’, used with respect to an individual,  
21 includes—

22 “(A) the race, color, religion, sex (includ-  
23 ing sexual orientation and gender identity), or  
24 national origin, respectively, of another person

1 with whom the individual is associated or has  
2 been associated; and

3 “(B) a perception or belief, even if inac-  
4 curate, concerning the race, color, religion, sex  
5 (including sexual orientation and gender iden-  
6 tity), or national origin, respectively, of the in-  
7 dividual.

8 “(2) GENDER IDENTITY.—The term ‘gender  
9 identity’ means the gender-related identity, appear-  
10 ance, mannerisms, or other gender-related character-  
11 istics of an individual, regardless of the individual’s  
12 designated sex at birth.

13 “(3) INCLUDING.—The term ‘including’ means  
14 including, but not limited to, consistent with the  
15 term’s standard meaning in Federal law.

16 “(4) SEX.—The term ‘sex’ includes—

17 “(A) a sex stereotype;

18 “(B) pregnancy, childbirth, or a related  
19 medical condition;

20 “(C) sexual orientation or gender identity;  
21 and

22 “(D) sex characteristics, including intersex  
23 traits.

1           “(5) SEXUAL ORIENTATION.—The term ‘sexual  
2           orientation’ means homosexuality, heterosexuality, or  
3           bisexuality.

4           “(b) RULES.—In a covered title referred to in sub-  
5           section (a)—

6           “(1) (with respect to sex) pregnancy, childbirth,  
7           or a related medical condition shall not receive less  
8           favorable treatment than other physical conditions;  
9           and

10           “(2) (with respect to gender identity) an indi-  
11           vidual shall not be denied access to a shared facility,  
12           including a restroom, a locker room, and a dressing  
13           room, that is in accordance with the individual’s  
14           gender identity.”; and

15           (3) by inserting after section 1105 the fol-  
16           lowing:

17   **“SEC. 1106. RULES OF CONSTRUCTION.**

18           “(a) SEX.—Nothing in section 1101 or the provisions  
19           of a covered title incorporating a term defined or a rule  
20           specified in that section shall be construed—

21           “(1) to limit the protection against an unlawful  
22           practice on the basis of pregnancy, childbirth, or a  
23           related medical condition provided by section 701(k);  
24           or

1           “(2) to limit the protection against an unlawful  
2           practice on the basis of sex available under any pro-  
3           vision of Federal law other than that covered title,  
4           prohibiting a practice on the basis of sex.

5           “(b) CLAIMS AND REMEDIES NOT PRECLUDED.—  
6           Nothing in section 1101 or a covered title shall be con-  
7           strued to limit the claims or remedies available to any indi-  
8           vidual for an unlawful practice on the basis of race, color,  
9           religion, sex (including sexual orientation and gender iden-  
10          tity), or national origin including claims brought pursuant  
11          to section 1979 or 1980 of the Revised Statutes (42  
12          U.S.C. 1983, 1985) or any other law, including a Federal  
13          law amended by the Equality Act, regulation, or policy.

14          “(c) NO NEGATIVE INFERENCE.—Nothing in section  
15          1101 or a covered title shall be construed to support any  
16          inference that any Federal law prohibiting a practice on  
17          the basis of sex does not prohibit discrimination on the  
18          basis of pregnancy, childbirth, or a related medical condi-  
19          tion, sexual orientation, gender identity, or a sex stereo-  
20          type.

21          **“SEC. 1107. CLAIMS.**

22          “The Religious Freedom Restoration Act of 1993 (42  
23          U.S.C. 2000bb et seq.) shall not provide a claim con-  
24          cerning, or a defense to a claim under, a covered title,



1 or provide a basis for challenging the application or en-  
2 forcement of a covered title.”.

3 **SEC. 10. HOUSING.**

4 (a) FAIR HOUSING ACT.—The Fair Housing Act (42  
5 U.S.C. 3601 et seq.) is amended—

6 (1) in section 802 (42 U.S.C. 3602), by adding  
7 at the end the following:

8 “(p) ‘Gender identity’, ‘sex’, and ‘sexual orientation’  
9 have the meanings given those terms in section 1101(a)  
10 of the Civil Rights Act of 1964.

11 “(q) ‘Race’, ‘color’, ‘religion’, ‘sex’ (including ‘sexual  
12 orientation’ and ‘gender identity’), ‘handicap’, ‘familial  
13 status’, or ‘national origin’, used with respect to an indi-  
14 vidual, includes—

15 “(1) the race, color, religion, sex (including sex-  
16 ual orientation and gender identity), handicap, fa-  
17 miliary status, or national origin, respectively, of an-  
18 other person with whom the individual is associated  
19 or has been associated; and

20 “(2) a perception or belief, even if inaccurate,  
21 concerning the race, color, religion, sex (including  
22 sexual orientation and gender identity), handicap,  
23 familial status, or national origin, respectively, of the  
24 individual.”;

1           (2) in section 804, by inserting “(including sexual  
2           orientation and gender identity),” after “sex,”  
3           each place that term appears;

4           (3) in section 805, by inserting “(including sexual  
5           orientation and gender identity),” after “sex,”  
6           each place that term appears;

7           (4) in section 806, by inserting “(including sexual  
8           orientation and gender identity),” after “sex,”;

9           (5) in section 808(e)(6), by inserting “(including sexual  
10          orientation and gender identity),” after  
11          “sex,”; and

12          (6) by adding at the end the following:

13   **“SEC. 821. RULES OF CONSTRUCTION.**

14          “Sections 1101(b) and 1106 of the Civil Rights Act  
15   of 1964 shall apply to this title and section 901, except  
16   that for purposes of that application, a reference in that  
17   section 1101(b) or 1106 to a ‘covered title’ shall be consid-  
18   ered a reference to ‘this title and section 901’.

19   **“SEC. 822. CLAIMS.**

20          “Section 1107 of the Civil Rights Act of 1964 shall  
21   apply to this title and section 901, except that for pur-  
22   poses of that application, a reference in that section 1107  
23   to a ‘covered title’ shall be considered a reference to ‘this  
24   title and section 901’.”.

1 (b) PREVENTION OF INTIMIDATION IN FAIR HOUS-  
 2 ING CASES.—Section 901 of the Civil Rights Act of 1968  
 3 (42 U.S.C. 3631) is amended by inserting “(including sex-  
 4 ual orientation (as such term is defined in section 802 of  
 5 this Act) and gender identity (as such term is defined in  
 6 section 802 of this Act)),” after “sex,” each place that  
 7 term appears.

8 **SEC. 11. EQUAL CREDIT OPPORTUNITY.**

9 (a) PROHIBITED DISCRIMINATION.—Section  
 10 701(a)(1) of the Equal Credit Opportunity Act (15 U.S.C.  
 11 1691(a)(1)) is amended by inserting “(including sexual  
 12 orientation and gender identity),” after “sex”.

13 (b) DEFINITIONS.—Section 702 of the Equal Credit  
 14 Opportunity Act (15 U.S.C. 1691a) is amended—

15 (1) by redesignating subsections (f) and (g) as  
 16 subsections (h) and (i), respectively;

17 (2) by inserting after subsection (e) the fol-  
 18 lowing:

19 “(f) The terms ‘gender identity’, ‘sex’, and ‘sexual  
 20 orientation’ have the meanings given those terms in sec-  
 21 tion 1101(a) of the Civil Rights Act of 1964.

22 “(g) The term ‘race’, ‘color’, ‘religion’, ‘national ori-  
 23 gin’, ‘sex’ (including ‘sexual orientation’ and ‘gender iden-  
 24 tity’), ‘marital status’, or ‘age’, used with respect to an  
 25 individual, includes—

1           “(1) the race, color, religion, national origin,  
2           sex (including sexual orientation and gender iden-  
3           tity), marital status, or age, respectively, of another  
4           person with whom the individual is associated or has  
5           been associated; and

6           “(2) a perception or belief, even if inaccurate,  
7           concerning the race, color, religion, national origin,  
8           sex (including sexual orientation and gender iden-  
9           tity), marital status, or age, respectively, of the indi-  
10          vidual.”; and

11           (3) by adding at the end the following:

12          “(j) Sections 1101(b) and 1106 of the Civil Rights  
13          Act of 1964 shall apply to this title, except that for pur-  
14          poses of that application—

15           “(1) a reference in those sections to a ‘covered  
16           title’ shall be considered a reference to ‘this title’;  
17           and

18           “(2) paragraph (1) of such section 1101(b)  
19           shall apply with respect to all aspects of a credit  
20           transaction.”.

21          (c) RELATION TO STATE LAWS.—Section 705(a) of  
22          the Equal Credit Opportunity Act (15 U.S.C. 1691d(a))  
23          is amended by inserting “(including sexual orientation and  
24          gender identity),” after “sex”.

1 (d) CIVIL LIABILITY.—Section 706 of the Equal  
 2 Credit Opportunity Act (15 U.S.C. 1691e) is amended by  
 3 adding at the end the following:

4 “(l) Section 1107 of the Civil Rights Act of 1964  
 5 shall apply to this title, except that for purposes of that  
 6 application, a reference in that section to a ‘covered title’  
 7 shall be considered a reference to ‘this title’.”.

