

# Is Hope Ahead?

## Paths to Defeating a Rash of Rising Anti-Trans Legislation

Sam G. Brinker

It's rare that an author doesn't give some biographical information somewhere in their writing—sometimes it's lurking on the sleeve of an inside book cover, other times it can be found in a footnote at the bottom of a webpage. In other cases it may only be evident from reading between the lines of any number of pages that author penned.

However, because of where this article both middles and ends—on the topic of the existence of trans people and the attempted regulation of that existence—it seemed not just important to put the context of the author's existence before the reader first, but rather: paramount—if for no other reason than to have a place to start.

Having a place to start, as it turns out, is a privilege that many trans people are not so fortunate to know. This author, in recognition of his many privileges (including this one), however, did have a place to start. He started out, over 31 years ago, with hope for the future—a future that would allow him to be who he is.

My name is Sam Brinker and—to get the basics out of the way—I'm a constant-work-in-progress, I grew up in Dayton, Ohio, I'm an advocate and board member, I'm a pretty decent home cook, I'm a planner, I'm an attorney and, yes, I am a trans man.

The beginning of my transition began in a very similar way to the beginning of the rest of my journey before that—with hope. The hope was, like biographical information of an author, sometimes prominent and clear—like in the support of my family, friends, and the law firm where I have spent my entire legal career—and other times it was harder to discern—like the fact that, even if I didn't know any other trans people yet, I wasn't going to be the first to ever be trans or to transition.

My hope now, as I middle my way through life, is that it won't get harder for other—especially young—trans people to find their own hope...that the hope doesn't turn into hoops to jump through or hurdles to jump over...that the end will be marked with just as much, if not more, hope as the beginning.

So now that you know I am trans you also know that trans people are not new. Jennifer Finney Boylan, a transwoman, recently wrote an Op/Ed for the *New York Times* in which she pointed out this obvious fact,

Trans people have been a part of human history for as long as there has been history. But with the exception of a few brave souls until relatively recently, trans individuals were rarely in the public eye in the United States.

Jennifer F. Boylan, Opinion, *Keeping Trans Kids from Medicine Doesn't Make Them Disappear*, *N.Y. Times* (April 7, 2021).

Today, however, trans people are in the public eye in a big way. As primarily Republican-led legislatures focus in on trans legislation, increasingly and across the country legislation has been introduced that would: (i) prohibit or limit access to healthcare for transgender youth (by, for example, banning the use of puberty blockers); (ii) require identification documents to reflect a person's gender-assigned-at-birth (regardless of how that person identifies); and (iii) exclude transgender athletes from participating in sports amongst groups of athletes that are consistent with their gender iden-

ties. The areas of trans lives that are, thusly, under attack span from healthcare, to sports, and even simple forms of identification.

The chart below reflects the status of these kinds of legislation in the states in which it has been introduced as of the writing of this article.

Legislation	States Proposed	Legislation Still Pending	Died in Committee	Adopted	Statute
Prohibiting Healthcare for Transgender Youth	20 states AL, AR, AZ, FL, GA, IA, IN, KS, KY, LA, MS, MO, MT, NC, OK, SC, TN, TX, UT, WV	14 states AL, AZ, FL, GA, IA, KS, LA, MO, NC, OK, SC, TN, TX, WV	IN, KY, MS, MT, UT	1 state AR - HB 1570 – “The Arkansas Save Adolescents from Experimentation (SAFE) Act”	Makes it a criminal offense for a doctor to provide gender-affirming medical care for transyouth
Restrictions on ID Documents	MT, SD	MT - LC 2997 – Sent to senate 4/13/21	SD		
Excluding Transgender Youth from Athletics	31 states AL, AR, AZ, CT, FL, GA, HI, IA, KS, KY, LA, ME, MI, MN, MO, MS, MT, NH, NJ, ND, NM, OH, OK, PA, SC, SD, TN, TX, UT, WI, WV	24 states AL, AZ, CT, FL, GA, HI, IA, KS, LA, ME, MI, MN, MO, MT, NH, NJ, ND, OH, OK, PA, SC, TX, WI, WV	KY, SD (ve-toed), UT	3 states AR SB 450 – “Gender Integrity Reinforcement Legislation for Sports (GIRLS) Act” MS SB 2536 TN SB 0228	

Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, *CNN* (Apr. 15, 2021).

As you can see, legislation has specifically been introduced in the Kentucky General Assembly that would prohibit the provision of certain types of healthcare for transgender youth and would exclude transgender youth from participating in sports consistent with their gender identities. So far in Kentucky, however, all of this legislation has died in committee—not so, however, in other states where anti-trans legislation is apparently still under consideration.