8 **SEC. 12. JURIES.**

9 (a) IN GENERAL.—Chapter 121 of title 28, United  
 10 States Code, is amended—

11 (1) in section 1862, by inserting “(including  
 12 sexual orientation and gender identity),” after  
 13 “sex,”;

14 (2) in section 1867(e), in the second sentence,  
 15 by inserting “(including sexual orientation and gen-  
 16 der identity),” after “sex,”;

17 (3) in section 1869—

18 (A) in subsection (j), by striking “and” at  
 19 the end;

20 (B) in subsection (k), by striking the pe-  
 21 riod at the end and inserting a semicolon; and

22 (C) by adding at the end the following:

23 “(l) ‘gender identity’, ‘sex’, and ‘sexual orientation’  
 24 have the meanings given such terms under section 1101(a)  
 25 of the Civil Rights Act of 1964; and

1 “(m) ‘race’, ‘color’, ‘religion’, ‘sex’ (including ‘sexual  
2 orientation’ and ‘gender identity’), ‘economic status’, or  
3 ‘national origin’, used with respect to an individual, in-  
4 cludes—

5 “(1) the race, color, religion, sex (including sex-  
6 ual orientation and gender identity), economic sta-  
7 tus, or national origin, respectively, of another per-  
8 son with whom the individual is associated or has  
9 been associated; and

10 “(2) a perception or belief, even if inaccurate,  
11 concerning the race, color, religion, sex (including  
12 sexual orientation and gender identity), economic  
13 status, or national origin, respectively, of the indi-  
14 vidual.”; and

15 (4) by adding at the end the following:

16 **“§ 1879. Rules of construction and claims**

17 “Sections 1101(b), 1106, and 1107 of the Civil  
18 Rights Act of 1964 shall apply to this chapter, except that  
19 for purposes of that application, a reference in those sec-  
20 tions to a ‘covered title’ shall be considered a reference  
21 to ‘this chapter’.”.

22 (b) **TECHNICAL AND CONFORMING AMENDMENT.—**  
23 The table of sections for chapter 121 of title 28, United

1 States Code, is amended by adding at the end the fol-  
2 lowing:

“1879. Rules of construction and claims.”.

Passed the House of Representatives May 17, 2019.

Attest: CHERYL L. JOHNSON,  
*Clerk.*

UNITED STATES of America,  
Plaintiff-Appellee,

v.

COUNTY OF MARICOPA, ARIZONA,  
Defendant-Appellant,

and

Paul Penzone,\* in his official capacity  
as Sheriff of Maricopa County,  
Arizona, Defendant.

No. 15-17558

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted September 15,  
2017 San Francisco, California

Filed May 7, 2018

**Background:** United States brought action alleging that county and its sheriff engaged in pattern or practice of discriminatory police conduct directed at Latinos, in violation of Title VI of Civil Rights Act, Violent Crime Control and Law Enforcement Act, and Due Process and Equal Protection Clauses, and of retaliation against their critics, in violation of First Amendment. The United States District Court for the District of Arizona, No. 2:12-cv-00981-ROS, Roslyn O. Silver, Senior Judge, 151 F.Supp.3d 998, entered summary judgment in United States' favor, and county appealed.

**Holdings:** The Court of Appeals, Watford, Circuit Judge, held that:

- (1) sheriff's law-enforcement acts constituted county policy;
- (2) in a case of first impression, county was subject to policymaker liability under Title VI and Violent Crime Control

within a year of the closing of the bankruptcy case, because the record does not reflect that the trustee filed any such objection.

and Law Enforcement Act for sheriff's acts; and

- (3) doctrine of issue preclusion barred county from relitigating lawfulness of its sheriff's traffic-stop policies.

Affirmed.

### 1. Civil Rights 1351(4)

Under Arizona law, sheriff has final policymaking authority, and thus his law-enforcement acts constituted county policy, for purposes of determining county's liability under Title VI of Civil Rights Act and Violent Crime Control and Law Enforcement Act for sheriff's discriminatory traffic-stop policies, even though sheriffs were independently elected and county board of supervisors did not exercise complete control over sheriff's actions. 34 U.S.C.A. § 12601; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d; Ariz. Const. art. 12, § 3; Ariz. Rev. Stat. Ann. §§ 11-251(1), 11-401(A)(1), 11-441(A)(1)-(3).

### 2. Civil Rights 1351(4)

County was subject to policymaker liability under Title VI of Civil Rights Act and Violent Crime Control and Law Enforcement Act for sheriff's acts as final policymaker. 34 U.S.C.A. § 12601; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

### 3. Civil Rights 1352(1)

While entity cannot be held vicariously liable on respondeat superior theory, it can be held liable under Title VI of Civil Rights Act if official with power to take corrective measures is deliberately indifferent to known acts of discrimination. Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

\* Paul Penzone is the current Sheriff of Maricopa County and has, therefore, been automatically substituted for his predecessor, Joseph M. Arpaio. See Fed. R. Civ. P. 25(d).



**4. Civil Rights**  $\approx$ 1088(1)

Violent Crime Control and Law Enforcement Act was enacted as remedy for violations of federal civil rights, specifically for violations that are systematically perpetrated by local police departments. 34 U.S.C.A. § 12601.

**5. Judgment**  $\approx$ 677, 715(2)

Doctrine of issue preclusion barred county from relitigating lawfulness of its sheriff's traffic-stop policies in action by United States alleging that sheriff engaged in pattern or practice of discriminatory police conduct directed at Latinos, in violation of Title VI of Civil Rights Act and Violent Crime Control and Law Enforcement Act, even though county had delegated responsibility for defense of prior private class action to sheriff, where county stipulated that it was party to prior action, there was full and fair opportunity to litigate identical issues in prior action, issues were actually litigated in prior action, and issues were decided in final judgment. 34 U.S.C.A. § 12601; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

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Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, Senior District Judge, Presiding, D.C. No. 2:12-cv-00981-ROS

Richard K. Walker (argued), Walker & Peskind PLLC, Scottsdale, Arizona, for Defendant-Appellant.

Elizabeth Parr Hecker (argued) and Thomas E. Chandler, Attorneys; Gregory B. Friel, Deputy Assistant Attorney General; Civil Rights Division, United States Department of Justice, Washington, D.C.; for Plaintiff-Appellee.

1. Title VI prohibits discrimination on the basis of "race, color, or national origin" in programs or activities that receive federal funding; § 12601 authorizes the United States to obtain declaratory and injunctive relief

Before: Ronald M. Gould, Richard C. Tallman, and Paul J. Watford, Circuit Judges.

**OPINION**

WATFORD, Circuit Judge:

The United States brought this action to halt racially discriminatory policing policies instituted by Joseph Arpaio, the former Sheriff of Maricopa County, Arizona. Under Arpaio's leadership, the Maricopa County Sheriff's Office (MCSO) routinely targeted Latino drivers and passengers for pretextual traffic stops aimed at detecting violations of federal immigration law. Based on that and other unlawful conduct, the United States sued Arpaio, MCSO, and the County of Maricopa under two statutes: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141).<sup>1</sup> The district court granted summary judgment in favor of the United States on the claims relating to the unlawful traffic stops; the parties settled the remaining claims. Maricopa County is the lone appellant here. Its main contention is that it cannot be held liable for the unlawful traffic-stop policies implemented by Arpaio.

We begin with a summary of the lengthy legal proceedings involving Arpaio's unlawful policing policies. In an earlier class action lawsuit, *Melendres v. Arpaio*, a group of plaintiffs representing a class of Latino drivers and passengers sued Arpaio, MCSO, and the County of Maricopa under 42 U.S.C. § 1983 and Title VI. They alleged that execution of Arpaio's racially

against any governmental authority that engages in a "pattern or practice of conduct by law enforcement officers" that deprives persons of rights protected by federal law.

discriminatory traffic-stop policies violated their rights under the Fourth and Fourteenth Amendments. Following a bench trial, the district court ruled in the plaintiffs' favor and granted broad injunctive relief, which we largely upheld on appeal. See *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*).

While the *Melendres* action was proceeding, the United States filed this suit. Among other things, the United States challenged the legality of the same traffic-stop policies at issue in *Melendres*. The United States named as defendants Arpaio, in his official capacity as Sheriff of Maricopa County; MCSO; and Maricopa County. Early on, the district court dismissed MCSO from the action in light of the Arizona Court of Appeals' decision in *Braillard v. Maricopa County*, 224 Ariz. 481, 232 P.3d 1263 (Ct. App. 2010), which held that MCSO is a non-jural entity that cannot be sued in its own name. *Id.* at 1269.

Throughout the proceedings below, the County argued that it too should be dismissed as a defendant, on two different grounds. First, the County argued that when a sheriff in Arizona adopts policies relating to law-enforcement matters, such as the traffic-stop policies at issue here, he does not act as a policymaker for the county. He instead acts as a policymaker for his own office, or perhaps for the State. The County contended that, because Arpaio's policies were not policies of the County, it could not be held liable for the constitutional violations caused by execution of them. Second, the County argued that, even if Arpaio acted as a policymaker for the County, neither Title VI nor 34 U.S.C. § 12601 permits a local government to be held liable for the actions of its policymakers.

The district court rejected both of the County's arguments. The court then granted the United States' motion for summary judgment with respect to claims predicated on the traffic-stop policies found unlawful in *Melendres*. The court held that the County was barred by the doctrine of issue preclusion from relitigating the issues decided in the *Melendres* action, which by that point had reached final judgment. The County does not contest that if the *Melendres* findings are binding here, they establish violations of Title VI and § 12601.

On appeal, Maricopa County advances three arguments: (1) Arpaio did not act as a final policymaker for the County; (2) neither Title VI nor § 12601 renders the County liable for the actions of its policymakers; and (3) the County is not bound by the *Melendres* findings. We address each of these arguments in turn.

## I

[1] We have already rejected Maricopa County's first argument—that Arpaio was not a final policymaker for the County. In *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*), we noted that “Arizona state law makes clear that Sheriff Arpaio’s law-enforcement acts constitute Maricopa County policy since he ‘has final policymaking authority.’” *Id.* at 650 (quoting *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837, 847 (Ct. App. 2002)). Because that determination was arguably *dicta*, we have conducted our own analysis of the issue, and we reach the same conclusion.

To determine whether Arpaio acted as a final policymaker for the County, we consult Arizona’s Constitution and statutes, and the court decisions interpreting them. See *McMillian v. Monroe County*, 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th Cir. 2000). Those

sources confirm that, with respect to law-enforcement matters, sheriffs in Arizona act as final policymakers for their respective counties.

Arizona's Constitution and statutes designate sheriffs as officers of the county. The Arizona Constitution states: "There are hereby created *in and for each organized county of the state* the following officers who shall be elected by the qualified electors thereof: a sheriff, a county attorney, a recorder, a treasurer, an assessor, a superintendent of schools and at least three supervisors. . . ." Ariz. Const. Art. 12, § 3 (emphasis added). The relevant Arizona statute explicitly states that sheriffs are "officers of the county." Ariz. Rev. Stat. § 11-401(A)(1).

Arizona statutes also empower counties to supervise and fund their respective sheriffs. The county board of supervisors may "[s]upervise the official conduct of all county officers," including the sheriff, to ensure that "the officers faithfully perform their duties." Ariz. Rev. Stat. § 11-251(1). The board may also "require any county officer to make reports under oath on any matter connected with the duties of his office," and may remove an officer who neglects or refuses to do so. Ariz. Rev. Stat. § 11-253(A). In addition, the county must pay the sheriff's expenses. Ariz. Rev. Stat. § 11-444(A); *Braillard*, 232 P.3d at 1269 n.2. As Maricopa County conceded in *Melendres*, those expenses include the costs of complying with any injunctive relief ordered against Arpaio and MCSO. *See Melendres III*, 815 F.3d at 650. A county's financial responsibility for the sheriff's unlawful actions is strong evidence that the sheriff acts on behalf of the county rather than the State. *See McMillian*, 520 U.S. at 789, 117 S.Ct. 1734; *Goldstein v. City of Long Beach*, 715 F.3d 750, 758 (9th Cir. 2013).

The limited guidance Arizona courts have provided on this topic further confirms that sheriffs act as policymakers for their respective counties. Most on point is *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837 (Ct. App. 2002), which held that then-Sheriff Arpaio acted as a final policymaker for Maricopa County with respect to jail administration. *Id.* at 847. *Flanders* relied in part on the fact that the statutory provision that specifies a sheriff's powers and duties lists "tak[ing] charge of and keep[ing] the county jail" as one of them. *Id.* (citing Ariz. Rev. Stat. § 11-441(A)(5)). That same provision also lists a wide array of law-enforcement functions that fall within the sheriff's powers and duties. Ariz. Rev. Stat. § 11-441(A)(1)–(3). Maricopa County does not explain why the Sheriff would be a final policymaker for the County with respect to jail administration but not with respect to the law-enforcement functions assigned to him in the same provision.

It is true that sheriffs in Arizona are independently elected and that a county board of supervisors does not exercise complete control over a sheriff's actions. Nonetheless, "the weight of the evidence" strongly supports the conclusion that sheriffs in Arizona act as final policymakers for their respective counties on law-enforcement matters. *See McMillian*, 520 U.S. at 793, 117 S.Ct. 1734. Because the traffic-stop policies at issue fall within the scope of a sheriff's law-enforcement duties, we conclude that Arpaio acted as a final policymaker for Maricopa County when he instituted those policies.

## II

[2] Maricopa County next argues that, even if Arpaio acted as the County's final policymaker, neither Title VI nor 34 U.S.C. § 12601 permits the County to be held liable for his acts. Whether either

statute authorizes policymaker liability is an issue of first impression. We conclude, informed by precedent governing the liability of local governments under 42 U.S.C. § 1983, that both statutes authorize policymaker liability.

The concept of policymaker liability under § 1983 is well developed. Section 1983 imposes liability on any “person” who, while acting under color of law, deprives someone of a right protected by the Constitution or federal law. In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that the term “person” includes municipalities, which had the effect of creating liability for local governments under § 1983. See *id.* at 690, 98 S.Ct. 2018. But the Court also limited the scope of that liability. It concluded that a local government may not be held vicariously liable for the acts of its employees under the doctrine of *respondeat superior*. *Id.* at 691, 98 S.Ct. 2018. Instead, liability arises only if a local government’s own official policy or custom caused the deprivation of federal rights. *Id.* at 694, 98 S.Ct. 2018. As the Court later explained, this “official policy” requirement is intended to ensure that a municipality’s liability “is limited to acts that are, properly speaking, acts ‘of the municipality’—that is, acts which the municipality has officially sanctioned or ordered.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Under policymaker liability, only certain employees of a local government have the power to establish official policy on the government’s behalf. The government’s legislative body has such power, of course, but so do officials “whose edicts or acts may fairly be said to represent official

policy.” *Monell*, 436 U.S. at 694, 98 S.Ct. 2018. Such officials are those who exercise “final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.” *McMillian*, 520 U.S. at 784–85, 117 S.Ct. 1734 (internal quotation marks omitted). In essence, policymaker liability helps determine when an act can properly be deemed a government’s own act, such that the government may be held liable for deprivations of federal rights stemming from it.

[3] We think this same concept of policymaker liability applies under both Title VI and § 12601. As to Title VI, the Supreme Court has held that an entity’s liability is limited to the entity’s own misconduct, as it is under § 1983. See *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 640, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 285, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998).<sup>2</sup> Thus, while an entity cannot be held vicariously liable on a *respondeat superior* theory, it can be held liable under Title VI if an official with power to take corrective measures is “deliberately indifferent to known acts” of discrimination. *Davis*, 526 U.S. at 641, 119 S.Ct. 1661. An entity can also be held liable for acts of discrimination that result from its own “official policy.” *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989; see *Mansourian v. Regents of the University of California*, 602 F.3d 957, 967 (9th Cir. 2010); *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1177–78 (10th Cir. 2007). Because this form of “official policy” liability resembles § 1983 policymaker liability, we think the proper standard for determining which employees have the power to establish an entity’s “official poli-

2. *Davis* and *Gebser* involved Title IX of the Education Amendments of 1972, but “the Court has interpreted Title IX consistently

with Title VI.” *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

cy” under Title VI is the standard that governs under § 1983.

We reach the same conclusion with respect to § 12601. As relevant here, the statute provides: “It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 34 U.S.C. § 12601(a).

[4] Section 12601 shares important similarities with § 1983. Section 1983 was enacted to create “a broad remedy for violations of federally protected civil rights.” *Monell*, 436 U.S. at 685, 98 S.Ct. 2018. Section 12601 was also enacted as a remedy for violations of federal civil rights, specifically for violations that are systematically perpetrated by local police departments. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 527–28 (2004). And, like § 1983, § 12601 imposes liability on local governments. Indeed, the language of § 12601 goes even further than § 1983, making it unlawful for “any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority” to engage in the prohibited conduct. 34 U.S.C. § 12601(a).

We need not decide whether the language of § 12601 imposes liability on the basis of general agency principles, as the United States urges here. It is enough for us to conclude, as we do, that § 12601 at least imposes liability on a governmental authority whose own official policy causes it to engage in “a pattern or practice of conduct by law enforcement officers” that deprives persons of federally protected rights. *Id.* Because of the similarity between § 12601 and § 1983, we again see no reason to create a new standard for

determining which officials have the power to establish a governmental authority’s official policy. The same standard that governs under § 1983 applies here as well.

In short, Maricopa County is liable for violations of Title VI and § 12601 stemming from its own official policies. As discussed above, when Arpaio adopted the racially discriminatory traffic-stop policies at issue, he acted as a final policymaker for the County. Those policies were therefore the County’s own, and the district court correctly held the County liable for the violations of Title VI and § 12601 caused by those policies.

### III

[5] Lastly, Maricopa County challenges the district court’s application of issue preclusion, which precluded the County from relitigating the lawfulness of Arpaio’s traffic-stop policies. Given the nature of the County’s involvement in the *Melendres* action, we conclude that the County is bound by the adverse findings rendered in that action.

The County was originally named as a defendant in the *Melendres* action, along with then-Sheriff Arpaio and MCSO. Early in the litigation, the parties stipulated to dismissal of the County as a named defendant, without prejudice to the County’s being rejoined as a defendant later in the litigation if that became necessary to afford the plaintiffs full relief. *Melendres III*, 815 F.3d at 648. In effect, the County agreed to delegate responsibility for defense of the action to Arpaio and MCSO, knowing that it could be bound by the judgment later despite its formal absence as a party.

The case proceeded to trial against Arpaio and MCSO and resulted in judgment against them. On appeal, we concluded that MCSO had been improperly named as a defendant because it could not be sued in its own name following the Arizona Court

of Appeals' intervening decision in *Brailard. Melendres II*, 784 F.3d at 1260 (citing *Brailard*, 232 P.3d at 1269). Pursuant to the parties' stipulation, we ordered that the County be rejoined as a defendant in lieu of MCSO. *Id.* We later explained that we did so "[t]o assure a meaningful remedy for the plaintiffs despite MCSO's dismissal." *Melendres III*, 815 F.3d at 648. The County challenged this ruling in a petition for rehearing en banc and a petition for writ of certiorari, both of which were denied. *See id.*

Given this history, the district court properly applied issue preclusion to bar the County from relitigating the *Melendres* findings. Each of the elements of offensive non-mutual issue preclusion is satisfied: There was a full and fair opportunity to litigate the identical issues in the prior action; the issues were actually litigated in the prior action; the issues were decided in a final judgment; and the County was a party to the prior action. *See Syverson v. International Business Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007). Indeed, the County contests only the last element, arguing that it was not in fact a party to *Melendres*. That is not accurate as a factual matter, because the County was originally named as a defendant in *Melendres* and is now one of the parties bound by the judgment in that action. Moreover, even though the County did not remain a party to *Melendres* throughout the litigation, it effectively agreed to be bound by the judgment in that action. Such an agreement is one of the recognized exceptions to non-party preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 893, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008).