The legislation which is still pending in the states of Texas and Alabama, for example, illustrate the sad, horrifying and hope-depleting features of anti-trans legislation. Texas Senate Bill 1646 would make it a crime for parents to allow their transgender children to access gender-affirming medical procedures and would even go so far as to authorize the removal of trans or gender-queer children from their homes if their parents affirm their gender identity. Alabama Senate Bill 10 goes to a different extreme—and would make it a felony for doctors to even offer gender-affirming medical care to trans children younger than the age of 19. This proposed legislation would also require teachers and other school employees to “out” trans children to their parents if their child shows any gender-nonconforming behavior or signs. Alanna Vagianos,

*Transgender Children Across the U.S. are Fighting for Their Lives*, *HuffPost* (Apr. 16, 2021).

When Governor Asa Hutchinson of Arkansas, a Republican, recently vetoed anti-trans legislation in that state it signaled some potential hope. He said, “The bill is overbroad, it's extreme and, very importantly, it does not grandfather in those

young people who are currently under hormone treatment, which means that those in Arkansas who are undergoing, under the doctor's care and the parents' care, hormonal treatment—that would be withdrawn in the middle of that.

That's a terrible consequence of this bill. This is the most extreme law in the country. Arkansas would be the first state to have adopted this bill. And I could not in good conscience sign it with the concerns that I have.”

Lisa Lerer, *Asa Hutchinson on Arkansas's Anti-Trans Law and the G.O.P Culture Wars*, *N.Y. Times* (Apr. 9, 2021).

It is important to note that, to be effective, certain hormonal treatments—specifically, puberty blockers—to which Governor Hutchinson referred, must be administered before the onset of puberty. Once puberty has begun, and the further along it progresses, the more difficult and ineffective some gender-affirming medical treatment can become. Thus, legislation which forbids puberty blockers will have a permanent and most likely profoundly negative impact on trans children. Still, against the beacon of hope, the Arkansas

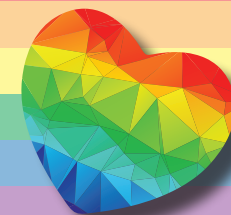
legislature overruled Governor Hutchinson's veto.

Just one state to the south, however, hope remains as Governor John Bel Edwards of Louisiana, a Democrat, vetoed legislation which would have had similar effects as the bill passed in Arkansas—the Louisiana legislation would also restrict trans athletes' participation in sports and the availability of certain medical care for trans youth. In vetoing the bill (which veto so far has yet to be overridden), Edwards expressed concern to reporters, “about emotionally fragile people” and said that he is “hopeful” that the legislature in his state will not advance the bills further. Will Sentell, *John Bel Edwards won't support bills that ban transgender athletes, restrict medical treatment*, *The Advocate* (Apr. 19, 2021).

Notwithstanding the move by the Arkansas legislature, recent polling suggests that the American people may agree with Governors Edwards and Hutchinson and are largely opposed to anti-trans legislation—again, hope. Joseph Guzman, *New Poll Finds Americans Oppose Transgender Laws by Wide Margin*, *The Hill* (Apr. 16, 2021).

In fact, 66% of adults polled oppose legislation that would prohibit transition-related medical care for minors while only 28% support it. Moreover, 67% of adults oppose legislation that would bar transgender student athletes from joining sports teams that correspond to their gender identities. In response,





the United States Congress is considering the 2021 Equality Act which would prohibit discrimination based upon sex, sexual orientation and sexual identity. This legislation passed the House of Representatives on February 25, 2021 and is currently being considered by the Senate Judiciary Committee. H.R. 5, 117th Cong. (2021).

Although the Equality Act may hold the key to many locks, it hasn't been passed. So the rash of anti-trans legislation begs the question, does the hope of defeating the regulation of so many aspects of trans existence lie in the Constitution? It might. In some cases related to anti-trans policies the equal protection clause had already been invoked.

In *Ray v. McCloud*, an Ohio United States District Court considered a challenge to whether a policy of the Ohio Department of Health, which forbade transgender people from changing the sex marker on their birth certificates, violated the equal protection clause of the United States Constitution. The court held that trans people are a quasi-subject classification of people and, thus, are entitled to heightened scrutiny. No. 2:18-cv-272, 2020 WL 8172750, at \*21 (S.D. Ohio Dec. 16, 2020).

The court so concluded based upon the application of the traditional factors associated with determining whether heightened scrutiny should be applied. Specifically, the court found that, "there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, and access to healthcare." *Id.* at \*21.