**AFFIRMED.**



**UNITED STATES of America,  
Plaintiff-Appellee,**

**v.**

**Pragedio ESPINOZA-VALDEZ,  
Defendant-Appellant.**

**No. 16-10395**

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted November 17,  
2017 San Francisco, California

Filed May 7, 2018

**Background:** Defendant was convicted, in the United States District Court for the District of Arizona, No. 2:15-cr-01465-JJT-1, John Joseph Tuchi, J., of conspiracy to import marijuana and conspiracy to distribute marijuana. Defendant appealed.

**Holding:** The Court of Appeals, Paul L. Friedman, District Judge, sitting by designation, held that evidence was insufficient to establish that defendant joined a conspiratorial agreement.

Reversed.

Rawlinson, Circuit Judge, filed a dissenting opinion.

## **1. Criminal Law ⇌1139**

The Court of Appeals reviews de novo whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

## **2. Conspiracy ⇌24(1), 24.5**

The elements of conspiracy are: (1) an agreement to accomplish an illegal objec-



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# **MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

**By Jordan Blair Woods, Brad Sears, & Christy Mallory**

September 2016

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### ***About the Williams Institute***

**The Williams Institute** is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at UCLA School of Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public.

### ***Acknowledgements***

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# MODEL LEGISLATION FOR ELIMINATING THE GAY AND TRANS PANIC DEFENSES

By Jordan Blair Woods, Brad Sears, and Christy Mallory

## INTRODUCTION

Lesbian, gay, bisexual, and transgender (LGBT) people have historically faced and continue to suffer disproportionately high rates of violence.<sup>1</sup> In 2014 alone, over 1,200 anti-LGBT hate crimes were reported to U.S. law enforcement agencies.<sup>2</sup> Homicides involving LGBT victims are particularly high.<sup>3</sup> Available data underestimate the true extent of violence against LGBT people, given that many anti-LGBT hate crimes go unreported every year.<sup>4</sup>

In recent decades, there have been some advances in law and policy to address anti-LGBT violence, including hate crime legislation at the federal, state, and local levels.<sup>5</sup> In spite of

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<sup>1</sup> Jaime M. Grant, *et al.*, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) (reporting that 61% of the 6,450 respondents in the National Transgender Discrimination Survey were the victim of physical assault); Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION AND VIOLENCE BEHAVIOR 170 (2009) (providing a comprehensive review of data on violence against transgender people); Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. INTERPERSONAL VIOLENCE 54, 54 (2009) (reporting that approximately 20% of LGB adults reported having experienced a person or property crime based on their sexual orientation).

<sup>2</sup> These statistics are based on the most recent data from the Federal Bureau of Investigation's Uniform Crime Reports. See 2014 Hate Crime Statistics, available at [https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/incidentsandoffenses\\_final](https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/incidentsandoffenses_final).

<sup>3</sup> National Coalition of Anti-Violence Programs, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2014 8 (2015), available at [http://www.avp.org/storage/documents/Reports/2014\\_HV\\_Report-Final.pdf](http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf).

<sup>4</sup> James J. Nolan & Yoshio Akiyama, *An Analysis of Factors That Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMP. CRIM. JUST. 111, 114 (1999) (concluding that gay, lesbian, bisexual, and transgender victims frequently do not report hate crimes because they fear police insensitivity and secondary victimization by police officers).

<sup>5</sup> See The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2014); Movement Advancement Project, *Hate Crime Laws*, [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws) (reporting that as of May 13, 2016, 17 states and the District of Columbia have

these developments, the “gay and trans panic” defenses remain valid defenses in many states today. The gay and trans panic defenses allow perpetrators of LGBT murders to receive a lesser sentence, and in some cases, even avoid being convicted and punished, by placing the blame for homicide on a victim’s actual or perceived sexual orientation or gender identity.

The gay and trans panic defenses are rooted in antiquated ideas that homosexuality and gender non-conformity are mental illnesses. Although these ideas have been discredited, their widespread historical acceptance is illustrated by the fact that homosexuality was included in the American Psychological Association’s Diagnostic and Statistical Manual of Mental Disorders until 1973.<sup>6</sup> In line with this view, criminal defense attorneys began invoking the gay and trans panic defenses in the 1960s, arguing that an LGBT victim’s unwanted sexual advance caused perpetrators to enter a state of “homosexual panic,” and kill the LGBT victim.<sup>7</sup>

Since the 1960s, the gay and trans panic defenses have appeared in court opinions in approximately one-half of the states.<sup>8</sup> No state recognizes gay and trans panic defenses as free-standing defenses under their respective penal codes. Rather, defendants have used concepts of gay and trans panic in three different ways in order to reduce a murder charge to manslaughter or to justifiable homicide.<sup>9</sup>

First, defendants have relied on gay and trans panic defenses to support a defense theory of provocation. Specifically, defendants argue that the discovery, knowledge, or potential disclosure of a victim’s sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion. Second, defendants have used gay and trans panic defenses to support a defense theory of diminished capacity (and in fewer cases, to support a defense theory of insanity). Under the more common diminished capacity

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hate crime laws that cover sexual orientation and gender identity, and 13 states have laws that only cover sexual orientation).

<sup>6</sup> In 1980, “gender identity disorders” were included in the DSM. GORDENE OLGA MACKINZIE, TRANSGENDER NATION 69 (1994). Those labels remained in the DSM until 2013, when the APA changed “gender identity disorders” to appear as “gender dysphoria.” American Psychological Association, REPORT OF THE APA TASK FORCE ON GENDER IDENTITY & GENDER VARIANCE (2008), <http://www.apa.org/pubs/info/reports/gender-identity.aspx>. This change reflected the APA’s intent to avoid stigmatizing transgender people who sought gender reaffirming medical care and to “better characterize the experiences of affected children, adolescents, and adults.” American Psychiatric Association, GENDER DYSPHORIA (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

<sup>7</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 477 (2008).

<sup>8</sup> States with reported court decisions discussing the gay and trans panic defenses are Arizona (2010), California (1967, 2002), Florida (2012), Georgia (2001), Kansas (2006), Illinois (1972, 1977, 1993, 2000, 2004), Indiana (2001), Iowa (2015), Louisiana (1990), Massachusetts (1978, 2005), Michigan (2000), Missouri (1975, 1990, 2000), New Jersey (2004), New York (2012), North Carolina (1978), Nebraska (1994), New Jersey (1988), Ohio (1988), Pennsylvania (2010), Tennessee (1998, 2009), Texas (2007), Wisconsin (2001), and Wyoming (1979, 1999).

<sup>9</sup> American Bar Association, Gay and Trans Panic Defenses Resolution (2013), *available at* <http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf>.

approach, defendants argue that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill — in other words, a “homosexual panic.” Third and finally, defendants have used gay and trans panic defenses to support a theory of self-defense. Here, defendants argue that they had a reasonable belief that they were in immediate danger of serious bodily harm based on the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity.

The gay and trans panic defenses are rooted in irrational fears based on homophobia and transphobia, and send the wrong message that violence against LGBT people is acceptable. In 2013, the American Bar Association unanimously approved a resolution calling for state legislatures to eliminate the gay and trans panic defenses through legislation.<sup>10</sup> At that point, no state legislature had passed legislation to ban the gay and trans panic defenses, although some courts had rejected the defenses under state law.<sup>11</sup> In 2014, California passed legislation amending the statutory definition of voluntary manslaughter,<sup>12</sup> to become the first state to eliminate the gay and trans panic defenses through legislation.<sup>13</sup> Since then, legislation banning the gay and trans panic defenses has been introduced in Illinois, New Jersey, and Pennsylvania.<sup>14</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> Those states are Florida, Illinois, and Kansas. *See infra* Part I.

<sup>12</sup> Assembly Bill 2501 amended the statutory definition of voluntary manslaughter under the California Penal Code to include the following language:

(f)(1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.

(2) For purposes of this subdivision, “gender” includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.

CAL. PENAL CODE § 192(f) (2015).

<sup>13</sup> Parker Marie Molloy, *California Becomes First State to Ban Gay, Trans “Panic” Defenses*, THE ADVOCATE, Sept. 29, 2014, available at <http://www.advocate.com/crime/2014/09/29/california-becomes-first-state-ban-gay-trans-panic-defenses>.

<sup>14</sup> Illinois: Bill Status of SB 3046, 99<sup>th</sup> General Assembly, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3046&GAID=13&DocTypeID=SB&LegId=96385&SessionID=88&GA=99>; New Jersey: Bills 2014-2015, A4083, [http://www.njleg.state.nj.us/2014/Bills/A4500/4083\\_11.PDF](http://www.njleg.state.nj.us/2014/Bills/A4500/4083_11.PDF), Pennsylvania: HB 1509, <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2015&sInd=0&body=H&type=B&bn=1509>.

This brief presents legal and policy analysis, and model legislation, for eliminating the gay and trans panic defenses. Part I provides an overview of what we know about the gay and trans panic defenses from court opinions across the United States. Part II evaluates potential constitutional challenges to state legislation eliminating the gay and trans panic defenses. Part III presents model legislation to eliminate the gay and trans panic defenses. The model legislation offers language to prohibit defendants from using the gay and trans panic defenses under the major defense theories of provocation, insanity/diminished capacity, and self-defense.

## **PART I: THE GAY AND TRANS PANIC DEFENSES IN COURT OPINIONS**

Since the 1960s, discussions of the gay and trans panic defenses have appeared in court opinions in approximately one-half of the states.<sup>15</sup> Although most of these decisions specifically involve the gay panic defense, there are several media reports of defendants raising the trans panic defense in court.<sup>16</sup> Because the reasoning behind a jury's verdict is not published in an opinion, most cases in which defendants successfully raise gay and trans panic defenses never result in a court opinion. For this reason, the available reported opinions are skewed towards cases involving defendants who were convicted of murder after not successfully raising a gay or trans panic defense, and are challenging their convictions in an appeal or habeas corpus proceeding.

In spite of these limitations, the examples from reported court opinions below show a variety of ways that defendants have raised gay and trans panic defenses based on theories of provocation, insanity/diminished capacity, and self-defense. The examples also show a mix of outcomes in cases in which defendants have raised the gay and trans panic defense. In some cases, defendants have successfully raised gay and trans panic defenses, resulting in the defendants avoiding a murder conviction and receiving reduced punishment for a lesser manslaughter offense. In other cases, courts have rejected that gay and trans panic defenses are valid defenses under state law. In some cases when defendants have raised gay and trans panic defenses, judges have allowed an instruction on a lesser included manslaughter offense to go to a jury, but juries rejected the defense and convicted the defendants of murder. In other cases, judges have refused to give the jury an instruction on a lesser included manslaughter offense based on the specific facts of the case, but it is unclear whether the judges would give the jury instruction in another case with different facts involving defendants who raise gay and trans panic defenses.

### **EXAMPLES OF CASES INVOLVING PROVOCATION**

Defendants in several states have used the gay and trans panic defenses to support a defense theory of provocation, which reduces a murder charge to a lesser voluntary manslaughter offense. Generally, when raising a provocation defense, defendants argue that they intentionally killed "another while under the influence of a reasonably-induced emotional disturbance . . . causing a temporary loss of normal self-control."<sup>17</sup> In cases involving gay and trans panic defenses, defendants allege that the discovery, knowledge, or potential disclosure of

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<sup>15</sup> See *supra* note 8.

<sup>16</sup> For a list and discussion of cases reported in the media in which perpetrators have used the trans panic defense see Aimee Wodda & Vanessa R. Panfil, *"Don't Talk To Me About Deception": The Necessary Erosion of the Trans Panic Defense*, 78 ALBANY L. REV. 927, 942-57 (2014/2015).

<sup>17</sup> Wayne R. LaFave, 2 SUBST. CRIM. L. § 15.2 (2d ed.) (West 2015).

a victim's sexual orientation or gender identity was a sufficiently provocative act that drove them to kill in the heat of passion.

#### Arizona

In *Greene v. Ryan*,<sup>18</sup> the defendant alleged that the victim offered to pay to perform oral sex on the defendant. The defendant accepted, but later changed his mind. In response, the victim purportedly smiled and touched defendant's leg. The defendant alleged that he "freaked out," and impulsively struck the victim several times, killing him. The defendant was convicted of murder. The jury rejected the defendant's version of the story that he "freaked out" during a dangerous homosexual encounter; rather, in convicting the defendant, the jury appeared to accept the prosecution's theory of the case that the defendant murdered the victim in order to gain access to the victim's property.

#### California

In *People v. Chavez*,<sup>19</sup> the defendant alleged that the victim made a sexual advance towards him after getting into the victim's car. The defendant purportedly tried to get away from the victim by exiting and walking away from the car, after which the victim grabbed the defendant's arm. The defendant then stabbed the victim, killing him. At trial, the defendant argued that he killed the victim in a heat of passion triggered by the victim's unwanted homosexual advance. The defendant also claimed that he acted unconsciously, based on the theory that he stabbed the victim during the midst of an epileptic seizure, and produced experts who testified regarding his epilepsy. The jury found the defendant guilty of voluntary manslaughter, not murder.

#### Florida

In *Patrick v. State*,<sup>20</sup> the defendant met the victim at a public park and later beat the victim to death. The defendant alleged that the victim tried to have sex with the defendant multiple times while the two were lying in bed at the victim's apartment. The defendant further alleged that after refusing each advance, he lost control and eventually "cut loose" on the victim. The trial court excluded evidence regarding the victim's inclination to pick up men at the public park and bring them home. In upholding the trial court's ruling, the Supreme Court of Florida stressed, "The State of Florida does not recognize a nonviolent homosexual advance as

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<sup>18</sup> No. CV-03-605, 2010 WL 1335490 (D. Ariz. Mar. 31, 2010).

<sup>19</sup> No. F038767, 2002 WL 31863441 (Cal. Ct. App. Dec. 23, 2002).

<sup>20</sup> 104 So.3d 1046, 1057 (Fla. 2012) (citing *Davis v. State*, 928 So.2d 1089, 1120 (Fla. 2005)).

sufficient provocation to incite an individual to lose self-control and commit acts in the heat of passion.”<sup>21</sup>

### Illinois

In *U.S. ex rel. Page v. Mote*,<sup>22</sup> the defendant stabbed the victim at the victim’s house. After being convicted for murder and losing his direct and post-conviction appeals in state court, the defendant filed a habeas corpus motion in federal district court. In his motion, the defendant argued that his trial counsel were constitutionally ineffective because they failed to present sufficient evidence to support a lesser voluntary manslaughter charge. One of the alleged pieces of evidence was that the victim made unwanted sexual advances towards the defendant immediately before the killing. In rejecting the defendant’s claim, the federal district court held that, “[u]nder Illinois law, an unwanted homosexual advance is not one of the recognized categories of provocation under the voluntary manslaughter offense.”<sup>23</sup>

### Indiana

In *Dearman v. State*,<sup>24</sup> the defendant claimed that the victim began biting on the defendant’s neck and grabbing his thigh. When the defendant resisted, the victim then allegedly threw him to the ground. The defendant subsequently crushed the victim’s skull with a concrete block. At trial, the defendant claimed that he was entitled to a voluntary manslaughter instruction. The trial court declined to instruct the jury on manslaughter, and the jury convicted the defendant of murder. On appeal, the Supreme Court of Indiana concluded that the trial court properly refused to submit a manslaughter instruction to the jury because the record did not show the defendant to be, “in such a state of terror or rage that he was rendered incapable of cool reflection.”<sup>25</sup> Further, the court observed, “[l]ifting and striking a person in the head twice with such a large object in a claimed attempt to thwart sexual

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<sup>21</sup> *Id.* at 1057.

<sup>22</sup> Nos. 02C 232, 01 C 233, 2004 WL 2632935 (N.D. Ill. Nov. 17, 2004). In reaching this conclusion, the federal district court cited to a line of Illinois Supreme Court precedent dating at least as far back as a 1926 case, *People v. Russell*, 322 Ill. 295 (Ill. 1926). This authority stands for the proposition that under Illinois law, there are only certain categories of provocation adequate to support a heat of passion theory: “substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender’s spouse.” *People v. Garcia*, 165 Ill.2d 409, 429 (Ill. 1995). As a corollary, “[n]o words or gestures, however opprobrious, provoking, or insulting, can amount to the considerable provocation which will so mitigate intentional killing as to reduce the homicide to manslaughter.” *Russell*, 322 Ill. at 301. Under this constricted definition of adequate provocation, the district court concluded that an apparently nonviolent yet unwanted homosexual advance was insufficient.

<sup>23</sup> *Mote*, 2004 WL 2632935, at \*9.

<sup>24</sup> 743 N.E.2d 757 (Ind. 2001).

<sup>25</sup> *Id.* at 762.



advances does not indicate that the killing was done in the sudden heat and without reflection.”<sup>26</sup>

#### Kansas

In *Harris v. Roberts*,<sup>27</sup> police officers found the victim dead in an alley, shot several times. At trial, the defendant tried to raise a provocation defense, claiming he stated to the police that he shot the victim after the victim made an unwanted sexual advance, and the defendant became angry. The trial court refused to give a voluntary manslaughter instruction to the jury based on a theory of provocation, and the defendant was convicted of second-degree murder. On appeal, the defendant claimed that it was error for the trial court to refuse to give the instruction on the lesser voluntary manslaughter offense. The court rejected the defendant’s claim, concluding that, “an unwanted homosexual advance is insufficient provocation to justify an instruction on the lesser included offense of voluntary manslaughter.”<sup>28</sup>

#### New York

In *People v. Cass*,<sup>29</sup> the defendant admitted to strangling the victim, but claimed he “just lost it” and “snapped” when the victim grabbed his genitals and made other sexual advances towards him during an argument. One year earlier, the defendant had also strangled another person he met in a bar when, after falling asleep at the person’s home, he found that person on top of him, kissing and grabbing him. At trial, the defendant raised a “defense of extreme emotional disturbance, claiming his violent response to [the victim’s] unexpected sexual advances was due to mental illness caused by protracted sexual abuse he suffered as a child.”<sup>30</sup> The jury rejected the defendant’s arguments and convicted him of second-degree murder.

#### Tennessee

In *State v. Wilson*,<sup>31</sup> the defendant alleged that he met the victim for the first time at a restaurant, and invited the victim back to his place for a few drinks. The victim then purportedly made a sexual pass at the defendant, which the defendant rejected. The victim allegedly picked up a handgun, pointed it at the defendant, and told the defendant, “you are going to be my boy tonight.” The defendant told the victim to hold on, and that he needed to use the restroom

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

<sup>27</sup> 130 P.3d 1247 (Table) (Kan. Ct. App. 2006).

<sup>28</sup> *Id.* at \*5.

<sup>29</sup> 942 N.Y.S.2d 416 (2012).

<sup>30</sup> *Id.* at 421.