Additionally, the district court found that trans people: (i) are no less capable of contributing value to society than others; (ii) have a common immutable characteristic that defines them as a discrete group primarily in that their gender identity does not align with the gender they were assigned at birth; and (iii) constitute a minority lacking in political power given that they represent only approximately 0.6% of the adult population of the United States. *Id.* at \*21-22.

Several United States Circuits Courts of Appeal and District Courts have likewise held that discrimination against transgender people is sex discrimination subject to heightened scrutiny and violates the equal protection clause of the United States Constitution. A good example is *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Specifically the Court found that:

(i) "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* at 1316.

...

(ii) Thus, "discrimination against a transgender individual because of [his, her, or their] gender-nonconformity is sex discrimination." *Id.* at 1317.

...

(iii) discrimination against a transgender individual because of [his, her, or their] gender-nonconformity is sex discrimination . . . that is subject to heightened scrutiny under the Equal Protection Clause." *Id.* at 1319.

Similarly, the Sixth Circuit held in *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) that, "[u]nder settled law in this Circuit, gender nonconformity . . . is an individual's 'fail[ure] to act and/or identify with his or her gender. . . Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."

Perhaps these cases or others like them will find a path to the United States Supreme Court to decide if hope in defeating the regulation of trans peoples' existence lies in the Constitution. Perhaps the hope lies in the Equality Act. Or perhaps the hope is more personal than that. Maybe it comes down to the power of the personal narrative, like this author's or Brandon Boulware's.

Boulware, a business lawyer in Missouri, in testimony before the Missouri House of Representatives, testified about a pending anti-transgender sports bill and his beloved daughter. This testimony heartrendingly illustrates the urgency of defeating anti-trans legislation and their efforts.

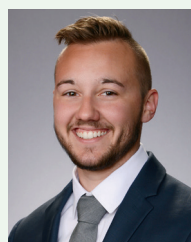
One thing I often hear when transgender issues are discussed is: "I don't get it." "I don't understand" . . . I didn't get it either for years. I would not let my daughter wear girl clothes. I did not let her play with girl toys. I forced by daughter to wear boy clothes and get short haircuts and play on boys' sports teams. . . . My child was miserable. I cannot overstate that she was absolutely miserable. Especially at school. No confidence, no friends, no laughter. I honestly say this, I had a child who did not smile. We did that for years. . . . The moment we allowed my daughter to be who she is, to grow her hair, to wear the clothes she wanted to wear, she was a different child. I mean it was immediate. It was a total transformation. . . . I need you to understand, that this language, if it becomes law, will have real effects on real people. It will mean she cannot play on the girl's volleyball team or dance squad or tennis team. I ask you please don't take that away from my daughter or the countless others like her who are out there. Let them have their childhoods. Let them be who they are.

Full transcript available at: <https://fox2now.com/news/missouri/missouri-dad-goes-viral-after-emotional-testimony-on-transgender-daughter-and-sports/>.

And this trans author would add to Boulware's plea—let them have hope. Let them have a place to start, which means finding the way—through the Equality Act, through the Constitution, or through stories of everyday people—to make this legislation end.

*This article was written with great assistance and contribution from John E. Selent and Jameson Gay, each also of Dinsmore & Shohl — thank you to both for your hard work and input.*

Sam Brinker currently resides in Columbus, Ohio and is also a self-proclaimed part-time New Orleanian, but he was born to be bearded in Dayton. Sam currently serves on the Board of Directors of Living With Change and of Rainbow Elder Care of Greater Dayton. Sam volunteers with a number of LGBTQ+ organizations such as the Point Foundation, his local cohort for the Human Rights, and Equitas Health. Sam has been an associate attorney at Dinsmore & Shohl since 2015 and currently works out of its Columbus, Ohio office. He focuses his practice on commercial real estate matters, primarily in the acquisition, disposition, development, and leasing spaces. Sam has been trans his whole life, but he began his transition in 2014 at the age of 24—completing his medical transition in 2017 (an aspect of transition which, it's worth noting, is not part of every trans person's journey for a myriad of potential reasons). ■



The Louisville Bar Association Diversity & Inclusion Committee Presents:



**June 22 | 6:30 PM**  
**Featuring Tristan Vaught**

**June 29 | 6:30 PM**  
**Featuring Sam Brinker**

**Watch your email and/or the LBA's social media for additional details about this month's Community Conversations!**

These will be virtual presentations streamed live beginning at 6:30pm on the LBA's Facebook page or you may register for a Zoom link online at [www.loubar.org](http://www.loubar.org) or call 502-583-5314 or email [lanspach@loubar.org](mailto:lanspach@loubar.org)