<sup>31</sup> No. M2007-01854, 2009 WL 2567863 (Tenn. Ct. App. Aug. 20, 2009).

first. The defendant returned with a shotgun. Both men put their weapons down and began to talk. The victim then reached for the handgun, a struggle ensued, and the defendant obtained possession of the gun and fired it, killing the victim. The defendant argued he responded with violence only in response to threats and homosexual advances from the victim. The defendant was convicted of second-degree murder. The defendant argued on appeal that the evidence was insufficient to convict him for second-degree murder and that it supported only a voluntary manslaughter verdict. The court held that it was within the prerogative of the jury to reject the defendant's "heat of passion" argument.

### Wisconsin

In *State v. Bodoh*,<sup>32</sup> the victim made sexual advances towards the defendant. Soon after, the defendant shot the victim while they were riding in a car. The defendant believed that the victim had molested him months earlier when the defendant was passed out from drinking. At trial, the defendant raised a provocation defense on the grounds that when he shot the victim, he was flashing back to the prior sexual assault. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was constitutionally ineffective for not pursuing a psychosexual evaluation for the defendant, which, had it been pursued, would have enabled the defendant to more adequately present a homosexual panic defense. The court rejected the defendant's claim and upheld his conviction.

## **EXAMPLES OF CASES INVOLVING INSANITY OR DIMINISHED CAPACITY**

Several defendants have used the gay and trans panic defenses to support a defense theory of diminished capacity. Under this theory, defendants argue that they were incapable of having the required mental state of a specific crime because of a temporary mental impairment or mental disease.<sup>33</sup> Diminished capacity is not a full defense to a crime, but merely results in the defendant being convicted of a lesser offense.<sup>34</sup> In cases involving gay and trans panic defenses, defendants raise a diminished capacity defense in order to avoid a murder conviction and receive reduced punishment for a lesser manslaughter offense. To do this, defendants allege that the discovery, knowledge, or potential disclosure of a victim's sexual orientation or gender identity caused them to have a temporary mental breakdown, driving them to kill — in other words, a "homosexual panic."

In fewer cases, defendants have used the gay and trans panic defenses to support a defense theory of insanity. Unlike diminished capacity, the insanity defense is a full defense to a

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<sup>32</sup> No. 00-2370, 635 N.W.2d 905 (Wisc. Ct. App. Sept. 5, 2001).

<sup>33</sup> LaFave, *supra* note 17, at § 9.2.

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

crime, and results in the defendant being found not guilty by reason of insanity.<sup>35</sup> In raising an insanity defense, defendants argue that they were legally insane<sup>36</sup> at the time of the crime, and therefore, could not have had the requisite mental state to be held criminally responsible for that crime.<sup>37</sup> In cases involving gay and trans panic defenses, defendants argue that they suffer from the purported syndrome of gay or trans panic, which prevented them from knowing what they were doing, or knowing that what they were doing was wrong, at the time they killed an LGBT victim.<sup>38</sup>

### Louisiana

In *State v. Dietrich*,<sup>39</sup> the defendant killed the victim by stabbing him sixteen times in the victim's apartment. The defendant alleged that the victim offered him \$50 in return for sexual favors and that the victim threatened him with violence when he refused. The trial court excluded the defendant's evidence involving, "homosexual anxiety panic syndrome." On appeal, the court affirmed the trial court's ruling on the grounds that, the "State of Louisiana does not recognize the doctrine of diminished responsibility,"<sup>40</sup> and that the defendant was able to distinguish right from wrong at the time of the offense.

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<sup>35</sup> LaFave, *supra* note 17, at § 7.1.

<sup>36</sup> Jurisdictions have adopted four different tests for determining legal insanity. As Wayne R. LaFave explains:

As for insanity as a defense, under the prevailing M'Naghten rule (sometimes referred to as the right-wrong test) the defendant cannot be convicted if, at the time he committed the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, as not to know he was doing what was wrong. A few jurisdictions have supplemented M'Naghten with the unfortunately-named "irresistible impulse" test which, generally stated, recognizes insanity as a defense when the defendant had a mental disease which kept him from controlling his conduct. For several years (but no longer) the District of Columbia followed the so-called Durham rule (or product test), whereby the accused was not criminally responsible if his unlawful act was the product of mental disease or mental defect. And in recent years a substantial minority of states have adopted the Model Penal Code approach, which is that the defendant is not responsible if at the time of his conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

*Id.*

<sup>37</sup> *Id.* at § 7.1.

<sup>38</sup> This iteration assumes that the majority M'Naghten rule applies in a given jurisdiction. If another legal test for insanity applies, then defendants might raise different gay and trans panic arguments to support an insanity defense.

<sup>39</sup> 567 So.2d 623 (La. Ct. App. 1990).

<sup>40</sup> *Id.* at 633.

### Massachusetts

In *Commonwealth v. Cutts*,<sup>41</sup> the defendant went to the victim's house as they were both part of a circle of friends who routinely gathered to play cards, watch pornographic films, and do drugs. After the victim went to bed, the defendant fractured the victim's skull, left a gearshift from a Jaguar automobile protruded in the victim's ear, and hung white rope around the victim's neck. At trial, the defendant raised a diminished capacity defense, contending that his actions were the result of "homosexual panic." Multiple psychologists testified that the defendant's conduct was a frenzied and unanticipated response to a perceived sexual advance by the victim. The jury rejected the defendant's gay panic defense and convicted him of first-degree murder.

### Michigan

In *People v. Harden*,<sup>42</sup> the defense counsel attempted to solicit testimony that the victim was gay in order to bolster the defense's theory that the victim's death resulted from his unwanted homosexual advances towards the defendant. The defense counsel decided not to assert an insanity defense, and the jury convicted the defendant of second-degree murder. On appeal, the defendant claimed that the testimony suggested that he was legally insane at the time of the killing. The court rejected the defendant's claim.

### New Jersey

In *Affinito v. Hendricks*,<sup>43</sup> the defendant claimed that he attacked the victim only after the victim made unwanted homosexual advances towards him. The defendant argued he had diminished capacity at the time of the homicide as a result of a "convulsive disorder." The jury convicted him of murder. The defendant argued that his counsel was ineffective for, among other things, failing to provide relevant documents to a defense expert that may have aided in the defendant's diminished capacity defense. The court ultimately denied the defendant's ineffective assistance of counsel claim.

### Ohio

In *State v. Van Hook*,<sup>44</sup> the defendant met the victim at a bar, and the two went back to the victim's apartment. At the apartment, the defendant killed the victim by stabbing him multiple times. The defendant then stole various items of jewelry from the victim's apartment.

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<sup>41</sup> 444 Mass. 821 (2005).

<sup>42</sup> No. 199958, 2000 WL 33407197 (Mich. Ct. App. Sept. 1, 2000).

<sup>43</sup> 366 F.3d 252 (3d Cir. 2004).

<sup>44</sup> 39 Ohio St.3d 256 (Ohio 1988).

At trial, a psychologist testified and prepared a written testimony addendum suggesting that the killing may have occurred as a result of a “homophobic panic.”<sup>45</sup> The defendant pled not guilty by reason of insanity for the offenses of aggravated murder and aggravated robbery. Waiving his right to a trial by jury, a three-judge panel found him guilty on both charges and the specified aggravated circumstances.<sup>46</sup>

## **EXAMPLES OF CASES INVOLVING SELF-DEFENSE**

Several defendants have used the gay and trans panic defense to support a theory of self-defense. To prove self-defense, defendants must reasonably believe that a victim put them in immediate danger of death or serious bodily harm when they used deadly force against the victim.<sup>47</sup> In cases involving gay and trans panic defenses, defendants have primarily argued that an LGBT victim’s unwanted sexual advance, or the discovery that the victim was LGBT, resulted in a reasonable belief that they were in immediate danger of serious bodily harm.

### Georgia

In *Harris v. State*,<sup>48</sup> the defendant met the victim and spent multiple nights with him, engaging in sexual acts. One night, the defendant became angry after one of their sexual encounters. When the victim purportedly continued to make sexually suggestive remarks, the defendant went to another room, but the victim followed. The defendant then picked up a knife and stabbed and killed the victim. The defendant argued self-defense and decided after discussion with counsel not to request a manslaughter instruction out of fear that he would likely be convicted of manslaughter and have no issues to raise on appeal. The defendant was convicted of murder.

### Iowa

In *State v. Pollard*,<sup>49</sup> the defendant used a crowbar to strike the manager of an adult movie theater in the head and strangle him, resulting in his death. Soon after, the defendant left the theater with a black bag of merchandise. The defendant admitted to killing the manager, but argued that he acted in self-defense. The defendant claimed that he panicked after the manager allegedly sat down next to him during the movie, and touched his leg. The jury rejected the gay panic defense used to support the defendant’s theory of self-defense, and convicted him of first-degree murder and first-degree robbery.

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<sup>45</sup> *Van Hook v. Bobby*, 661 F.3d 264, 267 (6th Cir. 2011).

<sup>46</sup> *Van Hook*, 39 Ohio St.3d at 257.

<sup>47</sup> LaFave, *supra* note 17, at § 10.4.

<sup>48</sup> 554 S.E.2d 458 (Ga. 2001).

<sup>49</sup> 862 N.W.2d 414 (Table) (Iowa Ct. App. 2015).

### New Jersey

In *State v. Camacho*,<sup>50</sup> the victim regularly dressed in feminine attire (a wig, makeup, jewelry, brown skirt, brown blouse, and high heels) during the evenings. After leaving a gay bar one night, the victim met the defendant while dressed in feminine attire on a street known to be a gay pick-up area. The victim offered the defendant \$20 to have sex. After entering the victim's apartment, the victim got undressed. Upon seeing the victim's genitals, the defendant alleged that he became angry. The defendant further alleged that he had a knife in his jacket that was visible to the victim, and he believed that the victim was going to grab the knife and use it against him. The defendant then stabbed, beat, and killed the victim. The jury convicted the defendant of first-degree murder. On appeal, the defendant claimed that his counsel was constitutionally ineffective for failing to request, among other things, an instruction for self-defense and/or imperfect self-defense. The court rejected the defendant's claim.

### Texas

In *Cutsinger v. State*,<sup>51</sup> the defendant argued on appeal that the evidence was insufficient to sustain a conviction for capital murder because, among other things, the defendant killed the victim in self-defense after what he perceived to be homosexual advances. The jury convicted the defendant of murder. On appeal, the court concluded that the evidence was sufficient to allow the jury to reject that the defendant killed the victim in self-defense to an attempted sexual assault, and to conclude that the defendant killed the victim to rob him.

## **EXAMPLES OF CASES INVOLVING POST-CONVICTION RELIEF**

In many cases, defendants invoke gay and trans panic defenses at trial in order to avoid a murder conviction and receive a reduced punishment based on a lesser charge, or avoid conviction and punishment entirely. Some defendants who have been convicted of murder, however, have also raised gay and trans panic defenses during post-conviction proceedings in order to get their murder convictions overturned and obtain a new trial.

### Missouri

In *Jones v. Delo*,<sup>52</sup> the defendant shot and killed the victim, and was sentenced to death for first-degree murder. In his motion for state post-conviction relief, the defendant argued that trial counsel was ineffective for failing to prepare and present an affirmative mitigating case at the penalty phase of the trial. At the defendant's state post-conviction hearing, a psychologist testified that the defendant had described that he experienced panic after the victim made a

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<sup>50</sup> No. 01-06-0660, 2010 WL 3218888 (N.J. Ct. App. 2010).

<sup>51</sup> No. 14-06-00893, 2007 WL 4442609 (Tex. Ct. App. 2007).

<sup>52</sup> 258 F.3d 893 (8th Cir. 2000).

direct sexual advance. The psychologist further testified that the defendant described that he remembered shooting a gun, but experienced intermittent memory loss in the process of the actual killing. The state court denied post-conviction relief, concluding that the defendant was not acting under homosexual panic when he shot and killed the victim.

#### Pennsylvania

In *Commonwealth v. Martin*,<sup>53</sup> the defendant asked the victim for money and the victim responded that he would give money in exchange for sex. In response to the victim's homosexual advance, the defendant hit the victim over the head, bound his wrists and ankles, and suffocated the victim with a plastic bag. On habeas, the defendant alleged that trial counsel was ineffective for failing to present a provocation defense to the jury. He argued that the victim's sexual advances triggered Post-Traumatic Stress Disorder flashbacks of sexual abuse he suffered as a child, thereby making him incapable of cool reflection. The defendant argued he was prejudiced by his counsel's omission because the presentation of a provocation defense would have reduced his crime from murder to manslaughter by effectively negating the defendant's specific intent to kill. The Court held that the defendant's ineffective assistance of counsel claim lacked merit, accepting a lower court's factual finding that even if the homosexual advance triggered PTSD flashbacks, such an event did not, "render [the defendant] incapable of cool reflection so as to support a provocation defense."<sup>54</sup>

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<sup>53</sup> 5 A.3d 177 (Pa. 2010).

<sup>54</sup> *Id.* at 186.

## **PART II: CONSTITUTIONAL CHALLENGES TO LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

Critics of state legislation eliminating the gay and trans panic defenses would most likely argue that such legislation violates defendants' rights protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>55</sup> A court, however, would be highly unlikely to conclude that a statute eliminating the gay and trans panic defenses violates the Due Process Clause because: (1) states are given broad latitude to define evidentiary rules in criminal trials and the elements of criminal offenses/defenses, (2) defendants do not have an absolute right to present relevant evidence in their defense, and (3) the gay and trans panic defenses have relatively recent origins in common law, have not been uniformly and consistently adopted by the fifty states, and their elimination is supported by considerable state policy justifications.

### **MONTANA V. EGELHOFF**

*Montana v. Egelhoff*<sup>56</sup> is the key case that governs the constitutional analysis on whether state legislation eliminating the gay and trans panic defenses violate defendants' due process rights under the Fourteenth Amendment. In *Montana v. Egelhoff*, the U.S. Supreme Court considered whether the Due Process Clause was violated by Montana Code Annotated § 45-2-203, which stated that voluntary intoxication, "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."<sup>57</sup> The defendant had been convicted of deliberate homicide after the police found him drunk in a vehicle next to his gun with two victims who had been shot in the head. At trial, the jury was instructed that, pursuant to section 45-2-203, it could not consider voluntary intoxication in determining the defendant's mental state at the time of the crime. The Supreme Court of Montana reversed the defendant's conviction, finding that the Montana statute violated due process because the State did not have to prove beyond a reasonable doubt every element of the crime where the jury could not consider evidence relevant to establishing *mens rea*.<sup>58</sup>

In a plurality opinion written by Justice Scalia, the U.S. Supreme Court reversed the decision of the state supreme court. The Court concluded that the defendant did not meet the heavy burden imposed under traditional due process that the rule allowing the defense to introduce evidence of intoxication offended, "some principle of justice so rooted in the

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<sup>55</sup> The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV.

<sup>56</sup> 518 U.S. 37 (1996).

<sup>57</sup> Mont. Code Ann. § 45-2-2-3.

<sup>58</sup> *Egelhoff*, 518 U.S. at 41.



tradition and conscience of our people as to be ranked as fundamental.”<sup>59</sup> The Court reasoned that this rule was too new, had not received sufficiently uniform and permanent allegiance, and displaced a lengthy common law tradition supported by legitimate state policy justifications rejecting inebriation as a criminal defense.<sup>60</sup> Justice Ginsburg concurred, reasoning that the statute could be upheld as being within the traditional broad discretion given to state legislatures to define the elements of criminal defenses.<sup>61</sup>

The plurality opinion also rejected the state supreme court’s reasoning that the statute was unconstitutional because it made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt. The Court reasoned that *any* evidentiary rule can have that effect, and that “reducing” the State’s burden in this manner is not unconstitutional unless the rule of evidence itself violates a fundamental principle of fairness. The Court stressed, “[w]e have rejected the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions.”<sup>62</sup>

### **STATES HAVE BROAD DISCRETION IN EXCLUDING CATEGORIES OF EVIDENCE FROM BEING CONSIDERED BY JURIES IN CRIMINAL CASES AND IN DEFINING THE ELEMENTS OF CRIMES/DEFENSES**

In *Montana v. Egelhoff*, the U.S. Supreme Court reaffirmed the broad discretion of states to determine the evidentiary rules in criminal trials and to define the elements of state crimes/defenses.

#### Limiting Evidence at Criminal Trials

Justice Scalia’s plurality opinion in *Montana v. Egelhoff* considered the Montana statute at issue as an evidentiary rule, and affirmed states’ discretion in determining evidentiary rules in criminal trials. The plurality opinion stressed that, “preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally ‘within the power of the State to regulate procedures under which its laws are carried out.’”<sup>63</sup>

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<sup>59</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

<sup>60</sup> *Id.* at 51.

<sup>61</sup> *Id.* at 57.

<sup>62</sup> *Id.* at 54.

<sup>63</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. at 201-202). See also *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (applying *Patterson* test); *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (“The Due

### Defining Elements of a Criminal Offense/Defense

In her concurrence in *Egelhoff*, Justice Ginsburg rejected the categorization of the Montana statute as an evidentiary prescription based on the fact that the law appears in a chapter entitled, “General Principles of Liability,” rather than in a chapter regarding evidentiary rules. As such, Justice Ginsburg stressed that the statute, “extract[s] the entire subject of voluntary intoxication from the *mens rea* inquiry,”<sup>64</sup> thereby rendering any such evidence irrelevant to proof of the requisite mental state. She further stressed that, “[c]omprehended as a measure redefining *mens rea*, [the statute] encounters no constitutional shoal. States enjoy wide latitude in defining the elements of criminal offenses . . . particularly when determining the extent to which moral culpability should be a prerequisite to conviction of a crime.”<sup>65</sup>

Justice Scalia’s plurality opinion expresses its “complete agreement” with the rationale of Justice Ginsburg’s concurrence and concludes that the Montana law can be supported either as an evidentiary rule or as a modification of a definition of an element of a crime.<sup>66</sup> The plurality opinion stresses that, “[i]n fact, it is for the states to make such adjustments: ‘The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.’”<sup>67</sup> The plurality’s support of Justice Ginsburg’s concurring opinion arguably makes it the majority opinion and the holding of the Court.<sup>68</sup> Moreover, it appears that even the dissenters in *Montana v. Egelhoff* would have upheld the statute if they had viewed the rule as redefining an element of a crime. The dissenting Justices, however, ultimately rejected this framing on the grounds that the Supreme Court of Montana framed the statute as an evidentiary rule in its decision below.<sup>69</sup>

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Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules”).

<sup>64</sup> *Egelhoff*, 518 U.S. at 58 (citations omitted).

<sup>65</sup> *Id.* (citations omitted).

<sup>66</sup> *Id.* at 50 n.4.

<sup>67</sup> *Id.* at 56 (quoting *Powell v. Texas*, 392 U.S. 514, 535-36 (1968)).

<sup>68</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when fragmented Court decides case by varying rationales, holding is “that position taken by those Members who concurred in the judgments on the narrowest grounds . . .”).

<sup>69</sup> See *Egelhoff*, 518 U.S. at 73 (“[A] State may so define the mental element of an offense that evidence of a defendant’s voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process”) (J. Souter dissenting) and *Id.* at 71 and 64 (due process concern “would not be at issue” for “[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish”) (J. O’Connor dissenting).

## **DEFENDANTS IN CRIMINAL CASES DO NOT HAVE A CONSTITUTIONAL RIGHT TO HAVE A JURY CONSIDER ALL RELEVANT EVIDENCE IN THEIR DEFENSE**

Consistent with its support of giving broad latitude to state legislatures in the area of criminal law, in *Montana v. Egelhoff*, the Supreme Court explicitly rejected the principle that criminal defendants have a due process right to present and have considered by a jury all relevant evidence to rebut the State's evidence on each element of the offense charged.<sup>70</sup> In reaching this conclusion, the Court reviewed a number of well-established evidentiary rules that prohibited the introduction of relevant evidence based on a defendant's failure to comply with procedural requirements and rules which prohibited evidence for substantive reasons.<sup>71</sup> In addition, the plurality opinion by Justice Scalia explicitly rejected an argument made by Justice O'Connor, that these evidentiary rules were distinguishable from a rule that prohibited consideration of, "a category of evidence tending to prove a particular fact" – "[s]o long as the category of excluded evidence is selected on a basis that has good and traditional policy support."<sup>72</sup>

## **THE GAY AND TRANS PANIC DEFENSES ARE NOT FUNDAMENTAL PRINCIPLES OF JUSTICE PROTECTED BY THE DUE PROCESS CLAUSE**

In order for a defendant to challenge an evidentiary rule as violating the Due Process Clause, he or she must meet the heavy burden imposed under traditional due process analysis that the proscription offend, "some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."<sup>73</sup> To determine whether the relevant principle is fundamental, the Court looks at: (1) "historical practice": how long-standing the rule is and how uniformly it has been adopted; and (2) any state policy justifications which support the elimination of the rule or defense.<sup>74</sup>

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<sup>70</sup> *Id.* at 42. The Court stressed, "The proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)).

<sup>71</sup> *Id.* (e.g. "Evidence 403 provides: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay rules, see *Fed. Rule Evid.* 802, similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable.'").

<sup>72</sup> *Id.* at 43 n. 1.

<sup>73</sup> *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

<sup>74</sup> *Id.* at 51.

### Historical Practice

The Court primarily looks to “historical practice” to help determine whether a particular rule represents a fundamental principle of justice.<sup>75</sup> To be deemed fundamental, the principle must be “deeply rooted” in our nation’s tradition and conscience at the time that the Fourteenth Amendment was adopted, although the Court does indicate that a defendant can “perhaps” demonstrate that a rule has become deeply rooted since then.<sup>76</sup> The Court considers when the rule was first adopted in the United States and whether the rule has commanded, “uniform and permanent allegiance” since its adoption.<sup>77</sup> The Court determines whether a rule has been uniformly followed by looking at the number of states and jurisdictions that have adopted it.<sup>78</sup>

In *Egelhoff*, the Court concluded that the common law tradition of considering voluntary intoxication when determining the requisite *mens rea* did not have sufficient longevity to make it fundamental. It noted that the emergence of this rule was traced to an 1819 English case, but the rule was “slow to take root” in the United States until the end of the 19th century. By the end of the 19th century, however, voluntary intoxication could be considered in most American jurisdictions when determining whether a defendant had the specific intent necessary to commit a crime.<sup>79</sup>

In *Egelhoff*, the Court stressed that the defendant had not shown the uniform and continuing acceptance necessary for a rule to be fundamental because one-fifth of the states had never adopted or were no longer following the rule that voluntary intoxication should be considered when determining *mens rea*.<sup>80</sup> It stressed, “[a]lthough the rule allowing a jury to consider evidence of a defendant’s voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental.”<sup>81</sup>

If a rule applied by courts in the 19th century is “of too recent vintage” to be deemed fundamental,<sup>82</sup> then it is extremely unlikely that a court would find that the gay and trans panic defenses are fundamental. The first judicial mention of the gay panic defense in the

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<sup>75</sup> *Id.* at 43.

<sup>76</sup> *Id.* at 48.

<sup>77</sup> *Id.* at 48.

<sup>78</sup> *Id.* at 48-49.

<sup>79</sup> *Id.* at 44.

<sup>80</sup> *Id.* at 48.

<sup>81</sup> *Id.* at 51.

<sup>82</sup> *Id.* at 51.

United States was in a case before the California Court of Appeal in 1961, *People v. Stoltz*.<sup>83</sup> In addition, if the Supreme Court held that a rule adopted by 80% of the states in the United States is not sufficient to be fundamental in *Egelhoff*, then it is unlikely that a court will hold that the gay and trans panic defenses have been so uniformly adopted. Only about half of the fifty states<sup>84</sup> have reported court opinions discussing gay or trans panic arguments. Moreover, no state has codified the gay and trans panic defenses in its penal code.

Thus, because the gay and trans panic defenses are recent common law innovations and do not have widespread uniform acceptance across the states, a court would not find them to be “fundamental principles of justice” protected by the Due Process Clause.

### **STATE POLICY JUSTIFICATIONS SUPPORT ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

Finally, the Court looks to any state policy justifications for eliminating the rule in question when determining whether it is fundamental. Such justification standing alone, “casts doubt upon the proposition that the rule is a ‘fundamental principle.’”<sup>85</sup> Regarding criminal trials, the introduction of relevant evidence can be limited by the State for a “valid” reason.<sup>86</sup>

In *Egelhoff*, the Court noted that excluding evidence of voluntary intoxication was supported by the following state policy justifications: (1) preventing a large number of violent crimes, (2) increasing the punishment for all unlawful acts committed in that state – thereby deterring irresponsible behavior while drunk, (3) serving as a specific deterrent by ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison, (4) implementing society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences, (5) interrupting the perpetuation of harmful cultural norms that validate drunken violence as a learned behavior, and (6) excluding misleading evidence because juries, “who possess the same learned belief . . . may be too quick to accept the claim that the defendant was biologically incapable of forming the requisite *mens rea*.”<sup>87</sup>

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<sup>83</sup> 16 Cal. Rptr. 285 (Cal. Ct. App. 1961). In *Stoltz*, the defendant was convicted of second-degree murder and grand theft. The defendant alleged that he killed the victim after the victim made unwanted sexual advances towards him, which frightened him. A psychiatrist and neurologist testified for the defense that the defendant killed the victim in a homosexual panic, a “panic reaction to a homosexual situation [that was] recognized in the field of psychiatry.” *Id.* at 287.

<sup>84</sup> See *supra* note 8.

<sup>85</sup> *Egelhoff*, 518 U.S. at 49.

<sup>86</sup> *Id.* at 53.

<sup>87</sup> *Id.* at 51.

Likewise, elimination of the gay panic and trans panic defenses serve multiple legitimate state policy justifications, some of which directly echo the policy considerations in *Egelhoff*. Elimination of gay and trans panic defenses are supported by the legitimate policy justifications of: (1) increasing punishment for acts made unlawful by the state, (2) specifically deterring further criminal actions by those who kill due to alleged gay or trans panic, (3) reinforcing society's moral conception of personal responsibility, (4) interrupting the perpetuation of harmful cultural norms that validate violence against LGBT people, (5) furthering the policies expressed in state hate crime laws and anti-discrimination legislation, (6) preventing defendants from exploiting any potential homophobic and transphobic biases among the members of a jury, and (7) precluding unnecessary and invasive testimony about a victim's sexuality, sex, and/or gender identity/expression in state criminal trials.

For these reasons, it is unlikely that any due process challenges to state legislation eliminating the gay and trans panic defenses would be successful.

## **PART III: MODEL LEGISLATION ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

### **AN ACT CONCERNING THE ELIMINATION OF THE GAY AND TRANS PANIC DEFENSES**

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new Article 123, which reads as follows:

#### **ARTICLE 123 ELIMINATING THE GAY AND TRANS PANIC DEFENSES**

##### **Section 101. Restrictions on the Defense of Provocation**

For purposes of determining sudden quarrel or heat of passion, the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

##### **Section 102. Restrictions on the Defense of Diminished Capacity**

A defendant does not suffer from reduced mental capacity based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

##### **Section 103. Restrictions on the Defense of Self-Defense**

A person is not justified in using force against another based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.

*Commemorating the 50<sup>th</sup> Anniversary of the Stonewall Riots: Reflecting on the Rise and Evolution of LGBTQ Activism and Rights in the Law.*

LGBTQ Rights in the Fields of Criminal Law and Law Enforcement

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The Stonewall Riots are commonly referred to as the genesis of the LGBTQ Pride movement in the United States. Lesser-known is that these riots were led by the transgender community – a community who today, face unheard of rates of violence, especially transgender women of color.<sup>1</sup> Transgender women of color, are murdered in the United States at rates that continue to increase. This unprecedented violence against the transgender community and the LGBTQ+ community at large will be explored as related to action and inaction of the criminal legal system. In an attempt to move beyond mainstream activism and research, queer criminology, which explores the experiences of the LGBTQ+ population as victims, offenders, and professionals in the criminal legal system in the U.S. and abroad<sup>2</sup> will be examined.

In couching this discussion within the theoretical and practical application of queer criminology, it will highlight the marginalization of LGBTQ+ folks and explore the impact that intersectionality has on the experiences of the LGBTQ+ community with special attention on law enforcement. For example, the persistent distrust that the LGBTQ+ community has of police<sup>3</sup> as well as the experiences of LGBTQ+ identified police officers and other agents within the criminal legal system. Further, as the current Administration continues to roll-back the rights and liberties of the LGBTQ+ community there must be a focus on how past and present policies continue to negatively impact LGBTQ+ people at the micro and macro levels.

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<sup>1</sup> Human Rights Campaign Foundation. (2018). Fatal anti-transgender violence in America in 2018.

<sup>2</sup> Buist, C.L. & Lenning, E. (2016). Queer criminology. New York: Routledge.

<sup>3</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality