

# TRIBAL EQUITY TOOLKIT 2.0

## Tribal Resolutions and Codes to Support Two Spirit & LGBT Justice in Indian Country



A collaboration of  
the Native American Program of Legal Aid Services of Oregon,  
the Indigenous Ways of Knowing Program at Lewis & Clark Graduate School of  
Education and Counseling, the Western States Center, the Pride Foundation  
and Basic Rights Oregon



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SUPPORT TWO SPIRIT & LGBT JUSTICE  
IN INDIAN COUNTRY

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A COLLABORATION OF THE NATIVE AMERICAN PROGRAM OF LEGAL AID SERVICES OF OREGON,  
THE INDIGENOUS WAYS OF KNOWING PROGRAM AT LEWIS & CLARK COLLEGE, BASIC RIGHTS  
OREGON, AND THE WESTERN STATES CENTER

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## ACKNOWLEDGMENTS

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PAST: Since time immemorial, Indigenous Nations of what now is known as the United States have been Sovereigns; we have been responsible for the health and wellbeing of our citizenry, an endeavor that is intergenerational and connects us to the work of our ancestors. In the spirit of this kinship connection, we respectfully acknowledge the collective wisdom and traditions of our ancestors.

PRESENT: We express our gratitude to our partners, allies and collaborators, specifically:

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FUTURE: In the spirit of this stewardship, we respectfully acknowledge our generations rising; for it is in their interest that we carry forward this work, and it is to them that we entrust it.

-Se-ah-dom Edmo, Editor



## FORWARD

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Dear Relatives:

As Native people, we have all experienced, in our own individual and shared way, what it means to be treated as less than human. Our lands were taken, our people slaughtered, we had diseases and poisoning influences injected among us, and our children taken from our homes and placed in institutions of assimilation – in an attempt to conquer and control us, and to make us more like those who thought they had control of us. We have had to survive dehumanizing federal policies that treated us as misbehaving children, as if we were unable to live responsibly or make decisions for ourselves, as if we did not have the right to be treated as equals, as fully human.

Our Tribal societies have been damaged by this onslaught of policies, forced change, and the unspeakable losses and grief we have suffered. In spite of all of that, today we stand stronger than we have for several generations, able to exercise communal and individual decision making on our own behalf – more than our grandparents and their parents ever dared to hope. Today we are reclaiming and reincorporating those parts of ourselves that it was the goal of federal policies to alienate. Our sense of natural law, and the blessings of our creator's gifts, is restored in the present generations, and all of us - having *been* wronged - have a strong sense of what social justice is, and what it should look like.

Two Spirit is a term in the English Language that attempts to incorporate and honor the hundreds of ancient, respectful, Native Language terms that were used for thousands of years within our Tribal societies. Two Spirit is used to denote people who traditionally have special roles within our communities, our cultures, and our ceremonial life. Our people were strong and beautiful in our traditional understanding of life, and that we all have different gifts. Two Spirit indicates an ability to see the world from both male and female perspectives and to bridge the world of male and female. The concept of balance is important in our traditional views, and balance can be between individuals, or groups, or within a particular individual. "Two Spirit" expresses the concept of balance within an individual.

Since the time of contact with Europeans, our Two Spirit people and our societal beliefs surrounding Two Spirit roles and contributions to our communities have been marginalized and stigmatized, resulting in marginalized individuals and groups of people within our families and tribal communities. This has led to perceptions that unprovoked violence against these unsupported persons is permitted, other times it leads to our unsupported members hurting themselves, whether with one (perhaps final) act; or many, which slice away at the chances of a productive life. When one of our members is oppressed & wrongfully mistreated, we are all made smaller, whether it is through active support for the action, or through neglectful silence, we can all be guilty of contributing to the result.

Many Two Spirit individuals are well known members of our own and other Tribal communities who have been exemplary carriers of culture, strong political and ceremonial leaders, amazing artisans, perhaps model citizens... perhaps showed human imperfections at times, but who love or loved their people, are, or were, loved by their people. Known to be kind, fair and strong in their beliefs, generously willing to help, and fierce in the defense of their communities... and yet

there is the too often unspoken or whispered truth – sometimes out of shame, sometimes out of awkwardness of the speaker, but it all amounts to the same thing – an implied lowering of status as a good and honest human being - by being silent or quiet in acknowledging that this beloved person is Two Spirit.

Today, some of our traditionalists understand the native language term, know the traditional role(s) and yet struggle with the application of the traditional term to our Gay/Lesbian Tribal Youth. It is damaging to our families and our communities to not share that part of our culture with our youth – whether they are Two Spirit themselves or not. They need to understand the cultural meaning and principles behind the traditional terms and the roles Two Spirits played and still play in our communities. For our Two Spirit Youth, it is an essential lifeline – giving them a healthy sense of purpose and role to fill, to feel [a part] of their community instead of feeling [apart], alone and without purpose or value.

We need to decide if we want our families and communities to be healthy and whole, if we want to be fair and just in our treatment of all our members, whether we all have the ability to live up to the fullest potential that we were born with and are able to develop throughout our lives. This toolkit provides us with an opportunity to reflect on how we, as Tribal Leaders, and Tribal Communities, are either passively or actively perpetuating policies, ordinances, or other bodies of Tribal Law that are damaging to the fabric of our Nations – or whether we are already committed to equity and justice for all members. The work compiled here – with love and understanding, is just what it says it is, - a toolkit - it does not dictate, it does not ask anything of you except to read it and decide what you believe in, and what core principles you stand for. It gives our communities another set of tools for restoring ourselves.

Please be strong in your work for all your people, and help them live long, healthy, and productive lives. Do all you can to see that all of our Tribal people can walk this land without fear, exclusion, or mistreatment, and reach their fullest potential in life. It's a human right.

Respectfully,

Robert Kentta  
Siletz Tribal Member,  
Cultural Resources Director, and  
Tribal Council Member,  
Gitauk-uahi (Two Spirit)

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## CHAPTER 1: INTRODUCTION

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Within Tribal communities, family is important, and within most Native families, we know someone who is Two Spirit, lesbian, gay, bisexual, or transgender.<sup>1</sup> Too often, rejection of Two Spirit / LGBT community members by families, peers, and the community breaks families apart and tears at the social fabric of our community. However, by accepting our Two Spirit / LGBT family members, we strengthen *all* families in our community.

Native Two Spirit / LGBT individuals also face amongst the highest disparities across all social and health indicators. These disparities lead to cumulative outcomes that affect every area of life. For example:

- 19.1% of Native gay male couples live in poverty (compared to 2.7% of white gay men), and 13.7% of Native lesbian couples live in poverty (compared to 4.3% of white lesbian couples).<sup>2</sup>
- Nearly 41% of children being raised by Native same-sex male couples live in poverty.<sup>3</sup>
- Overall, one out of every five children of unmarried same-sex couples is poor, compared to one out of every ten children of married same-sex couples.
- Native American and Alaskan Native transgender and gender nonconforming people often live in extreme poverty, with 23% reporting a household income of less than \$10,000 / year—and they are also more likely to be HIV positive.<sup>4</sup>
- While Native Americans have the highest suicide rate of any population in the United States, 56% of Native transgender and gender nonconforming respondents in a national transgender survey had attempted suicide.<sup>5</sup>
- Over 50% of Native gay or lesbian students experience physical violence at school because of their sexual orientation,<sup>6</sup> and more than 1/3 reported missing class at least once a month for fear of being bullied or harassed.<sup>7</sup>
- In 2010, HIV infection was the ninth leading cause of death among American Indian / Alaska Native (AI/AN) men and women aged 25 to 34. By the end of 2010, an estimated 1,945 AI/AN with an AIDS diagnosis had died in the United States.<sup>8</sup> An estimated 212 AI/AN were diagnosed with HIV in 2011.



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## ABOUT THIS TOOLKIT

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Tribal laws reflect our values as a people, define our collective barriers, prioritize our issues, allocate public resources, and identify eligibility for conferred status and public benefits and services. This Toolkit identifies areas in which existing tribal laws may discriminate against Two Spirit / LGBT individuals. The Toolkit also gives tribal legislators a brief overview of legal and policy issues that impact the equal treatment of Two Spirit / LGBT community members, and offers sample resolution and code language for tribal lawmakers to consider adopting to maximize equality within their communities.

The purpose of this Toolkit is to protect the most vulnerable among us by facilitating the development of tribal laws that ensure that Two Spirit / LGBT people have the same access and opportunities as other community members. By making simple adjustments to laws and policies—such as creating an inclusive definition of family, or extending criminal laws to address hate crimes based on sexual orientation and gender identity—tribal governments can exercise their sovereignty to better protect all of their tribal citizens. Changing tribal laws to bar discrimination in employment, housing, family matters, access to benefits, and other matters will help bridge the economic disparities that Two Spirit / LGBT community members experience. Removing these barriers will also allow Two Spirit / LGBT people to bring their full authentic selves to the community, and will strengthen and enrich the tapestry of our cultures.

In most cases, the sample code language offered in this Toolkit is based on provisions from numerous sources. The laws referenced during the development of this Toolkit are provided in the footnotes. If a tribe does not currently have laws governing a topic addressed in this Toolkit, the referenced laws may provide additional sample language. Commentary to the sample language is also provided to present some of the policy issues that should be considered when developing or revising tribal laws to promote Two Spirit / LGBT justice.

This Toolkit is not intended to provide “model” language. Instead, the sample language in this Toolkit is offered as a starting point for promoting discussion. Each tribal government has different needs, resources, values, and policies—all of which should be reflected in the tribe’s laws. The sample language provided in this Toolkit should therefore be tailored to meet the specific requirements of the given tribal sovereign. Moreover, because there are advantages and disadvantages to adopting each sample provision, the sample language should not be adopted without a thorough analysis by the appropriate tribal bodies and their legal counsel. This Toolkit is also not a replacement for Two Spirit / LGBT equality training. Special training for tribal decision-makers on issues impacting Two Spirit / LGBT community members is also essential.

It is important to note that transforming culture is complex work. Values, practices, and rules, having been passed on for generations and by multitudes of people and institutions, are embedded in our daily lives and become resistant to change. As such, policies that perpetuate

oppression—including homophobia and transphobia—seem invisible and unremarkable because of how deeply they have become institutionalized. Passage of new, inclusive laws can create transformative shifts within our communities.

Policy change is never effective without community engagement. It is critical that policy shifts accompany community conversations and engagement that will provide the catalyst for the cultural change needed to grow, unlearn, evolve, and become the prevailing custom of our communities. We recognize that implementation of the suggestions offered in this Toolkit will look differently within each tribal community. For some tribes, where leadership buy-in already exists and there is collective agreement on the way forward, adoption of resolutions and codes to support Two Spirit / LGBT equality may seem easy and perfunctory. For other communities, where there has never been this conversation, engaging the community and de-colonizing gender constructs may be more challenging—but are an essential part of the work that needs to be done.

The Tribal Equality Toolkit is designed to provide a powerful lantern that will help light the way. It now awaits your courage, political will, and perseverance to make the change that will create a community that embraces equality and freedom.

This second edition of the Tribal Equity Toolkit remains a work in progress. We welcome your questions, comments, suggestions, and experiences.

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## CHAPTER 2: FAMILY

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### PART A: MARRIAGE

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Marriage is one of the few times that people reveal their hearts, make a public promise of love and responsibility for each other, and ask their friends and family to hold them accountable. Committed couples, whether they are gay or straight, hope to marry for similar reasons—to make a lifetime promise to share the joys and sorrows that life brings.

Marriage also strengthens families. It provides the tools and the security to build a life together, and to protect the people we love. And marriage is a key building block for strong communities. Marriage can provide mutual support for the financial, physical, and emotional health of the couple and their family.

Marriage is also a legal status that confers a powerful set of rights, benefits, and protections onto spouses.<sup>9</sup> For example, a 2004 study by the Congressional Budget Office found 1,138 statutory provisions “in which marital status is a factor in determining or receiving ‘benefits, rights, and privileges.’”<sup>10</sup> These laws include, among others:

- Tax laws (according to the GAO report, as of 1997 there were 179 tax provisions that took marital status into account);<sup>11</sup>
- Child adoption, custody, and visitation laws and procedures;
- Public assistance and benefit laws, including Social Security;
- Probate laws and procedures;
- Laws relating to insurance, health, and pension benefits;
- Laws relating to title, tenure, inheritance, survivorship, or other acquisition, ownership, or transfer of real and personal property;<sup>12</sup>
- Laws relating to medical care and treatment, hospital visitation and notification, and rights guaranteed to hospital patients and nursing home residents;
- Laws governing advance directives for health care and the designation of health care representatives;

- Laws providing family leave benefits;
- Laws governing victim's compensation benefits; and
- Laws governing worker' compensation benefits.

Many of these laws provide benefits, rights, and privileges to married couples—but are not available to same-sex couples who are denied the right to marry. For example, unmarried same-sex couples are not eligible for spousal and survivor Social Security benefits. As a result, unmarried couples receive approximately \$5,588 less Social Security income per year than married couples.<sup>13</sup>

Unmarried couples also often lack access to the public programs and private benefits available to a person upon the death of a spouse, including: the right to sue for wrongful death of a spouse; Social Security payments based on the spouse's earnings; veteran's benefits available to spouses of veterans; worker's compensation benefits for a spouse killed on the job; and a variety of other pension, disability, and retirement benefits.<sup>14</sup> There are numerous other financial challenges for same-sex couples, for which legal marriage provides at least a partial shield.<sup>15</sup>

In addition, a legally recognized marriage can benefit a couple's children by enhancing the ability of the spouses to provide care and security for their family. For example, marriage can provide:

- Legal recognition of a child's relationship to both parents;
- Legal recognition of joint parenting rights;
- Visitation rights and/or custody of children after divorce;
- Joint or co-parent adoption (in most states) and second-parent adoption (in most states);
- The ability to enroll non-biological / not-jointly-adopted children in public and medical assistance programs;

### ***Defense of Marriage Act***

In 1996, Congress passed the Defense of Marriage Act (DOMA). DOMA barred federal recognition of same-sex marriages, even if states or tribes recognized such marriages. As a result of DOMA, same-sex married couples were denied approximately 1138 rights, benefits, and protections provided to married opposite-sex couples under federal law.

On June 26, 2013, in *U.S. v. Windsor*, the U.S. Supreme Court struck down part of DOMA as unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. The Court's decision does not guarantee a right to same-sex marriage, but does allow couples who marry in jurisdictions that recognize same-sex marriage to receive the same federal benefits as other married couples.

In the Court's majority opinion, Justice Anthony Kennedy wrote of DOMA: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."

- Recognition as an authority in educational settings to register a child for school, be involved in the child's education plan, and provide consent on waivers and sign permission forms; and
- The ability to travel with a child if travel requires proof of being a legal parent.<sup>16</sup>

We envision a world in which all people will have the freedom to marry the person that they love, in order to strengthen their partnership and to start their journey as a family together.

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### MANY RIGHTS, BENEFITS, AND PROTECTIONS ARE AVAILABLE ONLY THROUGH MARRIAGE

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Many of the rights, benefits, and protections offered by marriage are available only through *marriage*. Some opponents of marriage equality nevertheless suggest that marriage equality is unnecessary because same-sex couples can obtain rights and protections similar to those afforded by marriage through other legal arrangements.<sup>17</sup> It is true that legal agreements can provide same-sex partners with some rights, “such as power of attorney, naming the survivor in one’s will (at the risk of paying an inheritance tax, which does not apply to heterosexual married couples), and protecting assets in a trust.”<sup>18</sup> However, such legal arrangements do not make unmarried partners eligible for more than a thousand federal benefits and protections. In addition, such legal agreements “represent only the ‘best guesses’ of the legal community and may not withstand challenges from extended family members of the couple.”<sup>19</sup> Moreover, even where legal agreements can provide important rights to same-sex couples, the cost of hiring an attorney places these protections out of reach for many families.<sup>20</sup>

While domestic partnerships and civil unions are available in some jurisdictions—and can offer same-sex couples some or all of the benefits of marriage—domestic partnerships and civil unions do not equal *marriage*. For example, there is no guarantee that state-recognized domestic partnerships and civil unions will be recognized by other states.<sup>21</sup> This means that many states and tribes will treat couples in a domestic partnership or civil union as if they have no legal relationship to one another.<sup>22</sup> In addition, in several states, domestic partners have been excluded from their loved ones’ hospital rooms during health care emergencies because they aren’t considered “real” family members.<sup>23</sup> That just doesn’t happen when you’re married.

Finally, although “domestic partnerships and civil unions appear to be a milestone for gay, lesbian, and bisexual rights,”<sup>24</sup> they nevertheless “discriminately reserve the title of ‘married’ to opposite-sex couples.”<sup>25</sup> In so doing, “these marriage alternatives ‘perpetuate’ the societal



distinction between those worthy of marriage and those who are not. In other words, ‘separate but equal . . . [is] inherently unequal.’”<sup>26</sup> As recognized by a recent Connecticut Supreme Court decision in favor of marriage equality, a domestic partnership or civil union “entitles same-sex couples to all of the same rights as married couples except one, that is, the freedom to marry, a right that has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”<sup>27</sup> The simple truth is that the word marriage has power. It says “we are family” in a way that no other word does.

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### BENEFITS OF MARRIAGE EQUALITY

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Recognition of same-sex marriages is an essential step toward promoting equality and ending discrimination. And, as discussed above, marriage can offer significant legal, financial, and emotional benefits to families—many of which cannot be obtained by other means.<sup>28</sup>

Marriage equality also appears to financially benefit governments. For example, in 2004, Massachusetts became the first U.S. state to issue marriage licenses to same-sex couples.<sup>29</sup> A 2008 UCLA study concluded that allowing non-resident same-sex couples to marry would boost the Massachusetts economy by \$111 million over a three-year period. The study further estimated that state and local tax revenues would increase by \$5.1 million over three years (including \$4 million in sales and occupancy tax revenues and \$1.1 million in marriage license fees).<sup>30</sup> A 2004 Congressional Budget Office (CBO) likewise determined that federal recognition of same-sex marriage would have a positive effect on the federal budget. According to the CBO, “allowing same-gender couples to marry would increase federal income tax revenues by \$400 million annually to the end of 2010.”<sup>31</sup>

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### TRIBAL AND STATE RECOGNITION OF MARRIAGE EQUALITY

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Same-sex marriage is currently recognized by six Indian tribes: Coquille Indian Tribe, Suquamish Tribe, Santa Ysabel Tribe, Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Potawatomi Indians, and the Confederated Tribes of the Colville Reservation.<sup>32</sup> In addition, the Cheyenne and Arapaho Tribes’ marriage law does not include gender restrictions, and the Tribes have issued at least three marriage licenses to same-sex couples to date.<sup>33</sup>

Fourteen states (Massachusetts, Iowa, New York, Connecticut, Vermont, New Hampshire, California, Delaware, Maine, Maryland, Minnesota, Rhode Island, Vermont, New Jersey, and Washington),<sup>34</sup> the District of Columbia,<sup>35</sup> and fourteen other countries also currently recognize same-sex marriage.<sup>36</sup>

Some impacts of tribally-recognized same-sex marriages may differ depending on the laws of the state in which the tribe is located.<sup>37</sup> For example, in Oregon, the Oregon Family Fairness Act provides registered same-sex domestic partners with all of the statutorily-created spousal rights that are granted to married spouses.<sup>38</sup> Thus, same-sex couples who marry pursuant to the laws of an Oregon tribe may also apply for domestic partnership status under Oregon law. Such couples would be eligible for tribal spousal benefits, as well as spousal rights granted under Oregon law.<sup>39</sup> In contrast, same-sex couples married by tribes located in states that have not enacted marriage equality or domestic partnership / civil union laws would be eligible only for spouse benefits provided by the tribe, and would not be eligible for any state spousal benefits.<sup>40</sup>

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**TRIBAL RESOLUTION IN SUPPORT OF TWO SPIRIT EQUALITY  
AND THE FREEDOM TO MARRY**

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The Tribal Resolution in Support of Two Spirit Equality and the Freedom to Marry provided below was developed in July of 2012 as a tool for tribes in Washington State to support *Why Marriage Matters Washington*, a public education and awareness building campaign which put resources into explicitly reaching out to tribes. This resolution could serve as a model for tribes wishing to support other marriage equality efforts.

**TRIBAL RESOLUTION IN SUPPORT OF TWO SPIRIT EQUALITY  
AND THE FREEDOM TO MARRY**

(Preamble should include Tribe Specific 'WHEREAS' clauses discussing the business, purpose, values and history of the Tribe)

WHEREAS, prior to contact with settlers, many Tribal Nations across the country and continent had long and respected histories of respect and inclusion of those in their communities, who might now be described as Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit.

WHEREAS, all citizens of our Nation are born free and equal in dignity and rights; and

WHEREAS, many Lesbian, Gay, Bisexual, Transgender, Third & Fourth Gender or Two Spirit ancestors and Citizens of our Tribe/ Nation have been targets of Homophobia & Transphobia, carrying with it extremely harmful and even lethal effects; and

WHEREAS, Our Nation/ Tribe is unwaveringly committed to all causes that strengthen the health of our Tribal Citizens, Families, Communities and Nation;

WHEREAS, our Tribal Government is committed to promoting the principle of non-discrimination and to supporting and strengthening individuals, families, communities and our Nation; and

WHEREAS, the principle of non-discrimination is embodied in the Charter of the United Nations, in Articles 2, 7, and 10 of the Universal Declaration of Human Rights, in Articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights, and Article 2 of the International Covenant on Economic Social and Cultural Rights; and

WHEREAS, our Nation/ Tribe has taken steps to prohibit discrimination on grounds of sexual orientation in our laws and to address such discriminations; and<sup>41</sup>

WHEREAS, the principles of Sovereignty and Self-Determination dictate that our Tribal Nation has full and authority over issues that impact the health, welfare, preservation of culture and future for our Tribal Citizens; and

WHEREAS, in August of 2011, the Suquamish Tribe became the first jurisdiction in the state of Washington to recognize marriage for all couples, regardless of gender, by a unanimous vote of their Tribal Council; and

WHEREAS, in November 2012, Washington voters will have an opportunity to approve Referendum 74 extending marriage to all couples, regardless of gender; and

WHEREAS, our Nation/ Tribe believes that marriage and the protection of families is a human right that should be honored and respected regardless of who you love; and

WHEREAS, the social messages sent by Tribal laws and policies directly impact the mental, physical, spiritual and social health of our Tribal Citizens; and

WHEREAS, the laws and policies of the State of Washington have direct impact on our Tribal Citizens living within the borders of Washington State, outside our reservation; and now,

THEREFORE BE IT RESOLVED, that the (NAME OF NATION/ TRIBE HERE) hereby declares its support of the Freedom to Marry in the State of Washington exercising our Sovereignty in the interest of furthering the cause of human rights and the principle of non-discrimination for all our citizens wherever they reside.

The aforementioned resolution is now the official policy of the (NAME OF NATION/ TRIBE) signed this (DATE) of (MONTH), 20(YEAR).

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## SAMPLE MARRIAGE EQUALITY ORDINANCE

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The sample Marriage Equality Ordinance provided below has been compiled from the laws of the many of the tribes, states, and countries that recognize same sex marriage, with the majority of the sample language based on the laws of the Coquille Indian Tribe, New York, and the District of Columbia. This sample ordinance allows tribes with existing marriage laws to amend those laws to promote marriage equality. For tribes that have not yet adopted marriage laws, the marriage laws of Coquille Indian Tribe, Little Traverse Bay Band of Odawa Indians, Pokagon Band of Potawatomi Indians, and Vermont, among others, offer examples of more comprehensive language covering the issuance of marriage licenses and certificates, void and voidable marriages, solemnization of marriages, etc.<sup>42</sup>

### Marriage Equality Ordinance

**Section 1. Title.** This ordinance shall be known as the “Marriage Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] finds that marriage is a fundamental human right, and an institution that strengthens family relationships and preserves the integrity, cohesiveness, and continuity of the [insert name] Tribe (Tribe). The formation and recognition of marriage is thus essential to the Tribe’s political integrity, economic security, and health and welfare.

B. The [Tribal Council / Business Committee] further finds that the right to equality without discrimination requires that all couples, regardless of gender, have equal access to marriage and to the protections, responsibilities, and benefits that result from marriage.

C. To reflect our values of respect and equality, it is the policy of the Tribe that the marriages of all couples, regardless of gender, be treated equally in all respects under Tribal law.

**Section 3. Purpose.** The purpose of this ordinance is to recognize legal equality in the Tribe’s marriage laws. This ordinance formally recognizes valid marriages without regard to gender.

**Section 4. Construction.**

A. All provisions of Tribal law that use gender-specific terms in reference to the parties to a marriage, or that in any other way may be inconsistent with this ordinance, shall be construed in a gender-neutral manner and as otherwise necessary to carry out the intent of this ordinance.

B. The omission from this ordinance of changes to other provisions of law shall not be construed as intent to preserve any legal distinction between couples based on gender, with respect to marriage.

**Section 5.** The Tribe’s [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding three new sections, to read as follows:

**[citation]. Parties to a Marriage.**

1. Marriage is the legally recognized union of two persons. A marriage that is otherwise valid shall be valid regardless of the gender of the parties involved.
2. No Tribal government treatment or legal status, effect, right, benefit, privilege, protection, or responsibility related to marriage, whether deriving from a statute, resolution, administrative or court rule, regulation, policy, common law, or any other source of law, shall differ based on the gender of the parties who are entering the marriage.

**[citation]. Equal Access to Marriage License.** No application for a marriage license shall be denied on grounds related to the gender of the parties involved.

**Commentary:** *Some states that recognize marriage equality do not require religious officials or organizations to solemnize or otherwise participate in marriages that do not comply with their religious beliefs. If a tribe wishes to include this type of exemption, language could read:*

**Section X.** The Tribe’s [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding one new section, to read as follows:

**[citation]. Affirmation of Religious Freedom in Marriage.** Each religious organization, association, or society (“religious group”) has exclusive control over its own religious doctrine, teachings, and beliefs regarding who may marry within that particular faith. Nothing in this ordinance is intended to impact the freedom of members of religious groups to hold and declare their religious beliefs.

1. No official of a religious group shall be required to solemnize any marriage that is in violation of his or her religious beliefs.
2. No religious group shall be required to participate in the solemnization or celebration of a marriage that is in violation of the group’s religious beliefs.
3. No refusal by a religious group to provide services, accommodations, facilities, or goods in accordance with this Section shall create any civil claim or cause of action or result in any Tribal action to penalize or withhold benefits from such group, unless the group makes such services, accommodations, facilities, or goods available to members of the general public for purchase, rental, or use.

**[citation]. Recognition of Marriages, Domestic Partnerships, and Civil Unions from Other Jurisdictions.** All marriages, domestic partnerships, and civil unions performed under the laws of another jurisdiction, which are valid under the laws of the jurisdiction when and where performed, shall be recognized as valid by the Tribe, provided that such marriage, domestic partnership, or civil union is not otherwise expressly



prohibited by Tribal law.

**Commentary:** *This provision was included to explicitly recognize valid marriages, domestic partnerships, and civil unions created in other jurisdictions. However, if a tribe wishes to limit its recognition of other jurisdictions' marriages, domestic partnerships, and civil unions, additional language could read:*

- “For the exclusive purpose of providing Tribal and Tribally-administered benefits,…”

*and/or*

- “The Tribe shall recognize marriages, domestic partnerships, and civil unions formed under the laws of another jurisdiction if: 1) At least one party to the marriage, domestic partnership, or civil union is a Tribal member at the time that recognition is requested; and 2) The party requesting recognition of the marriage, domestic partnership, or civil union provides adequate proof of the marriage, domestic partnership, or civil union.”

**Section 6. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 7. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 8. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 9. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

**Additional Commentary:** *For tribes that have existing domestic partnership / civil union laws and now wish to provide for marriage equality, the following additional legislation could be adopted to merge domestic partnerships / civil unions into marriages:*

**Section X. Merger of [Domestic Partnership / Civil Union] into Marriage.** Two persons who are parties to a valid [domestic partnership / civil union] entered into pursuant to [cite to Tribe’s domestic partnership / civil union law], which has not been dissolved, terminated, or annulled by the parties or merged into a marriage by operation of law under Section [cite section] of this ordinance as of [insert date], shall be deemed to be married on said date, and such [domestic partnership; civil union] shall be merged into a marriage by operation of law on said date.

*Or:*

**Section X. Merger of [Domestic Partnership / Civil Union] into Marriage.** Two consenting persons who are parties to a valid [domestic partnership / civil union] entered into pursuant to [cite to Tribe’s domestic partnership / civil union law], which has not been dissolved, terminated, or annulled by the parties, and who are eligible to marry pursuant to [cite Tribal law(s) re: valid marriages], may apply for and receive a marriage license and have such marriage solemnized pursuant to Tribal law.

- A. The parties may apply to the [name of official recording marriages] to have their [domestic partnership / civil union] legally designated and recorded as a marriage, without any additional requirements of solemnization or payment of marriage licensing fees.
- B. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded with [name of recording agency].
- C. The [domestic partnership / civil union] shall be dissolved by operation of law by any marriage of the same parties to each other, as of the date of the marriage stated in the certificate.

*And:*

**Section X. No New [Domestic Partnerships / Civil Unions].** No new [domestic partnerships; civil unions] shall be established under Tribal law on or after the effective date of this ordinance.

***Additional Commentary:*** *The following legislation could be adopted by tribes wishing to promote HIV testing and education:*

**Section X. HIV Test and Educational Information.** Each person seeking to marry shall, prior to the issuance of a marriage license, take an HIV test at their own expense and shall obtain from the Tribe, at the Tribe’s expense, educational materials regarding prenatal care and the transmission and prevention of HIV and of venereal disease; provided, however, that such persons are not required to disclose the results of any HIV test to the Tribe.

*With the following addition to the code provision(s) governing marriage licenses:*

A completed application for a marriage license shall be accompanied by:

- A. Written certification by a health provider or laboratory that each person seeking to marry has taken an HIV test;
- B. Written certification by a health provider that he or she has provided each person seeking to marry with educational materials regarding prenatal care and the transmission and prevention of HIV and of venereal disease.

## PART B: DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

### APPROACHES TO DOMESTIC PARTNERSHIPS AND CIVIL UNIONS

Tribes and states recognizing domestic partnerships and civil unions have taken various legislative approaches. For example, the Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Fond du Lac Band of Lake Superior Chippewa, and the states of Oregon, Washington, California, and Nevada allow same-sex couples to enter into domestic partnerships that provide the same rights, benefits, and responsibilities as marriage under tribal / state law (but still not under federal law, as explained further in the *Marriage, Not Civil Unions, In N.J.* text box, below).<sup>43</sup> Similarly, Delaware<sup>44</sup> and Rhode Island<sup>45</sup> have adopted civil union laws that offer same-sex couples state-level spousal rights and responsibilities.

Other jurisdictions make domestic partners, partners joined in civil unions, or partners joined as reciprocal beneficiaries<sup>46</sup> eligible for only specified rights and benefits. For example, Maine's domestic partnership law makes registered domestic partners eligible to inherit without a will, make funeral and burial arrangements, be named a guardian or conservator if a partner becomes incapacitated, be named a representative to administer a deceased partner's estate, make organ and tissue donations, and be protected under the state's domestic violence laws.<sup>47</sup>

Likewise, Illinois' civil union law allows same-sex and opposite-sex partners to enter into civil unions, which provide some of the same benefits available to married couples, including the right to hospital visitation, control the disposition of a deceased partner's remains, and make medical decisions.<sup>48</sup>

#### **Use of Terms**

Although the terms civil marriage, civil union, and domestic partnership are often used interchangeably, there can be significant distinctions between the terms. According to Pawelski et al.:

Civil marriage “is a legal status established through a license issued by a state [or tribal] government. Such status grants legal rights to, and imposes legal obligations on, the 2 married partners.”

A domestic partnership “is a relationship between 2 individuals, often but not necessarily of the same gender, who live together and mutually support one another as spouses but who are not legally joined in a civil marriage or a civil union. Some same-gender couples enter into domestic partnership agreements to create legally enforceable contracts involving property, finances, inheritance, and/or health care.”

A civil union “is a legal mechanism, sanctioned by civil authority, intended to grant same-gender couples legal status somewhat similar to civil marriage.”

**Marriage, Not Civil Unions, In N.J.**

Even following the Supreme Court ruling that overturned part of the DOMA, couples who are not legally married—including domestic partners—remain ineligible for most federal benefits programs.

In September 2013, the New Jersey Superior Court legalized same-sex marriage and found that same-sex couples would be denied federal benefits if the state continued to permit only civil unions. Judge Mary Jacobson expressed concern that "civil union partners who are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the Family and Medical Leave Act applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy." The Judge stated: "Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey constitution."

*-Judge legalizes same-sex marriage in New Jersey (September 27, 2013), [http://www.nj.com/politics/index.ssf/2013/09/nj\\_superior\\_court\\_gay\\_marriage\\_ruling.html](http://www.nj.com/politics/index.ssf/2013/09/nj_superior_court_gay_marriage_ruling.html).*

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**SAMPLE DOMESTIC PARTNERSHIP ORDINANCE**

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For tribes that are not ready to adopt a marriage equality law but nevertheless wish to provide same-sex partners with the rights, benefits, and responsibilities afforded to married couples under tribal law, a sample Domestic Partnership Ordinance is provided below. The majority of the sample language is based on the laws of the Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Oregon, California, New Jersey, and Delaware.

**Domestic Partnership Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Domestic Partnership Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.** The [Tribal Council / Business Committee] finds that:

- A. The ability to enter into a committed, long-term relationship with another person that is recognized not only by friends and family, but also by the laws of the [insert name] Tribe (Tribe), is a significant and fundamental right.
- B. Without the ability to obtain legal status for their relationships, same-sex couples face numerous obstacles and hardships in attempting to secure legal protections and other rights and benefits for themselves and their children.
- C. The Tribe has a strong interest in promoting stable and lasting families, including the families of LGBT couples and their children. Legislation that provides for the formation and

recognition of domestic partnerships promotes stable and durable relationships and eliminates legal obstacles for LGBT couples. Such legislation reaffirms the Tribe's obligation to ensure equality for all of its members, and is essential to the political integrity, economic security, and health and welfare of the Tribe.

**Section 3. Purpose.** The purpose of this ordinance is to establish a domestic partnership system that will provide legal recognition to LGBT relationships under the laws of the Tribe, thereby ensuring more equal treatment of LGBT couples and their families under Tribal law.

**Section 4. Interpretation.** This ordinance shall be construed liberally in favor of finding that a domestic partnership is a valid civil contract entitled to be treated under Tribal law as a marriage would be treated.

A. A domestic partner shall be included in any definition or use of the terms "dependent," "family," "husband and wife," "immediate family," "next of kin," "spouse," "stepparent," and other terms, whether or not gender-specific, that denote a spousal relationship or a person in a spousal relationship, as those terms are used throughout Tribal law, including the Tribal Code, administrative rules and regulations, court rules, governmental policies, common law, or any other provisions or sources of the laws of the Tribe.

B. The term "domestic partnership" shall be construed liberally to include unions, regardless of title, in which two (2) adults are committed to one another in the same manner as married persons are traditionally committed, or in a relationship that is legally recognized as a contract of lawful marriage in another tribal, local, state, or foreign jurisdiction.

C. Many of the Tribe's laws are intertwined with federal law and state laws. The [Tribal Council / Business Committee] recognizes that the Tribe does not have the jurisdiction to control federal or states laws. To the extent that provisions of Tribal law adopt, refer to, or rely upon provisions of federal or state law in a way that otherwise would cause domestic partners to be treated differently than spouses, domestic partners shall be treated by Tribal law as if such federal or state law recognized a domestic partnership in the same manner as Tribal law.

**Commentary:** *An alternate provision, which could provide more protection to the Tribe but less protection to domestic partners, could read:*

"If any federal or state law or grant or regulation that is binding upon the Tribe prohibits the extension of privileges, immunities, rights, benefits, or responsibilities to domestic partners, or has negative consequences to the Tribe for the extension of such privileges, immunities, rights, benefits, or responsibilities to domestic partners, then the privilege, immunity, right, benefit, or responsibility shall not be extended to domestic partners."

**Section 5. Definitions.** As used in this ordinance:

A. "Domestic partnership" means a legal relationship, entered into in person between two eligible persons regardless of their genders, which has been registered and certified pursuant to this ordinance. A "domestic partnership" shall also include a domestic partnership or civil union that has been recognized by the Tribe pursuant to this ordinance.



B. “Domestic partner” means a person joined in a valid domestic partnership that has not been terminated.

**Section 6. Eligibility to Enter into Domestic Partnership; Prohibited and Void Domestic Partnerships.**

A. Two persons shall be eligible to enter into a domestic partnership if at least one of the persons is a member of the [insert name] Tribe and both persons:

1. Are at least 18 years of age and capable of consenting to the domestic partnership;
2. Are not married to, in a domestic partnership, or in a legal relationship substantially similar to a domestic partnership, with a different person;
3. Have entered into a committed interdependent relationship; and
4. Are not related by blood in a way that would prevent them from being married to each other under the laws of the Tribe.

**Commentary:** *Some statutes include additional criteria for the relationship, such as:*

1. Have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.
2. Are domiciled together under a long-term arrangement that shows a commitment to remain indefinitely responsible for each other’s welfare.
3. Consider themselves to be members of the other’s immediate family.
4. Agree to be jointly responsible for each other’s basic living expenses.
5. Share a common residence. Two persons may share a common residence even if any of the following apply:
  - a. Only one of the persons has legal ownership of the residence;
  - b. One or both of the persons have one or more additional residences not shared with the other person; or
  - c. One of the persons leaves the common residence with the intent to return.

B. Domestic partnerships are subject to the same limitations and rights under Tribal law as void and voidable marriages.

**Commentary:** *A more detailed provision could read:*

1. A domestic partnership is prohibited and void when:
  - a. Either party to the domestic partnership has a partner, wife, or husband living at the time of the domestic partnership; or
  - b. The parties to the domestic partnership are first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law. However, when the parties are first cousins by adoption only, the domestic partnership is not prohibited or void.

*NOTE: Some tribes may want to include an exclusion for step-siblings, as well.*
2. When either party to a domestic partnership is incapable of making the civil contract or consenting to the contract for want of legal age or sufficient understanding, or when the consent of either party is obtained by force or fraud, the domestic partnership is void from the time it is so declared by a judgment of a court having jurisdiction of the domestic partnership.

**Section 7. Formation of Domestic Partnerships.** A domestic partnership shall be established under Tribal law when a Certificate of Registered Domestic Partnership is issued by the [Tribal Court / name of other entity issuing certificate].

A. To request a Certificate of Registered Domestic Partnership, both persons wishing to enter into a domestic partnership must jointly file a signed Declaration of Domestic Partnership with the [Tribal Court Clerk / title of other staff issuing certificate], in person, and pay the required filing fee.

**Commentary:** *This declaration process is based on a similar process used in Oregon and California. Other jurisdictions, such as the Confederated Tribes of the Umatilla Indian Reservation, Nevada, Delaware, and Hawaii, use a more detailed process for establishing domestic partnerships, which requires the issuance of a license and the solemnization of the domestic partnership (similar to the process for entering into a marriage).*

B. On the Declaration of Domestic Partnership, each person wishing to enter into the partnership shall:

1. Provide his or her full legal name, tribal affiliation if any, date of birth, age, place of birth, and residence.
2. Declare that he or she is at least 18 years of age and otherwise capable of entering into a domestic partnership.
3. State whether he or she has previously been married, a partner in a domestic partnership, or in a legal relationship substantially similar to a domestic partnership, and if so, provide a certified copy of the divorce decree or death certificate of the former spouse or partner or other proof that the previous

- marriage, domestic partnership, or other legal relationship has been terminated.
4. Declare his or her desire to enter into the domestic partnership with the other.
  5. Expressly consent to the jurisdiction of the Tribe:
    - a. To authorize the domestic partnership;
    - b. For the purpose of any action for dissolution or annulment of the domestic partnership, or for legal separation of the partners in the domestic partnership; and
    - c. For any other proceeding related to the partners' rights and obligations or governing or concerning family relationships under the laws of the Tribe, even if one or both partners cease to reside or to maintain a domicile within the Tribe's jurisdiction.
  6. Indicate the person's name after entering into the domestic partnership.

**Commentary:** *Some jurisdictions include additional requirements related to domestic partnership name changes. Additional language could read:*

**Section x. Surname upon entering into domestic partnership; legal effect.**

- A. Upon entering into a domestic partnership, either party to the domestic partnership may:
  1. Retain his or her surname as it existed prior to the domestic partnership;
  2. Change his or her surname or middle name to the surname of the other party; or
  3. Change his or her surname to a hyphenated combination or other combination of the surnames of both parties.
- B. If a party requests a surname change under this Section, that party may also change his or her middle name to his or her surname prior to the domestic partnership.
- C. The name of each party, as indicated on the Declaration of Domestic Partnership, shall become the sole legal name of each party after entering into the domestic partnership.
- D. A request for a name change other than as described in this Section requires approval of the [Tribal Court or other entity], in accordance with [insert citation to Tribe's name change law].

7. Sign the form with a declaration that: "To the best my knowledge and belief, all representations made on this Declaration of Domestic Partnership are true, correct, and contain no material omissions of fact." The signatures of both partners must be affixed to one Declaration of Domestic Partnership form.
- C. Each person wishing to enter into the partnership shall attach satisfactory documentary

proof of identification [, shared residence,] and Tribal membership to the Declaration of Domestic Partnership.

D. Each person wishing to enter into the partnership shall swear or affirm to the declaration before the [Tribal Court Clerk / title of other staff issuing certificate].

E. Upon receipt of a Declaration of Domestic Partnership, in person, from both persons who wish to enter into the partnership, the [Tribal Court Clerk / title of other staff issuing the certificate] shall:

1. Confirm the identities [, residence,] and ages of each person, through examination of his or her photo identification or other reasonable proof satisfactory to the [Clerk / title of staff person].
2. Collect the filing fee for registering a Declaration of Domestic Partnership, which shall be established by the [Tribal Council / Business Committee].
3. Review the Declaration of Domestic Partnership to ensure that all requirements of this Section are met.

F. If the [Tribal Court Clerk / title of other staff issuing certificate] is not satisfied with the documentary proof presented or questions whether the Declaration of Domestic Partnership meets all requirements of this Section, the Clerk shall submit the declaration and accompanying proof to a judge of the Tribal Court for an opinion as to its sufficiency.

G. If the Declaration of Domestic Partnership meets all requirements of this Section, the [Tribal Court Clerk / title of other staff issuing certificate] shall:

1. Register the Declaration of Domestic Partnership in a domestic partnership registry; and
2. Issue a Certificate of Registered Domestic Partnership to the partners in person or at the mailing address provided by the partners. The registration certificate shall state that the partners have entered into a domestic partnership pursuant to this ordinance.
  - a. If one or both of the partners have chosen to change their name in accordance with the requirements of this ordinance, the registration certificate shall set forth the new name(s) of the partner(s).
  - b. The Certificate of Domestic Partnership shall be presumptive evidence of the domestic partnership in all courts.

H. This ordinance does not require the performance of any solemnization ceremony to enter into a domestic partnership. It is left to the partners entering into a domestic partnership to determine whether to seek a ceremony or other blessing over the domestic partnership.

I. The [Tribal Court Clerk / title of other staff issuing certificate] shall maintain a public record of all Declarations of Domestic Partnership and Certificates of Domestic Partnership issued.

J. Filing an intentionally and materially false Declaration of Domestic Partnership is punishable as a misdemeanor.

**Section 8. Consent to Jurisdiction.** Each person signing a Declaration of Domestic Partnership consents to the jurisdiction of the Tribal Courts:

A. For the purpose of an action to obtain a judgment of dissolution or annulment of the domestic partnership;

B. For legal separation of the partners in the domestic partnership; and

C. For any other proceeding related to the partners' rights and obligations, even if one or both partners cease to reside or to maintain a domicile within the jurisdiction of the Tribe.

**Commentary:** *If the tribe lacks a Tribal Court, describe how the tribe will address dissolution, separation, etc.*

**Section 9. Rights, Benefits, and Responsibilities of Domestic Partners.**

A. Any privilege, immunity, right, or benefit granted by Tribal statute, administrative or court rule, policy, common law, or any other law to any person, and any responsibility imposed by Tribal statute, administrative or court rule, policy, common law, or any other law on any person, because the person is or was married, or because the person is or was an in-law in a specified way to another person, is granted on equivalent terms, substantive and procedural, to any person because the person is or was in a domestic partnership, or because the person is or was, based on a domestic partnership, related in a specified way to another person.

1. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.
2. Any such privilege, immunity, right, benefit, or responsibility granted or imposed to or on a former or surviving spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a former or surviving partner with respect to the child of either of the partners.
3. The rights and obligations of domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

B. Domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses. No Tribal agency may discriminate against any person or couple on the grounds that the person is a domestic partner rather than a spouse or a party to a domestic partnership rather than a marriage, except as may otherwise be provided by Tribal law.

**Commentary:** *Some jurisdictions have chosen to limit the benefits available to the domestic partners of employees, including through provisions such as:*

- “The provisions of this ordinance do not require a non-Tribal public or private employer within the Tribe’s jurisdiction to provide health care benefits to or for the domestic partner of an employee or officer; provided, however, that nothing in this ordinance shall prohibit any public or private employer from voluntarily providing health care benefits to or for the domestic partner of an employee or officer upon such terms and conditions as the affected parties may deem appropriate.”
- “This ordinance does not require, on the basis of a domestic partnership, the extension of:
  1. Any retirement, deferred compensation, or other employee benefit plan, if the plan administrator reasonably concludes that the extension of benefits would conflict with a condition for tax qualification of the plan or a condition for other favorable tax treatment of the plan under the Internal Revenue Code or regulations adopted under the Internal Revenue Code; or
  2. Any benefit under any employee benefit plan that is subject to federal regulation under the Employee Retirement Income Security Act of 1974.”

#### **Section 10. Termination of Domestic Partnerships.**

A. A domestic partnership entered into or otherwise recognized under this ordinance may be dissolved in the same form and manner as marriages entered into or recognized under [insert citation to Tribal dissolution provision(s)].

**Commentary:** *Some jurisdictions, including Fond du Lac Band of Lake Superior Chippewa and the State of Wisconsin, allow domestic partnerships to be terminated through a simplified procedure that involves the filing of a notice with the clerk who issued the Certificate of Registered Domestic Partnership. This type of provision could read:*

#### **Section X. Termination of Domestic Partnership.**

A. Either person in a domestic partnership may initiate termination of the domestic partnership relationship, by written notification to the Clerk of Court. The Clerk shall promptly notify the other partner at the address of record by certified mail.

B. A domestic partnership registration terminates when the earlier of the following occurs: (1) One of the partners dies; or (2) Forty-five (45) days after one partner sends the other a written notice of termination that he or she has terminated the partnership by filing a notice of termination with the Clerk of Court; or (3) Forty-five (45) days after the Clerk notified the non-filing partner of the filing of any notice of termination.

C. If any of the criteria under Section 6 ceases to exist, the parties shall be ineligible for any

benefits based upon the domestic partnership unless otherwise provided by law or the employer.

*Other jurisdictions, such as Nevada, dissolve domestic partnerships in the same manner as a marriage, but also offer a simplified termination process for some domestic partnerships (such as: domestic partnerships that have been registered for 5 years or less, involve no minor children of the relationship, and involve no community or joint property; or domestic partnerships in which the parties have executed an agreement setting forth the division of property / liabilities), if the parties waive any rights to support (or have executed an agreement re: support) and waive the right to more comprehensive proceedings.*

*In addition, depending on their divorce laws, tribes may wish to add additional language, such as:*

*“... ; provided, however, that the Tribal Court shall have, in addition to any other basis for jurisdiction, jurisdiction over all proceedings for termination of domestic partnerships that are entered into pursuant to this ordinance, notwithstanding that the domicile or residency of the petitioner and the respondent are not within the jurisdiction of the Tribe, if the jurisdiction of domicile or residency of the petitioner and/or the respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction.”*

B. A person who has filed a Declaration of Domestic Partnership may not file a new Declaration of Domestic Partnership or enter a marriage with someone other than the person's partner unless a judgment terminating the recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended due to the death of one of the partners.

**Section 11. Recognition of Domestic Partnerships from Other Jurisdictions.** A registered domestic partnership, or other legal relationship substantially similar to a domestic partnership that extends benefits and responsibilities without the status of marriage, which has been legally entered into in another jurisdiction shall be recognized by the Tribe as a domestic partnership if the relationship meets the eligibility requirements of this ordinance and satisfactory proof of the relationship is provided.

**Section 12. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 13. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 14. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 15. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]



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**PART C: CHILDREN**

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*“Public policy designed to promote the family as the basic building block of society has at its core the protection of children’s health and well-being. Children’s well-being relies in large part on a complex blend of their own legal rights and the rights derived, under law, from their parents.”<sup>49</sup>*

Family law in the United States is generally based on the concept of a nuclear family, consisting of a mother, father, and one or more (biological or adopted) minor children.<sup>50</sup> This view of “family” has been incorporated into the domestic relations laws adopted by many tribes. However, today, “the traditional nuclear family is closer to the exception than the rule” in the U.S.<sup>51</sup>

The nuclear family concept fails to reflect the family structures prevalent within many Native communities. Although family practices within Native cultures are diverse, some common core values and beliefs about family exist across tribal groups, including group sharing of family responsibilities, dependence on extended family supports, and a focus on collective well-being. Many Native families, both traditionally and today, thus include mothers, fathers, grandparents, aunts, uncles, and cousins, as well as more extended or adopted relatives—all of whom may assume childcare responsibilities.

In addition, Two Spirit / LGBT people have historically played an important role in tribal communities, including as caretakers and medicine givers. In many cases, families would ask Two Spirit / LGBT leaders for help and guidance in rearing their children. It is important that we continue to honor the wisdom that Two Spirit / LGBT people have to offer all children in our tribal communities, and it is imperative that we support the bonds that Two Spirit / LGBT parents have with their own children.

Many jurisdictions are changing their laws to set forth a broader definition of “family,” and to provide parental rights to those that have taken on the responsibilities of parenthood. These changes reflect a more inclusive view of family, which is grounded in relationships and care—and can help provide stability and protection for the millions of children in the United States who are estimated to have at least one gay or lesbian parent.<sup>52</sup>

At a minimum, laws governing family relationships, including adoption and parentage laws, “should allow joint adoption by LGBT parents, recognize LGBT parents using assisted reproduction, and provide avenues such as second-parent adoption and de facto parenting to allow children to gain full legal ties to their parents.”<sup>53</sup> In addition, effective laws are needed to prevent discrimination based on Two Spirit / LGBT status during custody and visitation disputes, and to protect children involved in the child welfare system. These topics are discussed further in the sections that follow. Sample ordinance language is provided in each respective section.

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## ADOPTION

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Adoption is the process through which “an adult seeking to be a parent can establish a legal parental relationship to a child.”<sup>54</sup> When a person or family adopts a child, the adopting family is legally substituted for the child’s birth family, and the child becomes the legal child of the adopting parent(s).<sup>55</sup> Through adoption, a child’s adoptive parents take on the obligation to support and care for the child, and the child is protected in terms of inheritance or social security if a parent dies.<sup>56</sup>

Adoption of children by Two Spirit / LGBT persons may take the form of a joint adoption by a same-sex couple, adoption by a single Two Spirit / LGBT person, or adoption by one partner of the other partner’s biological child (known as step-parent adoption).<sup>57</sup> “Adoption provides LGBT individuals and couples with a critical way to ensure or create family relationships, whether (1) by bringing unrelated children into the family or (2) by securing the legal relationship of a second parent to the child of his or her partner or spouse.”<sup>58</sup> Supporting the legal recognition of Two Spirit /LGBT parents increases the strength of individual families as well as our communities. Keeping Two Spirit / LGBT families together also increases the likelihood that important cultural heritage can be passed through the family line.

### ***Best Interests of the Child***

Adoption is about securing the best interests of children—not about the rights of parents. “No one has the ‘right’ to be an adoptive parent. Although each state’s adoption process differs, the common thread among all is that an adoption proceeding asks whether a child’s adoption by a particular person or family is in that child’s best interests. These decisions are made by judges, often with the input of parents and child welfare professionals, and almost always after a home study by either a state agency or agency approved of by the state.”

- *Adoption Questions & Answers*

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## LGBT ADOPTION IN PUBLIC DEBATE

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Although adoption by same-sex couples is currently legal in approximately 20 U.S. states, plus the District of Columbia and Guam,<sup>59</sup> several states, including Utah, Nebraska, North Dakota, and Mississippi, restrict adoption options for same-sex couples.<sup>60</sup> More jurisdictions could follow with attempts to limit or prohibit gay parenting.<sup>61</sup> The key notions behind the anti-gay adoption movement are that children must have a mother and a father, and that gay people do not make good parents.<sup>62</sup> In reality, however, research consistently shows that “children of LGBT parents fare just as well as other children.”<sup>63</sup>

The medical, psychological, and social welfare communities agree “that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents,”<sup>64</sup> and every mainstream health and child welfare organization has issued policies supporting the legal recognition of the family bond for lesbian and gay parents.<sup>65</sup> For example:

- According to the American Academy of Pediatrics, “[m]ore than 25 years of research have documented that there is no relationship between parents’ sexual orientation and any measure of a child’s emotional, psychosocial, and behavioral adjustment. These data have demonstrated no risk to children as a result of growing up in a family with 1 or more gay parents. Conscientious and nurturing adults, whether they are men or women, heterosexual or homosexual, can be excellent parents.”<sup>66</sup>
- The American Bar Association (ABA) has adopted policies urging state legislatures and courts to provide legal protections for children in families headed by same-sex partners.<sup>67</sup> The ABA has also resolved to “support the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.”<sup>68</sup>
- The North American Council on Adoptable Children (NACAC) has adopted the following practice and policy recommendation: “All prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration. NACAC opposes rules and legislation that restrict the consideration of current or prospective foster and adoptive parents based on their sexual orientation.”<sup>69</sup>
- According to the Child Welfare League of America: “Any attempt to preclude or prevent gay, lesbian, and bisexual individuals or couples from parenting, based solely on their sexual orientation, is not in the best interest of children.”<sup>70</sup>
- The American Medical Association “will support legislative and other efforts to allow the adoption of a child by the same-sex partner, or opposite-sex non-married partner, who functions as a second parent or co-parent to that child.”<sup>71</sup>

Finally, it is important to note that roughly 115,000 children in the United States await permanent homes.<sup>72</sup> These children need nurturing foster or adoptive parents—regardless of their sexual orientation. Therefore, it “is in the best interests of children that all qualified adults who have the room in their hearts and homes to adopt a child are permitted to do so, and are treated fairly in the process.”<sup>73</sup> Two Spirit / LGBT foster and adoptive parents “can provide a loving, stable home, responsive to the needs of LGBT youth in care, and are a largely untapped resource—an estimated 2 million LGB individuals are interested in adopting.”<sup>74</sup>

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### ADOPTION OF UNRELATED CHILDREN

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A person or couple who are unrelated to a child “may adopt a child (a) who is in the legal custody of a state agency, or (b) who has been placed with a private child welfare agency, or (c) who is secured as the result of a private agreement.”<sup>75</sup> Non-relative children may be adopted through a single parent adoption or through a joint adoption.

*Single parent adoption* occurs when one person adopts a child, as an individual (even if other adults live in the home of the adoptive parent). After the adoption, the child has one legal parent.<sup>76</sup> It is not uncommon for LGBT people, *as individuals*, to adopt children through single parent adoption.<sup>77</sup> *Joint adoption* (sometimes known as co-parent adoption) occurs when a couple, together, jointly adopts a child who was not previously the legal child of either party. After the adoption, the child has two legal parents.

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### TRIBAL TWO SPIRIT / LGBT ADOPTION LAWS

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Most tribal laws do not directly address the issue of LGBT adoption. Instead, under the laws of most tribes, any person may petition to adopt a child. For example, the Tulalip Tribes and the Confederated Tribes of Grand Ronde allow “[a]ny adult, twenty-one (21) years of age or older [to] file a Petition for Adoption.”<sup>78</sup> Similarly, the Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians permits the following persons to adopt: “(a) Any adult may file a petition to adopt. (b) In the case of married persons, not legally separated, both spouses shall be petitioners except that, if one of the spouses is the natural parent of the minor to be adopted, the natural parent shall not be a party to the petition. (c) A married person legally separated may adopt without the consent of his spouse.”<sup>79</sup> These provisions would permit an LGBT individual to petition to adopt a child, and appear to permit a LGBT couple who is married under the laws of a jurisdiction that recognizes same-sex marriage to petition to jointly adopt a child.

We found only one tribal law that specifically addresses adoption by Two Spirit / LGBT couples. The Confederated Tribes of Siletz Indians permits domestic partners to petition to adopt a child. According to their Juvenile Code: “Married persons or *domestic partners who maintain a home together shall both petition for adoption*. If one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.”<sup>80</sup>

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### STATE LGBT ADOPTION LAWS

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The “laws and policies in many States do not directly address the issue of adoption by LGBT individuals and/or couples.”<sup>81</sup> In many states, adoption decisions are made on a case-by-case basis and it is ultimately the decision of the judge whether to grant the adoption petition.

Most states permit any person to petition to adopt.<sup>82</sup> Other state laws specify that an unmarried adult may petition to adopt, or a married couple may jointly petition to adopt.<sup>83</sup> Courts in several of these states have ruled that joint adoption petitions by unmarried individuals may also

be considered.<sup>84</sup> LGBT couples can jointly petition to adopt in 21 states, plus D.C.<sup>85</sup> “Joint adoptions by gay and lesbian couples now happen in every New England state, but in some circumstances are tied to whether the couple has a legal status like a civil union or marriage.”<sup>86</sup>

Several states explicitly prohibit discrimination against LGBT individuals in adoption processes.<sup>87</sup> For example, New York regulations state: “Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children.”<sup>88</sup> Similarly, according to the Oregon DHS website, to adopt: “You can be single, married, or *domestic partners* ... Oregon welcomes and supports all families equally. Families of every race, culture, and ethnicity are needed to help children grow with a strong sense of racial and cultural identity. Applicants are considered regardless of race, ethnicity, gender, religion, or *sexual orientation*.”<sup>89</sup>

Other state regulations require adoption petitions to be considered without regard to sexual orientation (among other protected statuses). For example, New Jersey’s Division of Youth and Family Services must “allow any adult to apply to be an adoptive parent regardless of age, race, color, national origin, disability, gender, religion, sexual orientation, or marital status.”<sup>90</sup> Similarly, according to the Nevada Administrative Code: “The application process for the adoption of a child through an agency which provides child welfare services must be available to all persons regardless of age, color, race, gender, sexual orientation, ethnicity, disability, income, religion or national origin. These factors must be considered only to the extent that they affect or may affect the ability of a person to meet the needs of a specific child.”<sup>91</sup>

Nevertheless, Mississippi and Utah prohibit same-sex couples from adopting, and state courts in Michigan have ruled that unmarried individuals may not jointly petition to adopt.<sup>92</sup>

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## SECOND PARENT ADOPTION

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Countless LGBT couples co-parent children. However, due to a combination of marriage laws and adoption statutes, LGBT couples with children must often designate only one parent as the legal parent of the child.<sup>93</sup> “This is because the status as a legal parent is automatically conveyed to the parent who has a biological connection to a child,”<sup>94</sup> such as in the case of children born through artificial insemination,<sup>95</sup> in vitro fertilization, surrogacy,<sup>96</sup> or past relationships. This issue may also arise when one partner has a child that he or she previously adopted as a single individual,<sup>97</sup> or when an LGBT couple is adopting a child together in a jurisdiction that prohibits LGBT couples from adopting children in both partners’ names.

*Second parent adoption* provides an opportunity for a child's non-biological parent to create a legal relationship with his or her partner's biological child.<sup>98</sup> Second parent adoption is "a legal process in which a child who is already the child of one member of an unmarried couple (gay, lesbian or heterosexual) is adopted either through a joint petition by both members of the couple (even though one of them is already the child's parent) or through an individual petition by the member of the couple who is not yet the child's parent, depending on the procedures of the [jurisdiction]. After the adoption, the child has two legal parents."<sup>99</sup>

Second parent adoption provides a child with two legal parents—both of whom are legally obligated to provide support and care for the child.<sup>100</sup> In addition, because second parent adoption typically grants the adoptive parent the same legal rights as a biological parent, second parent adoption allows family ties to be maintained upon the separation of a couple or the death of one parent. Without an adoption, a LGBT parent "who is not legally recognized as a parent can lose custody or visitation rights, even in instances when that parent is the most suitable caregiver and has acted as a parent for the child's entire life."<sup>101</sup>

As one court has recognized, when biological or adoptive parents separate from or predecease non-legal parents:

[T]he children often remain in legal limbo for years while their future is disputed in the courts.... In some cases, children have been denied the affection of a functional parent who has been with them since birth, even when it is apparent that this outcome is contrary to the children's best interests. Adoption serves to establish legal rights and responsibilities so that, in the event that problems may arise in the future, issues of custody and visitation may be promptly resolved by reference to the best interests of the child.<sup>102</sup>

Second parent adoption also provides assurances that a child's relationship to both parents will be recognized across jurisdictions, which is especially important due to the disparate treatment of same-sex couples. For example, although "a child born to a married same-sex couple or to a couple in a civil union is presumed to be the child of both members of the couple and both should be listed as parents on the birth certificate,<sup>103</sup> another state might not respect that presumption if the couple moves or if they separate and one party relocates."<sup>104</sup> A court judgment of adoption creates a legal parent-child relationship that should be respected by other tribes and states, even if those tribes or states have not extended rights to same-sex couples.

Second parent adoption is thus a win-win situation—and has received broad support.<sup>105</sup> For example, the American Academy of Pediatrics has strongly endorsed second parent adoption.<sup>106</sup> In addition, the American Bar Association has adopted a position statement supporting state laws and court decisions permitting second-parent adoptions by unmarried persons who are functioning as a child's parents, when such adoptions are in the best interests of the child.<sup>107</sup>

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### APPROACHES TO SECOND PARENT ADOPTION

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Some tribes have adopted laws referencing second parent adoption. For example, as noted above, the Confederated Tribes of Siletz Indians' Juvenile Code states: "Married persons or *domestic partners who maintain a home together shall both petition for adoption*. If one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition."<sup>108</sup> In addition, according to the Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, where two people are married, "both spouses shall be petitioners [for adoption] except that, if one of the spouses is the natural parent of the minor to be adopted, the natural parent shall not be a party to the petition."<sup>109</sup>

Approximately four states (Vermont, Colorado, Connecticut, and California) have adopted legislation specifically providing for second parent adoptions.<sup>110</sup> Courts in approximately 22 states and D.C. have granted second-parent adoptions or ruled that the state adoption law permits second-parent adoption.<sup>111</sup> In three states (Nebraska, Ohio, and Wisconsin), appellate courts have ruled that the state adoption law does not permit second-parent adoption.<sup>112</sup>

Where permitted, second parent adoptions generally occur through a joint petition by both members of the couple (even though one of them is already the child's parent), or through an individual petition by the member of the couple who is not yet the child's parent.<sup>113</sup> For example, Vermont law states: "If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."<sup>114</sup> In Colorado, a child may be adopted by a specified second adult parent upon the written and verified consent of the child's sole legal parent if the child has no other legal parent.<sup>115</sup>

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### STEPPARENT ADOPTION

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Adopting a stepchild, a type of second parent adoption, is the most common form of adoption. *Stepparent adoption* is the formal, legal adoption of a child by a stepparent who is married to a legal parent or in a marriage-equivalent relationship (such as a domestic partnership or civil union). In a stepparent adoption, a stepparent adopts a spouse or partner's child and becomes the child's legal parent.<sup>116</sup>

Generally, a stepparent adoption is easier to complete than other types of adoption because many jurisdictions waive or streamline some steps in the process (such as the waiting period, a home study, and/or an adoption hearing). However, in a stepparent adoption, the child's other birth



or legal parent must to consent to the adoption. If the other birth parent refuses to consent, the adoption will not be permitted unless that parent's rights are terminated (such as for abandonment, unfitness, failure to support the child, etc.) or the parent is deceased.<sup>117</sup>

LGBT stepparents may adopt in jurisdictions that permit same-sex marriage, and in some states that provide for civil unions and domestic partnerships.<sup>118</sup> For example, same-sex spouses can use stepparent adoption procedures in Massachusetts, where same-sex couples can marry, in California, registered domestic partners and married couples may adopt their partners' children using stepparent procedures, and pursuant to the Juvenile Code of the Confederated Tribes of Siletz Indians.<sup>119</sup>

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### THIRD PARENT ADOPTION

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In most jurisdictions, one legal parent must give up his or her parental rights before the other parent's new spouse or partner can pursue second parent adoption.<sup>120</sup> However, in a *third-parent adoption*, neither biological parent relinquishes parental rights; instead, the spouse or partner of one of the parents also becomes an additional legal parent through adoption. For example, a child may be raised by two fathers, but have a strong parental bond and relationship with her biological mother, or may be raised by a mother and a non-biological father but have a parental bond and relationship with her biological father.

A four parent situation could also arise, such as when a child has a biological mother, who has a partner, as well as a biological father and his partner. Countless other scenarios could also arise, for both LGBT and non-LGBT families. Third parent adoption allows for these relationships to be recognized when to do so is in the best interests of the child.

Courts in California, Oregon, Washington, Alaska, and Massachusetts have permitted third-parent adoptions.<sup>121</sup> In addition, a proposed new California law, SB 1476, would allow judges to recognize more than two legal parents for a given child, based on the evidence and the best interests of the child. The proposed law is intended to “give judges more flexibility when dealing with parent-child relationships and the custody, visitation and child support issues that often arise when there are more than two parental figures involved.”<sup>122</sup> The bill could also make it easier to “facilitate children moving into a functional, loving home instead of being forced into the foster care system if both biological parents are unfit.”<sup>123</sup>



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**SAMPLE CHILD ADOPTION EQUALITY ORDINANCE**

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The sample Child Adoption Equality Ordinance set forth below has been compiled from the tribal and state laws referenced above, and is based primarily on Colorado law.<sup>124</sup> This draft ordinance allows tribes that currently provide for adoptions to explicitly permit adoption by Two Spirit / LGBT individuals and couples, including second parent adoptions.

**Child Adoption Equality Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Child Adoption Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] finds that:

1. The best interests of children are promoted by having persons in each child’s life who manifest a deep concern for the child and his or her growth and development, and when a child is part of a loving, supportive, and stable family, regardless of the sexual orientation or gender identity of the family’s members.
2. Sexual orientation and gender identity should not affect a person’s legal ability to be a parent.
3. Promoting equality in the adoption process is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. The [Tribal Council / Business Committee] declares that it is the policy of the Tribe that the sexual orientation or gender identity of a prospective adoptive parent shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

**Section 3. Purpose.** The purpose of this ordinance is to promote equal treatment of potential adoptive parents under Tribal law by prohibiting discrimination on the basis of sexual orientation and gender identity in the adoption process and by authorizing second parent adoptions.

**Section 4. Addition of Definitions.** The Tribe’s [domestic relations; family law] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** “Domestic partner” means a person joined in a valid domestic partnership that has not been terminated.

**[citation].** “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the

jurisdiction in which it was created.

**Commentary:** Tribes may wish to broaden the definition of “domestic partnership.” As drafted, “domestic partnership” includes only legally recognized relationships. Therefore, this provision does not allow for joint adoptions by same-sex partners who are barred by tribal or state law from entering a legally recognized relationship. Accordingly, couples in tribal or state jurisdictions that do not recognize legal relationships between same-sex couples who seek to adopt together would be required to determine a primary adoptive parent, then incur additional expense of two separate adoption petitions (original and then second parent).

**[citation].** “Gender Identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

**Commentary:** Tribes could choose to limit the definition of “domestic partner” to same-sex partners, as drafted above, or could expand the definition to include committed opposite-sex partners who have not married.

**Section 5. Petition for Adoption.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision describing who may petition to adopt a child], is amended to read as follows:

**[citation]. Who May Petition for Adoption.**

1. Single Parent Adoption. Any adult may file a petition to adopt a child.
2. Joint Adoption.
  - a. Where married persons or domestic partners maintain a home together, both spouses or domestic partners shall be petitioners in a petition to adopt a child; provided, however, that if one of the spouses or domestic partners is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.

**Commentary:** Tribes could choose to use “may” in place of “shall” in the provision above to permit only one spouse or domestic partner to adopt the child.

- b. A person who is legally separated from his or her spouse or domestic partner may petition to adopt a child without the consent of his or her spouse or partner.

**Section 6. Non-Discrimination in the Adoption Process.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision within the adoption chapter], is amended by adding two new sections, to read as follows:

**[citation]. Non-Discrimination in the Adoption Process.**

1. The process for applying to adopt a child through the [name of tribe’s social services department] or other agency providing adoption services within the jurisdiction of the Tribe shall be available to all persons without regard to sexual orientation, gender identity, or marital status.
2. In determining whether an adoption is in the best interests of a child, the Juvenile Court shall not consider the sexual orientation or gender identity of the petitioner(s), except to the extent that sexual orientation or gender identity may affect the ability of a person to successfully parent and meet the needs of a specific child.

**[citation]. Policies Required.** Within 180 days of the adoption of this ordinance, the Tribe’s [insert name of social services department] shall adopt written policies prohibiting discrimination in the adoption process on the basis of sexual orientation and gender identity.

**Section 7. Second Parent Adoption.** The Tribe’s [domestic relations; family law] [code; ordinance; statute], [cite to specific provision within the adoption chapter], is amended by adding three new sections, to read as follows:

**[citation]. Second Parent Adoption Permitted.** If a family unit consists of the legal parent of a child and the parent’s spouse or domestic partner, and adoption is in the best interest of the child, the spouse or domestic partner may petition to adopt the child of the legal parent without requiring the legal parent to terminate his or her parental rights.

**Commentary:** *If the tribe’s laws already permit stepparent adoption, this provision could read:*

“If a family unit consists of the legal parent of a child and the parent’s domestic partner, and adoption is in the best interest of the child, the domestic partner may petition to adopt the child of the legal parent in the same manner as stepparents may adopt a child.”

**[citation]. Availability of a Child for Second Parent Adoption.** A child may be available for second parent adoption only upon verification that:

1. The child has only one legal parent;

**Commentary:** *Tribes may not want to limit second parent adoption in this way. Some commentators recognize that there are circumstances in which more than two legal parents may be in a child’s best interest. Additional provisions that could be included to permit third (or fourth)*

*parent adoptions are provided below.*

2. The child’s legal parent consents to the adoption of the child by his or her spouse or domestic partner; and
3. Adoption is in the best interest of the child.

**[citation]. Home Study Report Required.** Upon receipt of a petition for a second parent adoption, the court shall require the [name of tribal social services department] to prepare a written home study report.

**Commentary:** *If tribal law does not require stepparents to undergo the cost and invasiveness of a home study during the second parent adoption process, same-sex couples should not be required to do so.*

1. If the child was adopted by his or her legal parent less than six months prior to the filing of an adoption petition by a second prospective parent, and if the second prospective parent was included in the home study report that was prepared for the adoption of the child by the first parent, that home study report shall be a valid home study report for the purpose of the second parent’s adoption.
2. If the filing of a petition for adoption by the second prospective parent occurs six months or more after the child was adopted by the first parent, a separate home study report shall be required.

**Commentary:** *For tribes that wish to permit third (or fourth) parent adoption, an additional provision could read:*

**[citation]. Adoption by Additional Parents.**

1. The Tribe’s [parent and child; family; domestic relations] [code; ordinance; statute], [cite to specific provision], is amended to add the following provision: “In an appropriate action, the Tribal Court may find that a child has more than two natural or adoptive parents, if required to serve the best interest of the child. In determining a child’s best interest under this section, the Tribal Court shall consider the nature, duration, and quality of the presumed or claimed parents’ relationships with the child and the benefit or detriment to the child of continuing those relationships.”
2. The Tribe’s [parent and child; family; domestic relations] [code; ordinance; statute], [cite to specific provision(s) related to custody], is amended to add the following provision: “In any case in which a child has more than two legal parents, the Tribal Court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, stability for the child. This may mean that not all parents share legal or physical custody of the child.”
3. The Tribe’s [parent and child; family; domestic relations] [code; ordinance; statute], [cite

to specific provision(s) related to child support], is amended to add the following provision: “In any case in which a child has more than two legal parents, the Tribal Court shall divide child support obligations among the parents based on income and amount of time spent with the child by each parent, according to the principles set forth in Section x, and the general formula set forth in Section x, adjusted to permit recognition of more than two parents.”

4. The Tribe’s [parent and child; family; domestic relations] [code; ordinance; statute], [cite to provision defining the parent and child relationship], is amended to read: “Parent and child relationship’ means the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship. Nothing in this part shall be construed to preclude a finding that a child has a parent and child relationship with more than two parents.”

**Section 8. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 9. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 10. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 11. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

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## CHILD CUSTODY AND VISITATION FOR TWO SPIRIT / LGBT PARENTS

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*“Even when some legal protections exist, discrimination can still wrongly wrest children from their parents when, for example, custody decisions are driven by anti-gay bias against a parent, rather than by the child’s best interests.”<sup>125</sup>*

Most child custody and visitation statutes do not specifically address sexual orientation or gender identity.<sup>126</sup> Instead, courts generally make child custody and visitation decisions based on the best interests of the child.<sup>127</sup> In several jurisdictions, courts have declined to make custody decisions based on the sexual orientation of a parent, and appellate courts have struck down custody or visitation decisions that incorrectly considered the sexual orientation of a parent. For example, an Oregon appellate court has found that the sexual orientation of a mother could not be a significant factor in determining custody,<sup>128</sup> and a New York appellate court has confirmed that where a parent’s sexual preference does not adversely affect the children, it is not determinative in a child custody dispute.<sup>129</sup>

Although most courts will not overtly refer to a parent’s sexual orientation or gender identity in custody and visitation disputes, Two Spirit / LGBT parents may still face an increased level of scrutiny or discrimination due to homophobia or transphobia. For example, according to an American Civil Liberties Union / National Center for Transgender Equality joint publication:

More and more transgender parents are fighting to protect their relationships with their children in the face of custody challenges. Yet they face significant obstacles. Parents who have come out or transitioned after having a child with a spouse or partner have seen their gender transition raised as a basis to deny or restrict child custody or visitation. Transgender people who formed families after coming out or transitioning have faced challenges to their legal status as parents, often based on attacks on the validity of their marriages.

Many transgender people have and raise children without encountering legal challenges to their fitness or legal status as a parent. However, such challenges are still all too common. And many parents have been treated terribly by the courts because judges have a limited understanding of what it means to be transgender and they have very little—and inconsistent—case law to guide them.<sup>130</sup>

Effective and enforceable laws are therefore needed to remove barriers to the equal treatment of LGBT parents during custody and visitation disputes. The American Bar Association has recognized this need, and adopted a policy supporting the enactment of legislation and policies requiring that “child custody and visitation shall not be denied or restricted on the basis of sexual orientation.”<sup>131</sup> In one example of such legislation, the District of Columbia requires: “In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the child shall be the primary consideration. The race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration.”<sup>132</sup>

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### SAMPLE CHILD CUSTODY AND VISITATION ORDINANCE AMENDMENT

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The sample Child Custody and Visitation Ordinance Amendment set forth below is based primarily on District of Columbia law. This draft language allows tribes with existing custody and visitation laws to amend those laws to promote equal parenting rights for Two Spirit / LGBT parents.

#### Child Custody and Visitation Ordinance Amendment

**Section x.** The Tribe's [domestic relations; family; marriage] [code; ordinance; statute], [cite to specific provision], is amended by adding one new section, to read as follows:

**[citation]. Best Interests of the Child.** In any proceeding between parents in which the custody of or visitation with a child is at issue, the best interest of the child shall be the primary consideration. The sexual orientation or gender identity of a party, in and of itself, shall not be a conclusive consideration. For purposes of this Section:

1. "Gender Identity" means an individual's actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.
2. "Sexual Orientation" means a person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

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### RECOGNITION OF PARENT-CHILD RELATIONSHIPS: DE FACTO PARENTING

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Non-biological parent caregivers, such as the unmarried partner of a biological parent, often play critical roles in the upbringing of children. Such caregivers regularly assume the role of parent on a day-to-day basis and fulfill the child's physical needs and psychological need for affection and care. *De facto parenting* is a legal doctrine that permits unrelated caregivers to be designated as the legal parent of a child, including to the right to seek custody or visitation and to participate as parties in juvenile court proceedings. The doctrine also permits a biological parent to seek child support from a de facto parent, if that biological parent is the primary residential parent of the children.<sup>133</sup>

Fourteen states currently have statutes that recognize the rights of non-biological parent caregivers as “de facto parents.”<sup>134</sup> Most jurisdictions’ laws do not specifically limit anyone from seeking de facto parentage, and thus presumably apply not only to LGBT couples, but to all unmarried parents where one partner is not the natural or adoptive parent of the parties’ children.

De facto parenting laws require claimants to meet a high burden before the court will establish de facto parentage. For example, according to the D.C. Code, a “de facto parent” means an individual:

Who: Lived with the child in the same household at the time of the child's birth or adoption by the child's parent; Has taken on full and permanent responsibilities as the child's parent; and Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or

Who: Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody; Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party; Has taken on full and permanent responsibilities as the child's parent; and Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.<sup>135</sup>

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### RECOGNITION OF PARENT-CHILD RELATIONSHIPS CREATED BY ASSISTED REPRODUCTIVE TECHNOLOGIES

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*“Medical infertility affects about 10 percent of the reproductive age population—approximately 7.3 million people—and strikes people of all socioeconomic backgrounds... In addition to those who experience physiological obstacles to conceiving or maintaining a pregnancy, those who are physically capable of reproducing but do not have a partner of the opposite sex with whom to reproduce are increasingly taking advantage of assisted reproductive services. They include lesbian, gay, and transgender couples as well as single individuals of any sexual orientation or gender identity.”*<sup>136</sup>

Various medical options, such as *in vitro fertilization* (the creation of an embryo by combining sperm and egg in a laboratory dish), *traditional surrogacy* (a woman agrees to be impregnated through artificial insemination and give birth to a child who will be raised by others), *gestational surrogacy* (a woman agrees to be impregnated with another woman’s fertilized egg and give birth to a child who will be raised by others), and egg donation (a woman allows her eggs to be used to create a child whom she does not intend to parent) challenge our understanding of parenthood and biological and legal relationships. These options are often referred to as “assisted reproductive technologies” (ART), which are defined as fertility procedures in which both eggs and sperm are manipulated outside the body in a laboratory.



Most jurisdictions have laws that confer parental status on a husband who consents to his wife's insemination, but allow a woman's unmarried partner to become a parent only through second-parent adoption. For example, the Tulalip Tribes' Paternity and Child Support Code states: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child thereby conceived. The husband's consent must be in writing and signed by him and his wife."<sup>137</sup> The Northern Arapaho Family Support Ordinance, Swinomish Tribal Community's Domestic Relations Code, Laws of the Confederated Salish and Kootenai Tribes, Codified, and the Bishop Paiute Tribe's Paternity Ordinance contain similar language.<sup>138</sup>

In contrast, a D.C. law allows both lesbian mothers who plan a child using donor insemination to be designated as the child's legal parents. Under the marital status- and gender-neutral law, parentage stems from the intent of the parties: a person who consents to a woman's insemination with the intent to be a parent of the resulting child is a parent of the child, and both names will be listed as parents on the child's birth certificate.

### **Assisted Reproductive Technologies**

This Toolkit briefly explores the issue of parentage determinations in the context of artificial insemination. However, we are unable to cover many other issues that may arise in relation to ART, such as surrogacy laws and agreements, health insurance coverage for fertility services, discrimination in fertility services on the basis of sexual orientation and marital status, the disposition of frozen embryos, donor agreements, sperm donor custody challenges, etc.

For more information about these and other ART topics, see, e.g., Nancy D. Polikoff, *Alternative Reproductive Technologies and Lesbian, Gay, Bisexual and Transgender People*, [www.lgbtbar.org](http://www.lgbtbar.org); Human Rights Campaign, *Assisted Reproduction*, <http://www.hrc.org/issues/pages/assisted-reproduction>; Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U.L.Rev. 227-294 (2006).

## SAMPLE PARENT-CHILD RELATIONSHIP ORDINANCE AMENDMENTS

The sample Parent-Child Relationship Ordinance Amendment set forth below is based primarily on Delaware and District of Columbia law.<sup>139</sup> This draft language allows tribes with existing laws governing the establishment of the parent-child relationship to amend those laws to recognize additional parent-child relationships involving Two Spirit / LGBT parents, including de facto parents, domestic partners of biological parents, and parents who consent to artificial insemination of a woman with the intent to be a parent of the resulting child.

### **Parent-Child Relationship Ordinance Amendment**

**Section 1. Definitions.** As used in this ordinance:

- A. "De facto parent" means an individual:
1. Who has:
    - a. Lived with a child in the same household at the time of the child's birth or adoption by the child's legal parent;
    - b. Taken on full and permanent responsibilities as the child's parent; and
    - c. Held himself or herself out as the child's parent with the consent of the child's legal parent or, if there are 2 legal parents, both parents; or
  2. Who has:
    - a. Lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
    - b. Formed a strong emotional bond with the child with the encouragement and intent of the child's legal parent that a parent-child relationship form between the child and the third party;
    - c. Taken on full and permanent responsibilities as the child's parent; and
    - d. Held himself or herself out as the child's parent with the consent of the child's legal parent, or if there are 2 legal parents, both parents.
- B. "Domestic partnership" means a legal relationship, entered into in person between two eligible persons regardless of their genders, which has been registered and certified pursuant to this Tribal law, or a domestic partnership or civil union that has been recognized by the Tribe pursuant to Tribal law.
- C. "Domestic partner" means a person joined in a valid domestic partnership that has not been terminated.

**Section 2.** The Tribe's [domestic relations; family; children's] [code; ordinance; statute], [cite to specific provision(s) re: establishing the parent-child relationship], is amended to read:

**[citation]. Establishment of Parent-Child Relationship.** A parent-child relationship may be established as follows:

1. The parent-child relationship is established between a woman and a child by:
  - a. The woman's having given birth to the child, unless she is not the intended parent pursuant to a gestational carrier arrangement;
  - b. An adjudication of the woman's maternity;
  - c. Adoption of the child by the woman;

- d. An un rebutted presumption that the woman is the mother of the child. A presumption that a woman is the mother of a child shall exist if:
    - i. The woman and the child's mother are or have been married, or in a domestic partnership, at the time of the conception or birth of the child, or between conception and birth; and
    - ii. The child is born during the marriage or domestic partnership, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership.
  - e. The Tribal Court determines, based on clear and convincing evidence, that the woman is a de facto parent of the child;
  - f. The woman's intending to be the mother of a child born pursuant to a gestational carrier arrangement; or
  - g. The woman's having consented to assisted reproduction of another woman, with the intent to be the parent of the other woman's child, which resulted in the birth of the child.
2. The parent-child relationship is established between a man and a child by:
- a. An effective acknowledgment of paternity by the man under [cite to Tribe's paternity acknowledgment provisions(s), if any], unless the acknowledgment has been rescinded or successfully challenged;
  - b. An adjudication of the man's paternity;
  - c. Adoption of the child by the man;
  - d. An un rebutted presumption of the man's paternity of the child. A presumption that a man is the father of a child shall exist if:
    - i. He and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception and birth; and the child is born during the marriage or domestic partnership, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership; or
    - ii. Prior to the child's birth, he and the child's mother have attempted to marry, and some form of marriage has been performed in apparent compliance with law, though such attempted marriage is or might be declared void for any reason, and the child is born during such attempted marriage, or within 300 days after the termination of such

	<p>attempted marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court; or</p> <p>iii. After the child's birth, he and the child's mother marry or attempt to marry, (with the attempt involving some form of marriage ceremony that has been performed in apparent compliance with law), though such attempted marriage is or might be declared void for any reason, and he has acknowledged the child to be his.</p> <p>e. The man's having consented to assisted reproduction by a woman, with the intent to be the parent of her child, that resulted in the birth of the child; or</p> <p>f. The Tribal Court determines, based on clear and convincing evidence, that the man is a de facto parent of the child.</p>
3.	<p>A presumption of maternity or paternity created by subsection 1 or 2 of this section may be overcome upon proof by clear and convincing evidence that the presumed parent is not the child's genetic parent.</p> <p>a. The Tribal Court shall try the question of parentage, and may determine that the presumed parent is the child's parent, notwithstanding evidence that the presumed parent is not the child's genetic parent, after giving due consideration to:</p> <p>i. Whether the conduct of the mother or the presumed parent should preclude that party from denying parentage;</p> <p>ii. The child's interests; and</p> <p>iii. The duration and stability of the relationship between the child, the presumed parent, and the genetic parent.</p> <p>b. The presumption created by subsection 1(d) of this section, that a child is the child of the mother's female domestic partner, may be overcome pursuant to paragraph (a) of this subsection or upon proof by clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child.</p>
	<p><b>[citation]. Consequences of Establishment of Parentage.</b> Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise specifically provided by other applicable law.</p>
	<p><b>[citation]. Assisted Reproduction.</b></p>
1.	<p>Consent by a woman, and a person who intends to be a parent of a child born to the woman by assisted reproduction, shall be in writing signed by the woman and the intended parent.</p>
2.	<p>Failure of a person to sign a consent required by subparagraph 1 of this section,</p>

before or after the birth of the child, shall not preclude a finding of intent to be a parent of the child if the woman and the person resided together in the same household with the child and openly held the child out as their own.

3. A donor of semen to a person for purposes of assisted reproduction, other than the donor's spouse or domestic partner, is not a parent of a child thereby conceived unless the donor and the person agree in writing that said donor shall be a parent. Notwithstanding any other provision in this title, genetic test results shall not establish parentage of a semen donor unless:
  - a. The donor of semen is the spouse or domestic partner of the child's mother; or
  - b. The donor and the child's mother agree in writing that said donor shall be a parent.

For tribes who wish to modify existing artificial insemination laws to make such laws marital status-neutral and gender-neutral, an amendment could read:

#### **Artificial Insemination Ordinance Amendment**

The Tribe's [domestic relations; family; child support] [code; ordinance; statute], [cite to specific provision(s) re: artificial insemination], is amended to read:

**[citation]. Parent and Child Relationship.** The parent-child relationship is established between a person and a child if the person consents to assisted reproduction involving artificial insemination of a woman, with the intent to be the parent of the woman's child, and the assisted reproduction results in the birth of a child.

**Commentary:** *Some tribes may wish to include "under the supervision of a licensed physician," after "artificial insemination," to allow the parent-child relationship to be established only when artificial insemination is performed by a physician. Tribes who include such modifying language may also wish to include a provision requiring the physician to certify the consent of the parents and the date of the insemination, and to file the certification with the tribe, and/or the following additional language:*

The failure of the licensed physician to perform any administrative act required by this section shall not affect the parent and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only in exceptional cases upon an order of the Tribal Court for good cause shown.

1. The consent of the woman and the person who intends to be a parent of a child born to the woman by assisted reproduction shall be in writing signed by the woman and the intended

parent. The parents shall file the consents with the Tribe's [Vital Records / Child Support Enforcement / Tribal Court], where it shall be kept confidential and in a sealed file.

2. Failure of a person to sign or file a consent required by subparagraph 1(a) of this section, before or after the birth of the child, shall not preclude a finding of intent to be a parent of the child if the woman and the person resided together in the same household with the child and openly held the child out as their own.

**[citation]. Donor and Child Relationship.**

1. A donor of semen to a person for purposes of assisted reproduction, other than the donor's spouse or domestic partner, is not a parent of a child thereby conceived unless the donor and the person agree, in writing, that said donor shall be a parent. The agreement must be signed by the donor and the woman. [A licensed physician shall certify their signatures and the date of the insemination.] The woman and the donor shall file the agreement with the Tribe's [Vital Records / Child Support Enforcement / Tribal Court], where it shall be kept confidential and in a sealed file.
2. Notwithstanding any other provision in this title, genetic test results shall not establish parentage of a child by a semen donor unless:
  - a. The donor of semen is the spouse or domestic partner of the child's mother; or
  - b. The donor and the child's mother agree in writing that said donor shall be a parent.

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## CHILD WELFARE

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### TWO SPIRIT / LGBT FOSTER OR ADOPTIVE HOMES

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*"As of 2009, there were more than 423,000 children in foster care; with ~115,000 of these awaiting adoption. An estimated 14,000 foster children, or 3% of all foster children, currently live with LGB foster parents."<sup>140</sup>*

In several states, including North Dakota, Arkansas, Nebraska, and Utah, foster parenting by LGBT individuals is prohibited or restricted.<sup>141</sup> In other jurisdictions, "[a]lthough not expressly forbidden by statute or regulation, gay and lesbian individuals have been denied the ability to apply for foster parenting as a result of unwritten administrative policies of some state agencies."<sup>142</sup>

At the other end of the spectrum, states such as California, Oregon, Massachusetts, and New Jersey prohibit discrimination against LGBT individuals in the foster parent process.<sup>143</sup> For example, California's 2003 Foster Care Non-Discrimination Act prohibits discrimination in the foster care system on the basis of several actual or perceived characteristics, including sexual orientation and gender identity.<sup>144</sup> This law also includes explicit protections for LGBT youth and adults involved with the foster care system, and mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel.

Some tribal laws specifically address Two Spirit / LGBT child welfare issues. For example, the Omaha Tribe of Nebraska's Foster Home Licensing Standards states that for foster homes: "Two parents of either or same sex are preferred in most cases; however, a single parent may be selected if she/he can effectively fulfill the needs of the child."<sup>145</sup> In addition, the Hoopa Valley Tribe recognizes the right of foster children to be free from discrimination or harassment, including on the basis of actual or perceived sexual orientation or gender identity.<sup>146</sup>

At the federal level, in April 2011, the U.S. Department of Health and Human Services (HHS) issued a memo to state, tribal, and territorial agencies that administer federal child welfare funds. The memo called prospective LGBT parents "a largely untapped resource" for providing foster or adoptive homes to LGBT young people and recognized that LGBT foster and adoptive parents "can provide a loving, stable home, responsive to the needs of LGBT youth in care."<sup>147</sup> In addition, although a bill in Congress that would withhold federal funds from states that discriminate against LGBT people in foster placements or adoption died in committee in 2011, Senator Kirsten Gillibrand (D-N.Y.) and Rep. Pete Stark (D-Calif.) are expected to introduce similar bills again.<sup>148</sup>

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## LGBT YOUTH IN THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS

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*"During the past decade, [LGBT] adolescents have become increasingly visible in our families, communities, and systems of care. A significant number of these youth are in the custody of child welfare or juvenile justice agencies. Yet the public systems that are charged with their care and well-being have been unresponsive to their needs and slow to acknowledge that LGBT children and adolescents are in urgent need of appropriate and equitable care."<sup>149</sup>*

An estimated 5–10% of children and youth in the foster care system are—or are perceived to be—LGBT or questioning (LGBTQ), though the "numbers are likely much higher due to the parental abuse, neglect, and rejection too often experienced by LGBTQ children and youth."<sup>150</sup>

All young people in out-of-home custody, whether through the child welfare or juvenile justice system, "are entitled to equal protection of the law and have the right to safety while in care."<sup>151</sup> This safety includes the right to be protected from physical and sexual abuse at the hands

of foster parents, facility staff, social workers, other youth, and individuals that provide for their care, as well as the right to protection from mental and emotional harm.

Although LGBTQ youth have the right to the services and protections afforded to other children in the foster care system, and to live in an environment that is safe, understanding, and supportive of their needs, “[c]hild welfare and juvenile justice systems have not incorporated advances in research and understanding related to human sexuality and child and adolescent development [and] these systems continue to deliver misguided, uninformed, second-class care to LGBT youth in their custody.”<sup>152</sup> As a result, LGBTQ youth in the child welfare system, including Two Spirit / LGBT youth, “often face disapproval and rejection from their caretakers – including foster parents, kinship care providers and group home staff.”<sup>153</sup>

“[D]iscrimination, neglect, and mistreatment by peers, foster families, caseworkers, and other agency staff compound the problems facing many foster youth, resulting in higher risks of health and mental health problems, school failure, homelessness, and suicide.”<sup>154</sup> In addition, statistics show “that LGBTQ youth face higher rates of suicide and suicide attempts than their heterosexual peers,”<sup>155</sup> are more likely to be bullied (as we will discuss in Chapter 5), drop out of school, and be pushed into the juvenile justice system. Once in that system, these youth are often targeted for further abuse.

Native LGBTQ youth in the child welfare and/or the juvenile justice systems face some of the most oppressive abuse—often experiencing harassment and mistreatment based upon both their heritage or political status and their actual or perceived sexual orientation or gender identity—and have little access to recourse. Effective protections for these vulnerable youth require significant changes to the systems charged with their care.

## PROTECTING THE RIGHTS OF TWO SPIRIT / LGBT YOUTH IN CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS

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Some jurisdictions are taking steps to ensure that their policies address the needs of Two Spirit / LGBT children in the child welfare and juvenile justice systems. For example, as mentioned above, the Hoopa Valley Tribe has adopted a Bill of Rights of Foster Children, which includes the following right: “To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.”<sup>156</sup>



In addition, some states have adopted non-discrimination laws that explicitly protect LGBT youth in child welfare and juvenile justice systems. For example, California's Foster Care Non-Discrimination Act makes it unlawful for county child welfare providers, including child welfare departments, group home facilities, and foster family agencies, to discriminate on the basis of actual or perceived sex, sexual orientation, gender identity, or HIV status. Under the law, "all foster children and persons engaged in providing care and services to foster children in California have the right to fair and equal access to all available child welfare services, placements, care, treatment, and benefits, and to be free from discrimination or harassment on these bases."<sup>157</sup>

Several state agencies have also adopted policies or practice guides that include protections for LGBT youth. To illustrate, according to the Alameda County Social Services Agency's LGBT Policy:

Lesbian, gay, bisexual, transgender, and questioning (LGBT) children and youth, or those perceived to be LGBT, are entitled to the same care, support, and protections that are provided to all children and youth served by the Department of Children and Family Services... Sexual orientation and gender identity must be affirmed, respected, and considered in all decisions regarding placement, care, manner of treatment and benefits received. Safety concerns must be considered when evaluating the placement needs of LGBT children and youth. LGBT children and youth are entitled to support for their positive expression and development of their identities, in the same manner as their peers. Anti LGBT violence, the use of slurs, jokes, name calling or other forms of real or perceived verbal, nonverbal, or emotional harassment based on sexual orientation or gender identity is prohibited. Employees, resource families, care providers, and community members who provide services to children and youth will be treated with respect. Differences will be affirmed and harassment prevented and addressed. Discrimination based on sexual orientation and gender identification will not be tolerated.<sup>158</sup>

Similarly, New York's Division of Child Protection's policies include the following:

- "When assessing safety and risk of an LGBT child or young person, Children's Services staff must, in addition to looking for other safety factors, assess whether a parent's attitude about the child's actual or perceived sexual orientation and/or gender identity is contributing to the parent's behavior, and in turn, whether the parent's behavior is impacting upon the child's safety or placing a child at risk."
- "Division of Child Protection prohibits staff from acting in a discriminatory manner toward LGBT youth."
- "When interviewing a transgender young person, CPS should take care to address the child by the name that he/she prefers to be called, which may be a name associated with a gender different than the child's biological gender."

- “Under no circumstances is any staff member of Children’s Services to attempt to convince an LGBTQ child or young person to reject or modify his/her sexual orientation or gender identity.”
- “LGBT young people do not always feel comfortable disclosing information about their sexual orientation and/or gender identity. It is therefore not appropriate to directly ask a young person if he or she is LGBT. Instead, the CPS should use sensitive and inclusive language that signals to all young people that they will be treated with respect and dignity, regardless of how they identify.”<sup>159</sup>

### SAMPLE CHILD WELFARE AND JUVENILE JUSTICE NON-DISCRIMINATION ORDINANCE

The sample Child Welfare and Juvenile Justice Non-Discrimination Ordinance set forth below is based primarily on California’s Foster Care Non-Discrimination Act.<sup>160</sup> This draft ordinance allows tribes with existing laws protecting the rights of children in the tribe’s child welfare or juvenile justice systems to expand those laws to promote equality.

#### **Child Welfare and Juvenile Justice Non-Discrimination Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Child Welfare and Juvenile Justice Non-Discrimination Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.** The [Tribal Council / Business Committee] finds and declares that:

- A. Children in the Tribe’s child welfare and juvenile justice systems are harmed by discrimination based on sexual orientation and gender identity, whether that discrimination is directed at them, their caregivers, or service providers.
- B. The [insert name of Tribal social services agency] (Department) provides programs and services to protect children and families within the Tribe’s jurisdiction, including programs and services related to the care, placement, and supervision of children who have been removed from their homes due to abuse, neglect, or involvement in the juvenile justice system.
- C. Two Spirit, or lesbian, gay, bisexual, transgender, and questioning (collectively referred to herein as LGBT) children, or those perceived to be LGBT, are entitled to the same level of care, support, and protections that are provided to all children served by the Department.
- D. The Tribe is committed to treating all children with respect, valuing and affirming differences, and preventing harassment or discrimination of any kind. The sexual orientation and gender identity of a child must be respected in all child welfare and juvenile justice decisions regarding placement, care, manner of treatment, and benefits received.

E. Promoting equality in the Tribe’s child welfare and juvenile justice processes is essential to the political integrity, economic security, and health and welfare of the Tribe.

**Section 3. Purpose.** The purpose of this ordinance is to protect the rights of children, caregivers, potential foster and adoptive parents, and service providers in the child welfare and juvenile justice systems within the Tribe’s jurisdiction by prohibiting discrimination on the basis of sexual orientation or gender identity.

**Section 4. Interpretation.** Nothing in this ordinance shall be interpreted to create or modify existing Tribal preferences for foster placements or to limit the Department’s ability to make placement decisions for a child based on the child’s best interests.

**Section 5. Addition of Definitions.** The Tribe’s [juvenile; children’s] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding two new sections, to read:

**[citation].** “Gender Identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

**Section 6. Non-Discrimination in in Child Welfare and Juvenile Justice Processes.** The Tribe’s [juvenile; children’s] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding a new section, to read:

**[citation]. Non-Discrimination in Child Welfare and Juvenile Justice Processes.**

1. All children involved in the Tribe’s child welfare and juvenile justice systems, and all adults engaged in the provision of care and services to such children, including but not limited to, caseworkers, facility staff, foster parents and adoptive parents, and relative caregivers, shall have a right to:
  - a. Fair and equal access to all available and appropriate services, placements, care, treatment, and benefits; and
  - b. Be free from discrimination or harassment on the basis of sexual orientation or gender identity.
2. The application process to become a foster parent, adoptive parent, or relative caregiver for a child through the Department shall be available to all persons without regard to sexual orientation or gender identity.
  - a. Sexual orientation or gender identity may be considered only to the extent that such factors may affect the ability of a person or couple to successfully meet the needs of a specific child.
  - b. In determining whether the placement of a child with a potential foster parent or parents is in the best interests of the child, the Department and the

Juvenile Court shall not consider the sexual orientation or gender identity of the potential caregiver, except to the extent that such factors may affect the ability of a person to successfully meet the needs of a specific child.

3. Once foster parents, adoptive parents, or relative caregivers accept a child into their home, they have a legal responsibility to provide care to the child without discrimination on the basis of the child's actual or perceived sexual orientation or gender identity.

**Section 7. Policies Required.** Within 180 days of the adoption of this ordinance, the Department shall adopt written policies prohibiting harassment and discrimination on the basis of actual or perceived sexual orientation and gender identity. The policies shall:

- A. Apply to all Department personnel, providers who contract to serve children in the Department's custody, and all direct care providers, including foster parents, adoptive parents, relative caregivers, and facility staff.
- B. Include a formal grievance procedure that allows for confidential complaints and neutral third-party investigations.
- C. Be widely distributed to promote understanding and compliance, including, at a minimum,:
  1. By including a copy of the policies in the staff training or orientation for every new employee, contractor, and caregiver;
  2. By posting the policies in Department offices, group care facilities, courtrooms, and other strategic locations; and
  3. By discussing the policies with every child who is capable of understanding them;
  4. By including the policies in any written handbook or orientation materials provided to youth entering the system; and
  5. Including the policies in culturally and developmentally appropriate written materials designed for children and their families.

**Commentary:** *Tribal policies could include the following types of provisions:*

1. *Policies that prohibit all forms of harassment and discrimination, including jokes, slurs, and name calling. "Adopting and enforcing a policy that prohibits violence, name calling, and other harassment or discrimination promotes equitable care for all young people. Such a policy does not infringe on individual beliefs about homosexuality or gender roles. Providers and staff members are free to hold any beliefs they choose, so long as they enforce and adhere to the agency's nondiscrimination policy."<sup>161</sup>*
2. *Policies that "permit youth to: disclose their sexual orientation to other youth, caregivers, and agency personnel; discuss their feelings of attraction to youth of the same sex, consistent with discussion of romantic attachments among heterosexual youth, without being penalized or*

*shamed; participate in social activities that are geared toward or inclusive of lesbian, gay, and bisexual youth; express their sexual orientation through their choice of clothing, jewelry, or hairstyle; have access to LGBT-inclusive, supportive books and materials; and post LGBT-friendly posters or stickers in their rooms.”<sup>162</sup>*

3. *Policies that “ensure that agency employees respect confidential information related to a youth’s sexual orientation or gender identity,” including policies requiring that:*

- *All employees working with youth should have a thorough understanding of the situations in which such information must / may be disclosed.*
- *Unless disclosure is legally required, no employee should disclose information regarding the sexual orientation or gender identity of a youth unless that person can identify a direct benefit to the youth and has discussed the matter with the youth and obtained his or her consent.*
- *Case managers should carefully consider the purpose, nature, and consequences of any contemplated disclosure, and should work with the youth to balance the potential negative consequences against the benefits of disclosure.*
- *When disclosure is required or appropriate, the information disclosed and the means of disclosure should be limited to that which is necessary to achieve the specific beneficial purpose*
- *The Department take affirmative steps to ensure that all employees have a thorough understanding of applicable confidentiality laws and related policies and procedures.<sup>163</sup>*

**Section 8. Training Required.** Department staff, foster parents, adoptive parents, and relative caregivers shall receive training on the rights of children in out of home care to have fair and equal access to all available services, placement, care, treatment, and benefits, and to be free from discrimination and harassment on the basis of sexual orientation and gender identity.

**Section 9. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 10. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 11. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 12. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

## CHAPTER 3: EMPLOYMENT

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*“In 29 states, it’s still legal to fire someone solely because they’re lesbian, gay, or bisexual; in 33 states it is legal to fire someone solely for being transgender.”<sup>164</sup>*

Gainful employment is one of the most important factors in determining our health, our income, and our futures. Without employment, Two Spirit / LGBT people are more likely to earn less and have less access to healthcare, housing, and other important basic necessities for survival.

“Employment discrimination against lesbian, gay, bisexual and transgender workers is pervasive and harmful. It violates core [values] of fairness and equality by discriminating against qualified individuals based on characteristics unrelated to the job.”<sup>165</sup> Decades of research has provided extensive evidence of employment discrimination against Two Spirit / LGBT people, including being fired, being denied a promotion and experiencing harassment on the job.<sup>166</sup> To illustrate:

- 15-43% of LGBT people have experienced some form of discrimination and harassment at work;
- Gay men earn 10-32% less than similarly qualified heterosexual males;<sup>167</sup>
- 90% of transgender workers report some form of harassment or mistreatment on the job;
- 37% of American Indian / Alaska Native (AI/AN) transgender and gender nonconforming people lost a job due to bias and 60% were not hired for a job due to bias;
- 65% of AI/AN transgender and gender nonconforming people were harassed, 14% were physically assaulted, and 10% were sexually assaulted at work; and
- The unemployment rate for AI/AN transgender and gender nonconforming people is 18% (over double the rate of the general population (7%).<sup>168</sup>

In addition, LGBT individuals “suffer from socioeconomic inequalities in large part due to pervasive discrimination in the workplace. Discrimination directly causes job instability and high turnover, resulting in greater unemployment and poverty rates for gay and transgender people, as well as the wage gap between gay and straight workers.”<sup>169</sup>

We envision a world where Two Spirit / LGBT people are free to pursue their work and professional goals without fear of harassment or discrimination. We know that this will strengthen both our economies and our communities.

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## BENEFITS OF EMPLOYMENT ANTI-DISCRIMINATION LAWS AND POLICIES

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Tribal governments and economic enterprises provide revenue and services and create employment opportunities for tribal members and non-Indians alike. As employers, business owners, and service providers, tribes benefit from creating a comfortable work environment for employees that fosters recruitment, productivity, retention, and job satisfaction.

Research shows that nondiscrimination laws and policies, including those that include sexual orientation and gender identity protections, are likely to reduce employment discrimination and promote productivity. For example, where laws banning employment discrimination have been adopted, evidence suggests that the laws “have been effective in reducing wage gaps and employment discrimination ... Two recent studies using Census 2000 data found that state-level sexual orientation nondiscrimination laws reduced the gap in annual earnings for gay men.”<sup>170</sup>

Protecting workers from discrimination is also good for business. Economists and businesses “have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics, including sexual orientation, that have no impact on an employee’s ability to perform a job well.”<sup>171</sup> In addition, “studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.”<sup>172</sup>

“Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted policies” prohibiting employment discrimination.<sup>173</sup> For example, by 2010, 87% of Fortune 500 companies had implemented policies prohibiting discrimination on the basis of sexual orientation, and 46% percent had policies prohibiting discrimination on the basis of gender identity.<sup>174</sup> In addition, “large companies report that they adopt these policies to improve employee retention, recruitment, and productivity, as well as to generate the best ideas and a stronger customer base.”<sup>175</sup>

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## HEALTHCARE INSURANCE DISCRIMINATION AND TRANSGENDER EMPLOYEES

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Like anyone else, people who are transgender need preventive care to promote health and medical care when they are sick or injured. “Transgender people who use medical treatments as part of gender transition also require access to many of the same services that are regularly provided to nontransgender people. The same hormone therapy used in gender transition, for example, is provided to patients with endocrine disorders and to women with menopausal symptoms.”<sup>176</sup> In addition, other transition-related care, such as hormone therapy, mental health services, and surgery, is often medically necessary for transgender people.

However, many transgender people experience serious and potentially life-threatening discrimination by insurance companies and health care service plans solely on the basis of their gender identity.<sup>177</sup> For example, due to pre-existing conditions or diagnoses, many transgender people find it hard to purchase insurance. Where transgender people have health insurance coverage, transgender-specific exclusions in many policies deny them access to coverage for basic, medically necessary care they need—often for services or treatments the insurance companies cover for non-transgender people.<sup>178</sup> Some policies' exclusions apply to surgical treatments but permit coverage for other transition-related care, such as hormone therapy and mental health services. Other policies include more sweeping exclusions, denying coverage of any “services, drugs, or supplies related to sex transformation.”<sup>179</sup> Thus, while thousands of women experiencing menopause are prescribed estrogen and other hormones, transgender women are often denied similar prescription hormones.

Under the federal Patient Protection and Affordable Care Act, public and private health insurers are prohibited from discriminating on the basis of sexual orientation, gender identity, or HIV status. This protection applies to all healthcare facilities and programs that receive federal funds, including hospitals, clinics, and mental health facilities that receive Medicare and Medicaid funding. People who face discrimination or are denied access to a federally funded health service or program on the basis of gender identity may file a complaint with HHS's Office of Civil Rights.<sup>180</sup>

In addition, major expert associations, including the American Medical Association,<sup>181</sup> have identified transition-related medical services, including mental health services, hormone therapy, and surgery, as being medically necessary. According to these experts, medical providers, not insurance companies, should determine the medical necessity of any transition-related service.<sup>182</sup>

Despite these advances, insurance companies continue to discriminate in the mental and physical care they will provide to transgender individuals. These exclusions are discriminatory and must come to an end as we strive to create a system of healthcare where all people can access the care they need to live healthy and productive lives.<sup>183</sup>

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### PROMOTING EQUALITY IN HEALTH CARE BENEFITS

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One solution to the problem of discriminatory health care services and coverage is to put health care back in the hands of patients and doctors—not the insurance companies. Tribal employers can further this effort by offering employees insurance coverage that does not include transgender-specific exclusions or that does not otherwise discriminate based on gender identity. “Some of the insurers offering inclusive plans include Aetna, Blue Cross Blue Shield, Cigna, Kaiser Permanente, and UnitedHealthcare.”<sup>184</sup>



The benefits of eliminating health insurance discrimination have been shown to far exceed the insignificant costs associated with providing inclusive health insurance coverage. For example, in 2001, the City and County of San Francisco became the first U.S. municipality to provide inclusive medically necessary care by removing transgender access exclusions from its employee health plans. To cover this care, a small surcharge of \$1.70 per member/per month was implemented. However, actual costs turned out to be far, far lower than anticipated, and the city dropped the surcharge in 2006 because the cost was so small as to be negligible.

City employee health plans in New York, Minneapolis, Portland, and Seattle also provide coverage for transition-related care,<sup>185</sup> and private employers are increasingly offering nondiscriminatory, comprehensive coverage for transgender people. Currently, 25% of Fortune 100 Companies (including Kraft Foods, Microsoft, and Nike), as well as many other businesses—large and small—offer inclusive health care to all employees, including equal healthcare for transgender employees.<sup>186</sup> In Oregon, for example, businesses offering transgender-related coverage to their employees include: Alcatel- Lucent, American Express, Ameriprise Financial, Bank of America, Chrysler Motors, Kimpton Hotel & Restaurant Group, Kraft Foods, Microsoft, New Seasons Market, and State Farm. These businesses and others have found that providing all employees with the medically-necessary care they need to be healthy is good for employees and their families, is good for business—and is the right thing to do.

Tribes may also wish to adopt the health insurance benefit provision set forth in the sample Nondiscrimination in Employment Ordinance, below. Moreover, where a tribe has the jurisdiction to regulate insurance providers, the tribe could choose to adopt a legislative solution to discriminatory health care coverage. For example, California became the first U.S. state to pass laws to protect against discrimination in insurance and health care access.<sup>187</sup> The law bars insurance companies and health care service plans from discriminating on the basis of gender in the creation or maintenance of service contracts or the provision of benefits or coverage. Tribes could likewise choose to pass comprehensive legislation regulating insurers.

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## APPROACHES TO PREVENTING EMPLOYMENT DISCRIMINATION

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Many tribes have adopted non-discrimination laws that prohibit discrimination based on sexual orientation. For example, the Shoshone-Bannock Tribes' Worker Protection Ordinance makes it unlawful to take various types of employment action "wholly or partially for a discriminatory reason based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, or political affiliation of any individual."<sup>188</sup> Similarly, the Mandan Hidatsa and Arikara Nation's Employment Rights and Contracts Preference Ordinance makes it unlawful for covered employers "to fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion and training, or to engage in any other action that would deprive or tend to deprive any individual of employment opportunities, on the basis of" various characteristics, including sexual orientation.<sup>189</sup>

According to the Stockbridge-Munsee Tribe’s Employee Rights Ordinance, the Tribe “recognizes basic human rights in the workplace in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, *sexual orientation*, marital status and ancestry.<sup>190</sup> Several other tribes’ Tribal Employee Rights Ordinances (TEROs) also make it unlawful to take various actions, such as “refusing to hire, failing to hire, or dismissing any individual with respect to their compensation, terms and condition, or privileges of employment” “wholly or partially for a discriminatory reason based on actual or perceived: race, color, religion, national origin, sex, age, marital status, *sexual orientation*, *gender identity*, height, weight, pregnancy, disability or political affiliation of any individual.”<sup>191</sup>

Approximately 21 states, plus the District of Columbia, have passed laws prohibiting employment discrimination based on sexual orientation, and approximately 17 states and D.C. prohibit discrimination based on gender identity.<sup>192</sup> In many of these states, broad non-discrimination laws ban discrimination based on sexual orientation and/or gender identity in the areas of housing, public accommodations, education, real-estate transactions, public service, business, union membership, insurance, public works contracts, and/or access to financial credit.<sup>193</sup>

The proposed federal Employment Non-Discrimination Act (ENDA) would extend federal employment discrimination protections (currently based on race, religion, sex, national origin, age, and disability) to cover sexual orientation and gender identity.<sup>194</sup> The law would prohibit public and private employers, employment agencies, and labor unions from using an individual’s sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotion or compensation.<sup>195</sup>

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### SAMPLE NONDISCRIMINATION IN EMPLOYMENT ORDINANCE

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The sample Nondiscrimination in Employment Ordinance is based primarily on Oregon,<sup>196</sup> California,<sup>197</sup> and Colorado<sup>198</sup> law. This draft ordinance allows tribes with existing anti-discrimination employment laws to expand the scope of protections to promote equality based on sexual orientation and gender identity. For tribes that have not yet adopted employment discrimination laws, the laws of the Blackfeet Nation,<sup>199</sup> the Nottawaseppi Huron Band of the Potawatomi,<sup>200</sup> and California<sup>201</sup> offer examples.

#### **Nondiscrimination in Employment Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Nondiscrimination in Employment Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.**

A. The [Tribal Council / Business Committee] finds that:

1. All employees of the [insert name of Tribe] (Tribe) are entitled to a workforce environment that is free from unfair discrimination. The practice of unfair discrimination in employment against properly qualified individuals by reason of their sexual orientation or gender identity deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living, and adversely affects the workforce, community, and Tribe.
2. Promoting equality in employment is essential to the political integrity, economic security, and health and welfare of the Tribe.

B. The [Tribal Council / Business Committee] declares that it is the policy of the Tribe to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment, without discrimination on the basis of sexual orientation or gender identity.

**Section 3. Purpose.** The purpose of this ordinance is to prohibit employment discrimination on the basis of sexual orientation or gender identity. Through the adoption of this ordinance, the Tribe seeks to promote equality in the workplace, and to prevent and remedy employment practices that discriminate on the basis of sexual orientation and gender identity.

**Section 4. Addition of Definitions.** The Tribe's [employment] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** "Committed relationship" means a relationship in which an employee and the domestic partner of the employee are each other's sole domestic partner (they are not married to or domestic partners with anyone else), and share responsibility for a significant measure of each other's common welfare and financial obligations.

**[citation].** "Domestic partner" means an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships. A domestic partnership includes but is not limited to any relationship between two individuals of the same or opposite sex that is granted legal recognition by a tribe or state as a marriage, domestic partnership, civil union, or similar relationship.

**Commentary:** *This broad definition of "domestic partnership" includes partners (same and different sex) that have not taken official action to formalize their relationship. Tribes may wish to limit this definition to more formal partnerships, such as through the following type of language:*

"Domestic partnership" means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

**[citation].** "Gender Identity" means an individual's actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.

**[citation].** “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

**Commentary:** *If a tribe wishes to exempt religious entities from the requirements set forth in this ordinance, an additional definition could read as follows:*

For purposes of this Ordinance, “employer” shall not include any religious organization or association, except for any religious organization or association that is supported in whole or in part by Tribal funds or other money raised by taxation or public borrowing.

**Section 5. Prohibiting Employment Discrimination on the Basis of Sexual Orientation and Gender Identity.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding “sexual orientation and gender identity” to the list of protected classes. As revised, this Section shall read as follows:

**[citation].** [provide language of original provision, with “sexual orientation, gender identity” added]

**Commentary:** *Tribes may also wish to provide specific protections on the basis of HIV status, (though some tribes’ disability discrimination laws may already protect against discrimination on the basis of HIV status).*

NOTE: The federal Americans with Disabilities Act (ADA) gives Federal civil rights protections to individuals with disabilities and guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications. An individual is considered to have a “disability” if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Persons with HIV disease have physical impairments that substantially limit one or more major life activities and thus are protected by the ADA. Persons who are discriminated against because they are regarded as being HIV-positive are also protected. For example, the ADA would protect a person who is denied an occupational license or admission to a school on the basis of a rumor or assumption that he/she has HIV or AIDS, even if he/she does not.

**Section 6. Requiring Equality in Employee Benefits.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to code / ordinance / statute / policy], is amended by adding two new sections, to read as follows:

**[citation]. Equality in Employee Benefits.** Any employment-related privilege, right, or benefit granted by statute, administrative or court rule, policy, common law, or any other law to an individual because the individual is or was married, or to an individual’s spouse or former spouse, shall be granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership, or to an individual’s domestic partner or former domestic partner. These privileges, rights, and benefits include but are not limited to:

1. An employee shall be granted a leave of absence, with pay, for the death of a domestic partner or family member of a domestic partner to the same extent as for a spouse or family member of a spouse. Use of the term “in-law” in the Tribe’s employee policies shall include the similarly situated relatives of a domestic partner.
2. An employee shall be granted sick leave to care for a domestic partner to the same extent that employees are granted sick leave to care for a spouse, and to care for a dependent of a domestic partner to the same extent permitted to care for a child.
3. An employee shall be entitled to take parental leave to take care of a child born to a domestic partner or a newly adopted child to the same extent as a married person.

**Commentary:** *Most jurisdictions entitle eligible employees to take unpaid, job-protected medical leave and/or leave to care for themselves or for family members with serious health conditions. The provisions above allow tribes with existing family medical leave laws to amend those laws to allow employees to expand the eligible family relationships for which employees can take leave. For example, these provisions allow an employee to take unpaid leave to care for his or her domestic partner with a serious health condition. In addition, an employee could take unpaid leave to provide care for the child of his or her domestic partner, if the child has a serious health condition, even if the employee has no legal or biological relationship with the child. Also, an employee who is having or adopting a child with his or her partner but who is not the biological parent of the child could take unpaid leave for the birth of the child and to bond with the child.*

4. The Tribe shall offer and provide health benefits to the domestic partner of an employee to the same extent that such benefits are offered and provided to a spouse of an employee. The Tribe shall offer and provide health benefits to a dependent of an employee’s domestic partner to the same extent that such benefits are offered and provided to a child of an employee.
5. To be eligible for benefits for a domestic partner, the Tribe may require an employee file a declaration of domestic partnership, signed by both partners under penalty of perjury, with the [human resources department / Tribal administration]. On such declaration, the employee shall agree to notify the Tribe promptly of any change in the status of the domestic partnership.
6. Benefits for an employee’s domestic partner and the dependents of an employee’s domestic partner shall terminate:
  - a. Upon the death of the employee in the same way that such benefits would terminate upon the death of a spouse.
  - b. Upon the termination of the domestic partnership in the same way that such benefits would terminate upon divorce.
7. As used in this Section, the term “employees” refers to active and retired employees who are eligible for benefits pursuant to the laws or policies of the Tribe.

8. When the term “spouse” or “married” or “marriage” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, such terms shall be interpreted to include a domestic partner or domestic partnership. When the term “family” or “dependent” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, it shall be interpreted to include domestic partners and dependents of domestic partners. When the term “divorce” or “legal separation” is used in other sections of the Tribe’s [employment] [code / ordinance / statute / policy], and documents, it shall be interpreted to mean termination of a domestic partnership.

**Commentary:** *An additional, more comprehensive amendment addressing family and medical leave could read:*

**[citation]. Family and Medical Leave Definitions.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to definitions provision for the Tribe’s family medical leave law], is amended by [adding / amending] the followings sections, to read as follows:

1. “Family member” means an individual with any of the following relationships to the employee:
  - a. Spouse, and parents thereof;
  - b. Sons and daughters, and spouses thereof;
  - c. Parents, and spouses thereof;
  - d. Brothers and sisters, and spouses thereof;
  - e. Grandparents and grandchildren, and spouses thereof;
  - f. Domestic partner and parents thereof, including domestic partners of any individual in Subsections (b) through (e) of this definition; and
  - g. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
  
2. “Immediate relative” means an individual with any of the following relationships to the employee:
  - a. Spouse, and parents thereof;
  - b. Sons and daughters, and spouses thereof;
  - c. Parents, and spouses thereof;
  - d. Brothers and sisters, and spouses thereof;
  - e. Grandparents and grandchildren, and spouses thereof;

- f. Domestic partner and parents thereof, including domestic partners of any individual in Subsections (b) through (e) of this definition; and
  - g. Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
3. “Parent” means:
- a. A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;
  - b. A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; or
  - c. A person who stands in loco parentis to the employee or stood in loco parentis to the employee when the employee was a minor or required someone to stand in loco parentis.
  - d. A parent of an employee’s spouse or domestic partner.
4. “Son or daughter” means:
- a. A biological, adopted, step, or foster son or daughter of the employee;
  - b. A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;
  - c. A son or daughter of an employee’s spouse or domestic partner; or
  - d. A person for whom the employee stands in loco parentis or stood in loco parentis when that individual was a minor or required someone to stand in loco parentis.
5. In loco parentis refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. Persons who are in loco parentis include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

9. Nothing in this [code / ordinance / statute / policy] shall be construed to impose liability upon a domestic partner for the health or health expenses of his or her domestic partner or dependents of his or her domestic partner.

**Section 7. Requiring Healthcare Benefits.** The Tribe’s [employment] [code / ordinance / statute / policy], [cite to code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Equality in Healthcare Benefits.** An insurer may not discriminate on the basis of an insured’s or prospective insured’s actual or perceived gender identity, or on the

basis that the insured or prospective insured is a transgender person. Prohibited healthcare discrimination includes but is not limited to when an insurer:

1. Denies, cancels, limits, or refuses to issue or renew an insurance policy on the basis of insured's or prospective insured's actual or perceived gender identity.
2. Demands or requires a payment or premium that is based in whole or in part on an insured's or prospective insured's actual or perceived gender identity.
3. Designates Gender Identity Disorders /Gender Dysphoria as a preexisting condition for which coverage will be denied or limited.
4. Excludes coverage for all Gender Identity Disorders /Gender Dysphoria.
5. Denies or Limits coverage or denies claims for procedures provided for Gender Identity Disorders /Gender Dysphoria if the same procedures are allowed in the treatment of another non-Gender Identity/Gender Dysphoria related conditions.

**Section 8. Requiring Equality by Contractors.** The Tribe's [employment / procurement] [code / ordinance / statute / policy], [cite to code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Equality by Contractors.** No Tribal entity may enter into any contract for the acquisition of goods or services in the amount of [one hundred thousand dollars (\$100,000)] or more with a contractor who, in the provision of benefits, discriminates between employees with spouses and employees with domestic partners, or discriminates between the domestic partners and spouses of those employees.

1. After taking all reasonable measures to find a contractor that complies with this Section as determined by the Tribal entity, the requirements of this Section may be waived under any of the following circumstances:
  - a. Whenever there is only one prospective contractor willing to enter into a specific contract with the Tribal entity.
  - b. If the contract is necessary to respond to an emergency, as determined by the Tribal entity, which endangers the health, welfare, or safety of the Tribe or its members, or the contract is necessary for the provision of essential services and no entity that complies with the requirements of this is available.
  - c. Where the requirements of this Section violate, or are inconsistent, with the terms or conditions of a grant, subvention, or agreement, provided that a good faith attempt has been made by the entity to change the terms or conditions of any grant, subvention, or agreement to authorize application of this Section.
  - d. Where the contractor is providing wholesale or bulk water, power, or natural gas, the conveyance or transmission of the same, or ancillary services, as required for assuring reliable services in accordance with good



utility practice, provided that the purchase of the same may not practically be accomplished through the standard competitive bidding procedures; and further provided that this exemption does not apply to contractors providing direct retail services to end users.

2. A contractor is not deemed to discriminate in the provision of benefits if:
  - a. There is a difference in the cost to provide a certain benefit to a domestic partner or spouse and the contractor permits the employee to pay any excess costs.
  - b. The contractor is unable to provide a certain benefit, despite taking reasonable measures to do so.
  - c. The contractor elects not to provide benefits to employees based on their marital status or domestic partnership status, or elects not to provide benefits to employees' spouses and to employees' domestic partners.

**Commentary:** Tribes may wish to provide an additional exception for contractors who do not provide benefits to employees' opposite-sex domestic partners.

3. Every contract subject to this Section shall contain a statement by which the contractor certifies that the contractor is in compliance with this Section.
4. For purposes of this Section, "contract" includes contracts with a cumulative amount of [add appropriate amount, such as one hundred thousand dollars (\$100,000)] or more per contractor in each fiscal year.
5. The Tribal entity or other contracting agency shall enforce this section pursuant to its existing enforcement powers.

**Section 9. Equality in Workplace Appearance, Grooming, and Dress Standards.** The Tribe's [employment] [code / ordinance / statute / policy], is amended by adding one new section, to read as follows:

**[citation]. Workplace Appearance, Grooming, and Dress Standards.** Tribal employees shall adhere to reasonable workplace appearance, grooming, and dress standards, provided that an employee shall be permitted to appear or dress consistently with the employee's gender identity or gender expression. Nothing in this section shall prohibit the Tribe from:

1. Requiring employees in a particular occupation to wear a uniform.
2. Requiring an employee to wear a costume while that employee is portraying a specific character or dramatic role.

**Commentary:** Where a tribe has already adopted detailed workplace grooming and dress

*standards, this language could be added to supplement those standards. Note that “[s]ome organizations adopt norms about the standard of dress appropriate for their business—for example, no jeans or shorts during work hours—and these rules should apply equally to all employees, regardless of gender, gender identity or expression.”<sup>202</sup>*

**Section 10. Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, employee or representative, which the Tribe expressly asserts.

**Section 11. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 12. Effective Date.** This ordinance shall take effect [insert date or condition].

## CHAPTER 4: HOUSING, REAL PROPERTY TRANSACTIONS, PUBLIC ACCOMMODATIONS, AND PUBLIC SERVICES

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*"[S]exual orientation and gender identity-based discrimination in housing, health care, and public accommodations is alive and well. This is especially true for gay and transgender people of color."<sup>203</sup>*

### DISCRIMINATION IN HOUSING AND REAL PROPERTY TRANSACTIONS

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Home is an important place for all of us. Our homes provide us with a sense of security, comfort, and peace in an ever changing world. Home is where we make meals, where we gather with loved ones, and where our lives unfold within the space of four walls. Unfortunately, Two Spirit / LGBT people are often excluded from finding or keeping their homes, due to discrimination.

Housing discrimination against Two Spirit / LGBT people "takes a variety of forms. For example, a study by the Michigan Fair Housing Commission found significant discrimination in the housing and rental markets based on sexual orientation, including: "Thirty percent of same-sex couples were treated negatively when attempting to buy or rent property. Same-sex couples were shown less desirable properties, quoted higher rent prices, received less favorable customer service, or encountered an outright refusal to sell or rent properties. Gay individuals reported verbal harassment from landlords, realtors, and lenders."<sup>204</sup> A recent HUD study also found that same-sex couples experience significantly higher levels of discrimination when looking for a home to rent than heterosexual couples do.<sup>205</sup>

Other same-sex couples "have been told they cannot put both partners' names on a homeowner's insurance policy, which is important to do if both partners share ownership of the home. And still other couples have been discriminated against when filing a claim as some insurance companies have attempted to refuse claims or cancel policies on the grounds that the owners are 'unrelated.'"<sup>206</sup>

In addition, in a groundbreaking National Gay and Lesbian Task Force study, 39% of Native American transgender respondents reported having been refused a home or apartment due to discrimination, and 20% reported being evicted due to discrimination.<sup>207</sup> In that same study, 40% of Native transgender respondents said they had experienced homelessness at some point in their lives, nearly six times the rate of the general U.S. population (7.4%).<sup>208</sup> Moreover, only 32% of transgender people own homes, compared to 67% of the general population.<sup>209</sup>

We envision a world where Two Spirit / LGBT people can find housing, without fear of discrimination, and where everyone's home can be a place of peace, security, and comfort.

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## DISCRIMINATION IN PUBLIC ACCOMMODATIONS AND PUBLIC SERVICES

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*“[G]ay and transgender individuals may experience an outright refusal of services when attempting to access a host of public accommodations including restaurants, parks, hotels, libraries, buses, museums, and elsewhere simply because of their sexual orientation or gender identity.”<sup>210</sup>*

*Public accommodations* are generally defined as public and private entities that are used by the public. Examples of public accommodations include places of lodging (hotels, motels, inns), places where food and/or drinks are served (restaurants, bars), places of entertainment (casinos, theaters), retail establishments (stores, banks), educational institutions (colleges, universities), museums, health and social service providers (medical clinics, homeless shelters), and recreation or fitness centers (parks, health clubs).

*Public services* are services that are performed for the benefit of the public or its institutions, such as education, utilities, or transportation, as well as public facilities, departments, agencies, etc.

Discrimination in public accommodations and public services “may happen when services are denied outright, such as when someone is refused admission to a public place. Discrimination may also occur in other ways, such as when someone is offered less favorable service than others.”<sup>211</sup>

Two Spirit / LGBT individuals report high rates of discrimination in public spaces. For example, according to a 2001 survey of gay New York residents, “when eating at a restaurant, entering a store, or checking in at a hotel: Thirty-seven percent of respondents said they were made to feel unwelcome. Twenty-seven percent reported experiencing inappropriate treatment or hostility. Twenty-five percent were verbally harassed. Six percent had been denied service. Five percent experienced physical harassment.”<sup>212</sup>

Public accommodation discrimination rates are much higher for transgender individuals, of whom 53% reported being verbally harassed or disrespected in an area of public accommodation; 43% reported being denied equal treatment or service at least once in a place of public accommodation; and 8% reported being physically attacked or assaulted in places of public accommodation.<sup>213</sup>

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## APPROACHES TO PREVENTING DISCRIMINATION

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We have found few tribal provisions specifically addressing Two Spirit / LGBT discrimination in the areas of housing, real property transactions, public accommodations, or public services. In one example, the Tribal Court Clearinghouse’s model Tribal Housing Code makes it a defense to an eviction that the landlord “is evicting the tenant because of his/her race, sex, *sexual orientation*, religion, age, marital status, family status, or because the tenant is disabled.”<sup>214</sup> In another example, the Coquille Indian Housing Authority has stated that it: “does not discriminate and does not do business with others who discriminate on the basis of race, color, national origin, sex, religion, age, familial status, disability, marital status, ancestry, *sexual orientation*, or *gender identity* in the employment or provision of services.”<sup>215</sup>

Many states, including Oregon,<sup>216</sup> Washington,<sup>217</sup> Hawaii,<sup>218</sup> and California,<sup>219</sup> have adopted laws that protect against discrimination in the areas of housing, real property transactions, public accommodations, and/or public services.

In addition, a U.S. Department of Housing and Urban Development (HUD) rule, aimed at addressing discrimination in federal housing programs, creates three key changes to federal housing regulations. “First, it includes language that ensures same-sex couples and their children are recognized as families covered by HUD programs, including affordable housing assistance. Second, it prohibits owners and operators of HUD-assisted housing, or housing whose financing is insured by HUD, from inquiring about the sexual orientation or gender identity of an applicant or basing a decision on their perceived sexual orientation or gender identity. Third, it prohibits consideration of factors other than creditworthiness, including sexual orientation and gender identity, in the awarding of mortgage loans insured by the Federal Housing Administration.”<sup>220</sup>

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## SAMPLE NONDISCRIMINATION IN HOUSING, REAL PROPERTY TRANSACTIONS, PUBLIC ACCOMMODATIONS, AND PUBLIC SERVICES ORDINANCE

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The sample Nondiscrimination in Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance provided below has been compiled from non-discrimination laws adopted by Oregon, Washington, Hawaii, Connecticut, and California, and the District of Columbia. This sample ordinance allows tribes with existing anti-discrimination laws relating to housing, property transactions, public accommodations, and/or public services to expand the scope of protection under those laws to promote equality based on sexual orientation and gender identity. For tribes that have not yet adopted such anti-discrimination laws, the laws referenced above offer examples of comprehensive statutory schemes.

**Nondiscrimination in Housing, Real Property Transactions,  
Public Accommodations, and Public Services Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Nondiscrimination in Housing, Real Property Transactions, Public Accommodations, and Public Services Ordinance of the [insert name] Tribe.”

**Section 2. Policy.** It is the policy of the Tribe to secure for persons within the Tribe’s jurisdiction freedom from discrimination because of sexual orientation or gender identity in the areas of housing and real property transactions, public accommodations, and public services.

**Section 3. Purpose.** The purpose of this ordinance is to promote equality and to prohibit discrimination on the basis of sexual orientation and gender identity in the areas of housing and real property transactions, public accommodations, and public services.

**Section 4. Addition of Definitions.** The Tribe’s [property / housing] [code / ordinance / statute / policy], [cite to definitions provision], is amended by adding four new sections, to read as follows:

**[citation].** “Gender Identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

**[citation].** “Place of public accommodation” means a public or private entity that is used by the public, including a business, accommodation, refreshment, entertainment, recreation, social or health service, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

**[citation].** “Public service” means any service that is performed for the benefit of the public or its institutions, including a public facility, department, agency, board or commission, owned, operated or managed by or on behalf of the Tribe, or any entity or subdivision thereof.

**[citation].** “Sexual orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

**Section 5. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Housing and Real Property Transactions.** The Tribe’s [real property / housing] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding one new section, to read as follows:

**[citation]. Prohibiting Unfair Discriminatory Practices.** It is an unfair discriminatory practice for an owner, lessee, sublessee, assignee, broker, managing agent, or other person having the right to sell, rent or lease any real property or housing accommodation, or any financial institution to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair, or maintenance of any real property or housing accommodation, or any agent or employee or any of these:

1. To discriminate against any person or group of persons because of sexual orientation or gender identity in the terms, conditions, or privileges of the sale, rental, or lease of any real property or housing accommodation or in the furnishing of facilities or services in connection therewith.
2. To refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property or housing accommodation because of sexual orientation or gender identity.
3. To make or to cause to be made any written or oral inquiry concerning the sexual orientation or gender identity of any person seeking to purchase, rent, or lease any real property or housing accommodation.
4. To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation by persons of any particular sexual orientation or gender identity is unwelcome, objectionable, not acceptable, or not solicited.
5. To discriminate against the lessee or purchaser of any real property or housing accommodation, or against any prospective lessee or purchaser of the property or housing, because of the sexual orientation or gender identity of persons who may from time to time be present in or on the lessee's or owner's premises, at the invitation of the lessee or owner, as friends, guests, visitors, relatives, or in any similar capacity.

**Section 6. Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity in Public Accommodations and Public Services.** The Tribe's [non-discrimination / public accommodations / public services] [code / ordinance / statute / policy], [cite to provision prohibiting discrimination against members of protected classes], is amended by adding one new section, to read as follows:

**[citation]. Full and Equal Enjoyment of Public Accommodations and Public Services.** It is an unfair discriminatory practice:

1. To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or a public service because of his or her sexual orientation or gender identity.
2. For a place of public accommodation or a public service to directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular sexual orientation or gender identity is unwelcome, objectionable,

not acceptable, or not solicited.

3. To discriminate against any person in the access to, admission to, full utilization of, or benefit from any place of public accommodation or any public service because of his or her sexual orientation or gender identity.

**Commentary:** *A tribe wishing to limit requirements as to any of these protections may add exceptions, such as:*

This Section shall not apply to:

1. Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.
2. The rental or leasing to individuals of less than six rooms within a single housing accommodation by the occupant or owner of such housing accommodation if the occupant or owner or members of that person's family reside therein.

**Section 7. Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, employee or representative, which the Tribe expressly asserts.

**Section 8. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 9. Effective Date.** This ordinance shall take effect [insert date or condition].



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## CHAPTER 5: EDUCATION

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Protecting and encouraging our children is one of the most important and most powerful things we can do for the wellbeing of our communities. Our children are our greatest wonders and they carry with them all of our hopes for a better future. In schools, Two Spirit / LGBT children should “have the freedom to be open (or not) about their identity ... and to have their identity embraced rather than belittled or erased.”<sup>221</sup> Sadly, Two Spirit / LGBT children are often marginalized, harassed, and attacked in schools simply for being who they are.

Bullying of Two Spirit / LGBT students, as well as students perceived to be Two Spirit / LGBT or who associate with Two Spirit / LGBT students, is widespread—and its impacts are devastating. The Gay, Lesbian & Straight Education Network’s 2011 National School Climate Survey “found that the majority of LGBT students are faced with many obstacles in school affecting their academic performance and personal well-being.”<sup>222</sup> For example, LGBT youth experience bullying at school more frequently than their non-LGBT peers, and LGBT youth are twice as likely to face verbal harassment, exclusion, and physical attacks at school than non-LGBT students.<sup>223</sup> The study also found that 81.9% of LGBT students experienced harassment at school in the past year because of their sexual orientation, 63.5% felt unsafe at school because of their sexual orientation, and 29.8% skipped a day of school in the past month because of safety concerns.<sup>224</sup> Another study found that in Oregon, one in five LGBT youth have attempted suicide in the last year, and that more than half were harassed at school in the last thirty days.<sup>225</sup>

Transgender students often face even greater harassment.<sup>226</sup> In one study, 80% of transgender students reported feeling unsafe at school because of their gender expression.<sup>227</sup> Another study found that AI/AN individuals “expressing a transgender identity or gender non-conformity reported alarming rates of harassment (86%), physical assault (51%), and sexual assault (21%) in K-12; harassment was so severe that it led 19% to leave school. Eleven percent (11%) were also expelled due to bias.”<sup>228</sup>

We can change our laws and our culture to support young Two Spirit / LGBT people as they receive their education. We envision a school system where all our children can thrive being exactly who they are, so that they can grow up and give the world all that they were meant to be.

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### APPROACHES TO PREVENTING DISCRIMINATION

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Laws that protect against discrimination and bullying in schools can give administrators, teachers, and staff the tools needed to provide a safe environment for all students, set clear

expectations, and hold students accountable. In addition, it has been shown “that effective anti-bullying programs can cut bullying in half. Critical early intervention is ensured by clearly communicated standards, combined with set procedures for dealing with problems as they arise and a designated point person for each school.”<sup>229</sup>

Legislation prohibiting discrimination, bullying, and harassment in schools should explicitly protect students based on their actual or perceived sexual orientation, gender identity, and association with Two Spirit / LGBT people.<sup>230</sup> Although we did not find any tribal laws specifically addressing LGBT educational issues, approximately 18 states and the District of Columbia have adopted education-related laws covering sexual orientation and gender identity.<sup>231</sup>

At the federal level, Title IX of the Education Amendment Acts of 1972 prohibits sexual harassment of any student, as well as gender-based harassment (which includes harassment based on a student’s departure from sex stereotypes) in public schools and many private schools that receive federal funding. Although Title IX should protect transgender students from harassment and discrimination, courts continue to grapple with the issue.<sup>232</sup>

In addition, the proposed federal Student Non-Discrimination Act (SNDA), H.R. 1652; S. 1088, would prohibit public schools from discriminating against students on the basis of actual or perceived sexual orientation or gender identity. The SNDA would also prohibit discrimination against any student because of the actual or perceived sexual orientation or gender identity of a person with whom a student associates or has associated, prohibit retaliation, and authorize judicial proceedings to address alleged violations. The SNDA was introduced in the House on April 18, 2013, and in the Senate on June 4, 2013.<sup>233</sup>

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### SAMPLE EDUCATION EQUALITY ORDINANCE

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The sample Education Equality Ordinance provided below has been compiled from the laws of Oregon, California, Connecticut, and New Hampshire,<sup>234</sup> the federal Equal Access Act,<sup>235</sup> and school board policies for Vancouver, Burnaby, and Southeast Kootenay.<sup>236</sup>

#### **Education Equality Ordinance**

**Section 1. Title.** This ordinance shall be known as the “Education Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.** The [Tribal Council / Business Committee] recognizes and values the diversity found within the educational institutions of the [insert name of Tribe] (Tribe).

- A. The [Tribal Council / Business Committee] finds that:
1. A safe and civil school environment is necessary for students to learn and achieve.
  2. One of the Tribe's highest priorities is to protect our children from physical, emotional, and psychological violence, including in educational institutions within the Tribe's jurisdiction.
  3. Students and school personnel who are Two Spirit, gay, lesbian, bisexual, and transgender (collectively referred to herein as LGBT) face a unique set of challenges.
  4. All students and school personnel should be protected against discrimination, bullying, and harassment, including discrimination, bullying, and harassment based on actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.
  5. Schools with bullying prevention and intervention strategies foster a positive learning and teaching environment that supports academic achievement for all students and that helps students reach their full potential.
  6. Providing students with the opportunity to learn and develop in a safe and respectful society is a shared responsibility in which the Tribe and our schools play an important role. Promoting equality in education is essential to the political integrity, economic security, and health and welfare of the Tribe.
- B. It is the policy of the Tribe to promote, for each student enrolled in an educational institution within the Tribe's jurisdiction, a safe and caring learning environment that fosters and maintains respectful and responsible behaviors.

**Section 3. Purpose.** The purpose of this ordinance is to prohibit discrimination, harassment, and bullying, including on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals in educational institutions.

**Section 4. Definitions.** As used in this ordinance:

- A. "Bullying" means any act directed at a student or students, including cyberbullying, which takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation, or at any official school bus stop, which does or can reasonably be predicted to:
1. Place the student or students in reasonable fear of harm to the student's or students' person or property;
  2. Cause a substantially detrimental effect on the student's or students' physical or mental health;
  3. Substantially interfere with the student's or students' educational benefits, opportunities, or performance;

4. Substantially interfere with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school;
5. Create a hostile educational environment; or
6. Substantially disrupt the orderly operation of the school.

"Bullying" shall include actions motivated by an imbalance of power based on a student's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the student's association with another person and based on the other person's characteristics, behaviors, or beliefs.

- B. "Cyberbullying" means the use of electronic communication devices to harass, intimidate, or bully.
- C. "Discrimination" means unequal treatment of persons, for a reason which has nothing to do with legal rights or ability, including any act that unreasonably differentiates treatment, whether intended or unintended, or any act that is fair in form but discriminatory in operation. Discrimination does not include enforcement of an otherwise valid dress code or policy, as long as the code or policy provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.
- D. "Educational institution" means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery or pre-school system, and a business, nursing, professional, secretarial, technical, or vocational school.
- E. "Electronic devices" include but are not limited to telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.
- F. "Gender Identity" means an individual's actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.
- G. "LGBT" means Two Spirit, gay, lesbian, bisexual, or transgender identified people or people perceived to be Two Spirit, gay, lesbian, bisexual or transgender.
- H. "Perpetrator" means a person who engages in bullying or cyberbullying.
- I. "School personnel" means persons employed by, on contract with, agents of, or who volunteer in an educational institution, including but not limited to administrators, teachers, coaches, guidance counselors, social workers, counselors, psychologists, nurses, cafeteria workers, custodians, bus drivers, school resource officers, and security guards.
- J. "School property" means all real property and grounds, equipment, and vehicles used for school purposes.

K. “Sexual Orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

L. “Victim” means a person against whom bullying has been perpetrated.

**Section 5. Prohibiting Discrimination in Education.**

A. Each student enrolled in an educational institution within the Tribe’s jurisdiction shall have the right to participate fully in the educational process, free from discrimination, harassment, or intimidation, including discrimination, harassment, or intimidation on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.

B. No person shall be excluded from participation in or denied the benefits of any school program or activity on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.

C. Nothing in this ordinance shall prohibit an educational institution from using academic qualifications or achievements as criteria for admission or requiring information from applicants that relates to academic qualifications or achievements.

**Section 6. Bullying Prevention.** Bullying, including on the basis of actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups, is prohibited in all educational institutions.

A. No student shall be subjected to bullying:

1. During any school-sponsored education program or activity;
2. While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
3. Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
4. That occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a student’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.

B. Bullying prevention and intervention strategies must be modeled by all members of the school community.

C. If school personnel witness an act of discrimination, harassment, intimidation, or bullying, they shall take immediate steps to intervene when safe to do so.

D. This Section shall not be interpreted to prevent a victim from seeking redress under any other available civil or criminal law.

E. Nothing in this Section is intended to infringe upon any right to exercise free expression or the free exercise of religion or religiously based views to the extent protected under applicable law.

**Commentary:** Tribes may wish to add additional language to promote equality for student groups and meetings, such as:

**[citation]. Fair Meeting Opportunities.** It shall be unlawful for any educational institution that receives Tribal assistance and that has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any student who wishes to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meeting. An educational institution has a “limited open forum” when it provides an opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. Educational institutions shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if the educational institution uniformly provides that—

1. The meeting is voluntary and student-initiated;
2. There is no sponsorship of the meeting by the school, the government, or its agents or employees;
3. Employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
4. The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
5. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

**Section 7. Policies Required.** Within 180 days of the adoption of this ordinance, all educational institutions within the Tribe’s jurisdiction shall adopt written policies prohibiting discrimination, harassment, and bullying on the basis of sexual orientation, gender identity, or association with LGBT individuals or groups. The policies shall, at a minimum:

- A. Apply to all school personnel at the educational institution.
- B. Require the educational institution to widely publicize its anti-bullying policy and complaint process, including information about how to file a complaint, to students, parents, and the general public. The anti-bullying policy must be posted in all schools and offices, including staff lounges and student government meeting rooms and distributed, at a minimum, to school personnel, students, and parents and guardians on an annual basis.
- C. Require school personnel to provide educational services in a manner that respects the dignity and rights of all persons, without prejudice as to actual or perceived sexual orientation, gender identity, or association with LGBT individuals or groups.

- D. Set forth a specific process for receiving and investigating complaints of bullying, including a requirement that school personnel intervene if they witness bullying. The process must include a timeline to investigate and resolve complaints and an appeals process for the complainant, require all complaints to remain confidential, as appropriate, and require the school to protect complainants from retaliation.
- E. Require the school to offer materials to support victims of bullying.
- F. Be updated every two years and filed with the [Tribal Council / Business Committee / Tribal Administration] after being updated.
- G. Be developed, to the greatest extent practicable, with the involvement of students, parents, school personnel, Tribal leaders, elders, community representatives, and local law enforcement agencies.

**Section 8. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 9. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 10. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 11. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

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**SAMPLE SCHOOL POLICY AND PROCEDURE TO ADDRESS  
BULLYING, HARASSMENT, AND INTIMIDATION**

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The sample School Policy and Procedure Prohibiting Harassment, Intimidation, and Bullying provided below is based on Washington State’s Model Anti-Bullying Policy and Model Anti-Bullying Procedure.<sup>237</sup> Please note that the Education Equality Ordinance, above, if adopted, would require the policy to be developed with significant community involvement.

**Policy: Prohibiting Harassment, Intimidation, and Bullying**

The [name] School (“School”) is committed to providing a safe educational environment for all students, employees, parents/legal guardians, volunteers, and patrons that is free from harassment,

intimidation, or bullying. “Harassment, intimidation, or bullying” means any intentionally written message or image— including those that are electronically transmitted—verbal, or physical act, including but not limited to one shown to be motivated by race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental or physical disability or other distinguishing characteristics, when an act:

- Physically harms a student or damages the student’s property;
- Has the effect of substantially interfering with a student’s education;
- Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment; or
- Has the effect of substantially disrupting the orderly operation of the school.

Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying.

“Other distinguishing characteristics” can include but are not limited to: physical appearance, clothing or other apparel, socioeconomic status, and weight.

“Intentional acts” refers to the individual’s choice to engage in the act rather than the ultimate impact of the action(s).

### **Behaviors/Expressions**

Harassment, intimidation, or bullying can take many forms including, but not limited to slurs, rumors, jokes, innuendos, demeaning comments, drawings, cartoons, pranks, gestures, physical attacks, threats or other written, oral, physical, or electronically transmitted messages or images.

This policy is not intended to prohibit expression of religious, philosophical, or political views, provided that the expression does not substantially disrupt the educational environment. Many behaviors that do not rise to the level of harassment, intimidation, or bullying may still be prohibited by other School policies or building, classroom, or program rules.

### **Training**

This policy is a component of the School’s responsibility to create and maintain a safe, civil, respectful, and inclusive learning community and shall be implemented in conjunction with comprehensive training of students, staff, and volunteers.

### **Prevention**

The School will provide students with strategies aimed at preventing harassment, intimidation, and bullying. In its efforts to train students, the School will seek partnerships with families, law enforcement, and other community agencies.

### **Interventions**

Interventions are designed to remediate the impact on the targeted student(s) and others impacted by the violation, to change the behavior of the perpetrator, and to restore a positive school climate. The School will consider the frequency of incidents, developmental age of the student, and severity of the conduct in determining intervention strategies. Interventions will range from counseling, correcting behavior and discipline, to law enforcement referrals.



**Retaliation/False Allegations**

Retaliation is prohibited and will result in appropriate discipline. It is a violation of this policy to threaten or harm someone for reporting harassment, intimidation, or bullying.

It is also a violation of School policy to knowingly report false allegations of harassment, intimidation, and bullying. Students or employees will not be disciplined for making a report in good faith. However, persons found to knowingly report or corroborate false allegations will be subject to appropriate discipline.

**Compliance Officer**

The superintendent will appoint a compliance officer as the primary School contact to receive copies of all formal and informal complaints and ensure policy implementation. The name and contact information for the compliance officer will be communicated throughout the School.

**Procedure: Prohibiting Harassment, Intimidation, and Bullying****A. Introduction**

The [name] School (“School”) strives to provide students with optimal conditions for learning by maintaining a school environment where everyone is treated with respect and no one is physically or emotionally harmed.

In order to ensure respect and prevent harm, it is a violation of School policy for a student to be harassed, intimidated, or bullied by others in the school community, at school sponsored events, or when such actions create a substantial disruption to the educational process. The school community includes all students, school employees, school board members, contractors, unpaid volunteers, families, patrons, and other visitors.

Student(s) will not be harassed because of their race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental or physical disability, or other distinguishing characteristics.

Any school staff who observes, overhears, or otherwise witnesses harassment, intimidation, or bullying or to whom such actions have been reported must take prompt and appropriate action to stop the harassment and to prevent its reoccurrence.

**B. Definitions**

Aggressor – is a student, staff member, or other member of the school community who engages in the harassment, intimidation, or bullying of a student.

Harassment, intimidation, or bullying – is an intentional electronic, written, verbal, or physical act that:

- Physically harms a student or damages the student’s property;
- Has the effect of substantially interfering with a student’s education;
- Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
- Has the effect of substantially disrupting the orderly operation of the school.

Conduct that is “substantially interfering with a student’s education” will be determined by considering a targeted student’s grades, attendance, demeanor, interaction with peers, participation in activities, and other indicators.

Conduct that may rise to the level of harassment, intimidation, and bullying may take many forms, including, but not limited to, slurs, rumors, jokes, innuendoes, demeaning comments, drawings, cartoons, pranks, ostracism, physical attacks or threats, gestures, or acts relating to an individual or group whether electronic, written, oral, or physically transmitted messages or images. There is no requirement that the targeted student actually possess the characteristic that is the basis for the harassment, intimidation, or bullying.

Incident Reporting Form – may be used by students, families, or staff to report incidents of harassment, intimidation, or bullying. A sample form is provided [designate where the form is available].

Retaliation – when an aggressor harasses, intimidates, or bullies a student who has reported incidents of bullying.

Staff – includes, but is not limited to, educators, administrators, counselors, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, classified staff, substitute and temporary teachers, volunteers, or paraprofessionals (both employees and contractors).

Targeted Student – is a student against whom harassment, intimidation, or bullying has allegedly been perpetrated.

### **C. Relationship to Other Laws**

The School will ensure its compliance with all applicable laws regarding harassment, intimidation, or bullying. Nothing in this procedure prevents a student, parent/guardian, or the School from taking action to remediate harassment or discrimination based on membership in a legally protected class under Tribal, state, or federal law.

### **D. Prevention**

#### ***Dissemination***

In each school [, and on the School’s web site], the School will prominently post information on reporting harassment, intimidation, and bullying; the name and contact information for making a report to a school administrator; and the name and contact information for the School compliance officer. The School’s policy and procedure will be available in each school in a language that families can understand.

Annually, the [superintendent or other administrator] will ensure that a statement summarizing the policy and procedure is provided in student, staff, volunteer, and parent handbooks, is available in school and School offices and/or hallways, or is posted on the School’s web site.

#### ***Education***

Annually, students will receive age-appropriate information on the recognition and prevention of harassment, intimidation, or bullying at student orientation sessions and on other appropriate

occasions. The information will include a copy of the Incident Reporting Form [and a link to a Web-based form].

### **Training**

Staff will receive annual training on the School's policy and procedure, including staff roles and responsibilities, how to monitor common area, and the use of the School's Incident Reporting Form.

### **Prevention Strategies**

The School will implement a range of prevention strategies including individual, classroom, and School-level approaches. Whenever possible, the School will implement evidence-based prevention programs that are designed to increase social competency, improve school climate, and eliminate harassment, intimidation, and bullying in schools.

### **E. Compliance Officer**

The School compliance officer will:

1. Serve as the School's primary contact for harassment, intimidation, and bullying.
2. Provide support and assistance to the principal or designee in resolving complaints.
3. Receive copies of all Incident Reporting Forms, discipline Referral Forms, and letters to parents providing the outcomes of investigations.
4. Ensure implementation of the policy and procedure by overseeing the investigative processes, including ensuring that investigations are prompt, impartial, and thorough.
5. Assess the training needs of staff and students to ensure successful implementation throughout the School, and ensure staff receive annual training.
6. In cases where, despite school efforts, a targeted student experiences harassment, intimidation, or bullying that threatens the student's health and safety, the compliance officer will facilitate a meeting between School staff and the child's parents/guardians to develop a safety plan to protect the student.

**Commentary:** *A sample student safety plan is available at: <http://www.k12.wa.us/SafetyCenter/default.aspx>.*

### **F. Staff Intervention**

All staff members shall intervene when witnessing or receiving reports of harassment, intimidation, or bullying. Minor incidents that staff are able to resolve immediately, or incidents that do not meet the definition of harassment, intimidation, or bullying, may require no further action under this procedure.

### **G. Filing an Incident Reporting Form**

Any student who believes he or she has been the target of unresolved, severe, or persistent harassment, intimidation, or bullying, or any other person in the school community who observes or receives notice that a student has or may have been the target of unresolved, severe, or persistent harassment, intimidation, or bullying, may report incidents verbally or in writing to any staff member.

**Commentary:** *Sample Bullying Prevention and Intervention Incident Reporting forms are available at: [www.doe.mass.edu/bullying/ModelPlan\\_appxA.docx](http://www.doe.mass.edu/bullying/ModelPlan_appxA.docx) and <http://www.wellesley.k12.ma.us/sites/wellesleyps/files/file/file/bullyingreprtngform.pdf>.*

## H. Addressing Bullying – Reports

### **Step 1: Filing an Incident Reporting Form**

In order to protect a targeted student from retaliation, a student need not reveal his identity on an Incident Reporting Form. The form may be filed anonymously, confidentially, or the student may choose to disclose his or her identity (non-confidential).

1. Anonymous individuals may file a report without revealing their identity. No disciplinary action will be taken against an alleged aggressor based solely on an anonymous report. Schools may identify complaint boxes or develop other methods for receiving anonymous, unsigned reports. Possible responses to an anonymous report include enhanced monitoring of specific locations at certain times of day or increased monitoring of specific students or staff. (Example: An unsigned Incident Reporting Form dropped on a teacher’s desk led to the increased monitoring of the boys’ locker room in 5th period.)
2. Confidential individuals may ask that their identities be kept secret from the accused and other students. Like anonymous reports, no disciplinary action will be taken against an alleged aggressor based solely on a confidential report. (Example: A student tells a playground supervisor about a classmate being bullied but asks that nobody know who reported the incident. The supervisor says, “I won’t be able to punish the bullies unless you or someone else who saw it is willing to let me use their names, but I can start hanging out near the basketball court, if that would help.”)
3. Non-confidential individuals may agree to file a report non-confidentially. Complainants agreeing to make their complaint non-confidential will be informed that due process requirements may require that the School release all of the information that it has regarding the complaint to any individuals involved in the incident, but that even then, information will still be restricted to those with a need to know, both during and after the investigation. The School will, however, fully implement the anti-retaliation provision of this policy and procedure to protect complainants and witnesses.

### **Step 2: Receiving an Incident Reporting Form**

All staff are responsible for receiving oral and written reports. Whenever possible, staff who initially receive an oral or written report of harassment, intimidation, or bullying shall attempt to resolve the incident immediately. If the incident is resolved to the satisfaction of the parties involved, or if the incident does not meet the definition of harassment, intimidation, or bullying, no

further action may be necessary under this procedure.

All reports of unresolved, severe, or persistent harassment, intimidation, or bullying will be recorded on a School Incident Reporting Form and submitted to the principal or designee, unless the designee is the subject of the complaint.

***Step 3: Investigations of Unresolved, Severe, or Persistent Harassment, Intimidation and Bullying***

1. All reports of unresolved, severe, or persistent harassment, intimidation, or bullying will be investigated with reasonable promptness. Any student may have a trusted adult with them throughout the report and investigation process.
2. Upon receipt of the Incident Reporting Form that alleges unresolved, severe, or persistent harassment, intimidation or bullying, the School designee will begin the investigation. If there is potential for clear and immediate physical harm to the complainant, the School will immediately contact law enforcement and inform the parent/guardian.
3. During the course of the investigation, the School will take reasonable measures to ensure that no further incidents of harassment, intimidation, or bullying occur between the complainant and the alleged aggressor. If necessary, the School will implement a safety plan for the student(s) involved. The plan may include changing seating arrangements for the complainant and/or the alleged aggressor in the classroom, at lunch, or on the bus; identifying a staff member who will act as a safe person for the complainant; altering the alleged aggressor's schedule and access to the complainant, and other measures.
4. Within two (2) school days after receiving the Incident Reporting Form, the school designee will notify the families of the students involved that a complaint was received and direct the families to the School's policy and procedure on harassment, intimidation, and bullying.
5. In rare cases, where after consultation with the student and appropriate staff (such as a psychologist, counselor, or social worker) the School has evidence that it would threaten the health and safety of the complainant or the alleged aggressor to involve his or her parent/guardian, the School may initially refrain from contacting the parent/guardian in its investigation of harassment, intimidation, and bullying. If professional school personnel suspect that a student is subject to abuse and neglect, they must follow School policy for reporting suspected cases to [name of applicable child protective services department].
6. The investigation shall include, at a minimum:
  - An interview with the complainant.
  - An interview with the alleged aggressor.
  - A review of any previous complaints involving either the complainant or the alleged aggressor.
  - Interviews with other students or staff members who may have knowledge of the alleged incident.
7. The principal or designee may determine that other steps must be taken before the investigation is complete.

8. The investigation will be completed as soon as practicable but generally no later than five (5) school days from the initial complaint or report. If more time is needed to complete an investigation, the School will provide the parent/guardian and/or the student with weekly updates.
9. No later than two (2) school days after the investigation has been completed and submitted to the compliance officer, the principal or designee shall respond in writing or in person to the parent/guardian of the complainant and the alleged aggressor stating:
  - The results of the investigation.
  - Whether the allegations were found to be factual.
  - Whether there was a violation of policy.
  - The process for the complainant to file an appeal if the complainant disagrees with results.
10. Because of the legal requirement regarding the confidentiality of student records, the principal or designee may not be able to report specific information to the targeted student's parent/guardian about any disciplinary action taken unless it involves a directive that the targeted student must be aware of in order to report violations.
11. If the School chooses to contact the parent/guardian by letter, the letter will be mailed to the parent/guardian of the complainant and alleged aggressor by U.S. mail, with return receipt requested, unless it is determined, after consultation with the student and appropriate staff (psychologist, counselor, social worker) that it could endanger the complainant or the alleged aggressor to involve his or her family. If professional school personnel suspect that a student is subject to abuse or neglect, as mandatory reporters they must follow School policy for reporting suspected cases to [name of applicable child protective services department].
12. If the incident is unable to be resolved at the school level, the principal or designee shall request assistance from the [Tribal Council or other applicable entity].

***Step 4: Corrective Measures for the Aggressor***

After completion of the investigation, the School will institute any corrective measures necessary. Corrective measures will be instituted as quickly as possible, but in no event more than five (5) school days after contact has been made to the families or guardians regarding the outcome of the investigation. Corrective measures that involve student discipline will be implemented according to School policy [name and title of policy]. If the accused aggressor is appealing the imposition of discipline, the School may be prevented by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded.

If in an investigation a principal or principal's designee found that a student knowingly made a false allegation of harassment, intimidation, or bullying, that student may be subject to corrective measures, including discipline.

***Step 5: Targeted Student's Right to Appeal***

1. If the complainant or parent/guardian is dissatisfied with the results of the investigation, they may appeal to the [superintendent or other applicable person or entity] by filing a

written notice of appeal within five (5) school days of receiving the written decision. The [superintendent or other applicable person or entity] will review the investigative report and issue a written decision on the merits of the appeal within five (5) school days of receiving the notice of appeal.

2. If the targeted student remains dissatisfied after the initial appeal to [superintendent or other applicable person or entity], the student may appeal to the [Tribal Council or other applicable person or entity] by filing a written notice of appeal with the [Tribal Council or other applicable person or entity] on or before the fifth (5) school day following the date upon which the complainant received the superintendent's written decision.
3. An appeal before the [Tribal Council or other applicable person or entity] must be heard on or before the tenth (10) school day following the filing of the written notice of appeal to the school board. The [Tribal Council or other applicable person or entity] will review the record and render a written decision on the merits of the appeal on or before the fifth (5) school day following the termination of the hearing, and shall provide a copy to all parties involved. The [Tribal Council or other applicable person or entity]'s decision will be the final School decision.

#### ***Step 6: Discipline/Corrective Action***

The School will take prompt and equitable corrective measures within its authority on findings of harassment, intimidation, or bullying. Depending on the severity of the conduct, corrective measures may include counseling, education, discipline, and/or referral to law enforcement.

Corrective measures for a student who commits an act of harassment, intimidation, or bullying will be varied and graded according to the nature of the behavior, the developmental age of the student, or the student's history of problem behaviors and performance. Corrective measures that involve student discipline will be implemented according to [name and title of policy].

If the conduct was of a public nature or involved groups of students or bystanders, the School should strongly consider school wide training or other activities to address the incident.

If staff have been found to be in violation of this policy and procedure, the School may impose employment disciplinary action, up to and including termination. Contractor violations of this policy may include the loss of contracts.

#### ***Step 7: Support for the Targeted Student***

Persons found to have been subjected to harassment, intimidation, or bullying will have appropriate School support services made available to them, and the adverse impact of the harassment on the student shall be addressed and remedied as appropriate.

#### **I. Immunity/Retaliation**

No school employee, student, or volunteer may engage in reprisal or retaliation against a targeted student, witness, or other person who brings forward information about an alleged act of harassment, intimidation, or bullying. Retaliation is prohibited and will result in appropriate discipline.

**J. Other Resources**

Students and families should use the School's complaint and appeal procedures as a first response to allegations of harassment, intimidation, and bullying. However, nothing in this procedure prevents a student, parent/guardian, school, or School from taking action to remediate discrimination or harassment based on a person's membership in a legally protected class under local, state or federal law.

A harassment, intimidation, or bullying complaint may also be reported to the following Tribal, state or federal agencies:

- [add applicable agencies]
- Department of Justice Community Relations Service: (877) 292-3804, [www.justice.gov/crt/](http://www.justice.gov/crt/)

**K. Other School Policies and Procedures**

Nothing in this policy or procedure is intended to prohibit discipline or remedial action for inappropriate behaviors that do not rise to the level of harassment, intimidation, or bullying as defined herein, but which are, or may be, prohibited by other School or school rules.

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**SAMPLE SCHOOL POLICY PROHIBITING DISCRIMINATION ON THE BASIS OF GENDER IDENTITY**

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A number of school districts have created rules or policies to address transgender and gender nonconforming student issues, such as updating educational records, providing access to appropriate restrooms, and bullying prevention.<sup>238</sup> In addition, some states, including Washington and Connecticut, have adopted laws allows transgender student athletes to participate in sports consistent with their gender identity, irrespective of the gender listed on their student records.<sup>239</sup>

The sample Policy Prohibiting Discrimination on the Basis of Gender Identity provided below is based on San Francisco Unified School District Regulations and the Gay, Lesbian, and Straight Education Network's *Model District Policy on Transgender and Gender Nonconforming Students*.<sup>240</sup>

**Policy Prohibiting Discrimination on the Basis of Gender Identity**

**A. Introduction**

Transgender and gender nonconforming students must be protected from discrimination, harassment, and intimidation in our school. Staff must respond appropriately to ensure that the



school is free from any such discrimination, harassment, or intimidation.

This policy is meant to advise school staff regarding transgender and gender nonconforming student concerns, in order to create a safe learning environment for all students and to ensure that every student has equal access to all components of their educational program.

## **B. Scope**

This policy applies to the entire school community, including educators, school staff, students, parents, and volunteers, and covers conduct that takes place in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles and at bus stops. This policy also pertains to usage of electronic technology and electronic communication that occurs in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles and at bus stops, and on school computers, networks, forums, and mailing lists.

## **C. Definitions**

*Bullying* means written, verbal, or physical conduct that adversely affects the ability of one or more students to participate in or benefit from the school's educational programs or activities by placing the student (or students) in reasonable fear of physical harm, including cyberbullying.

*Gender Identity* means an individual's actual or perceived gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth. [insert citation].

*Gender Expression* means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms.

*Transgender* is an umbrella term used by many individuals of any sex whose appearance, personal characteristics or behavior differ from stereotypes about how men and women are supposed to be; a political word that binds together multiple communities of people who experience trans oppression.

*Gender Nonconforming* is a term used to describe for individuals whose gender expression is different from societal expectations related to gender.

*Gender* is a term for socially constructed roles, behaviors, activities, and attributes. Gender is often defined as "feminine" and "masculine."

NOTE: Transgender and gender nonconforming youth use a number of words to describe their lives and gendered experiences (such as trans, transsexual, transgender, Two Spirit, male-to-female (MTF), female-to-male (FTM), bi-gender, trans man, trans woman, etc.). In general, school staff should employ those terms which the students use to describe themselves or should ask which terms students may prefer—and avoid terms that make these students uncomfortable.

"*Harassment*" means written, verbal or physical conduct that adversely affects the ability of one or more students to participate in or benefit from the school's educational programs or activities because the conduct is so severe, persistent or pervasive.

**D. Bullying, Harassment, and Discrimination Prohibited**

Discrimination, bullying, and harassment on the basis of sex, sexual orientation, or gender identity or expression are prohibited. It is the responsibility of all staff to ensure that all students, including transgender and gender nonconforming students, have a safe school environment.

The scope of this responsibility includes ensuring that any incident of discrimination, harassment, or bullying is given immediate attention, including investigating the incident, taking appropriate corrective action, and providing students and staff with appropriate resources.

Complaints alleging discrimination or harassment based on a person's actual or perceived gender identity or expression are to be taken seriously and handled in the same manner as other discrimination, bullying, or harassment complaints.

**E. Names/Pronouns**

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity that is exclusively and consistently asserted at school. Students are not required to obtain a court ordered name and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity.

This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student's gender identity. The requested name shall be included in the school's information system, in addition to the student's legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

**F. Official Records**

The school shall maintain a mandatory permanent pupil record that includes a student's legal name and legal gender. However, to the extent that the school is not legally required to use a student's legal name and gender on other school records or documents, the school shall use the name and gender preferred by the student. School IDs, for example, are not legal documents and should use the student's preferred name.

The school will change a student's official record to reflect a change in legal name or gender upon receipt of documentation that such change has been made pursuant to a court order, or through amendment of state or federally-issued identification.

In situations where school staff or administrators are required by law to use or to report a transgender student's legal name or gender, such as for purposes of standardized testing, school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information.

**G. Privacy / Confidentiality**

Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information.

All medical information relating to transgender and gender nonconforming students shall be kept

confidential, in accordance with applicable privacy laws. School staff shall not disclose information that may reveal a student's transgender status to others, including parents and other school staff, unless legally required to do so or unless the student has authorized such disclosure. The fact that a student chooses to disclose his or her transgender status to staff or other students does not authorize school staff to disclose other medical information about the student.

When contacting the parent or guardian of a transgender student, school staff should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise.

## **H. Access to Gender-Segregated Activities and Areas**

To the extent possible, the school shall reduce or eliminate the practice of unnecessarily segregating students by gender. In situations where students are segregated by gender, students should be included in the group that corresponds to their gender identity.

### ***Restroom Accessibility***

Students shall have access to the restroom that corresponds to their gender identity that is exclusively and consistently asserted at school. Where available, a single stall bathroom may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a single stall bathroom shall be a matter of choice for a student, and no student shall be compelled to use such bathroom.

### ***Locker Room Accessibility***

The use of locker rooms by transgender students shall be assessed on a case-by-case basis, with the goals of maximizing the student's social integration and equal opportunity to participate in physical education classes and sports, ensuring the student's safety and comfort, and minimizing stigmatization the student. In most cases, transgender students should have access to the locker room that corresponds to their gender identity consistently asserted at school, like all other students.

Any student – transgender or not – who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain, a P.E. instructor's office in the locker room, or a nearby health office restroom), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students). Any alternative arrangement should be provided in a way that protects the student's ability to keep his or her transgender status private. In no case shall a student be required to use a locker room that conflicts with the student's gender identity.

### ***Physical Education and Athletic Activities***

All students shall be permitted to participate in physical education classes and intramural sports in a manner consistent with their gender identity. Furthermore, unless precluded by state interscholastic association policies, all students shall be permitted to participate in interscholastic athletics in a manner consistent with their gender identity.

## **I. Dress Codes**

Students shall have the right to dress in accordance with their gender identity that is exclusively

and consistently asserted at school, within the constraints of the school dress code. School staff shall not enforce the school's dress code more strictly against transgender and gender nonconforming students than other students.

#### **J. Gender Segregation in Other Areas**

As a general rule, in any other circumstances where students are separated by gender in school activities (such as class discussions, field trips, etc.), students shall be permitted to participate in accordance with their gender identity that is exclusively and consistently asserted at school. Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case by case basis. In such circumstances, staff shall make a reasonable effort to provide an available accommodation that can address any such concerns.

#### **K. Training and Professional Development**

The school shall conduct staff training for all school staff on their responsibilities under applicable laws and this policy. Information regarding this policy shall be incorporated into training for new school employees.

To the extent funding is available, the school shall implement ongoing professional development to build the skills of all staff members to prevent, identify and respond to bullying, harassment and discrimination. The content of such professional development shall include, but not be limited to: (i) developmentally appropriate strategies to prevent bullying incidents; (ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents; (iii) information regarding the complex interaction and power differential that can take place between and among a perpetrator, target and witnesses to the bullying; (iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment, such as transgender and gender nonconforming students; (v) information on the incidence and nature of cyberbullying; and (vi) internet safety issues as they relate to cyberbullying.

#### **L. Publication; Updates**

This policy will be distributed at least annually to school staff, students, parents or guardians, and the general public, and will also be included in any student codes of conduct, disciplinary policies, student handbooks, and school websites. This policy will also be posted in all school offices, including staff lounges and student government meeting rooms.

This policy will be updated every two years and will be filed with the [Tribal Council / Business Committee / Tribal Administration] after being updated.

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## CHAPTER 6: HEALTH CARE; END OF LIFE

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*“Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights. Discrimination against LGBT persons has been associated with high rates of psychiatric disorders, substance abuse, and suicide.”<sup>241</sup>*

The Two Spirit / LGBT community experiences significant health disparities. For example, Two Spirit / LGBT people “are at a higher risk for cancer, mental illnesses, and other diseases, are more likely to smoke, drink alcohol, use drugs, and engage in other risky behaviors,”<sup>242</sup> “are more likely to attempt suicide, and are less likely to have insurance than their heterosexual or nontransgender counterparts due to social stigma, culturally incompetent health care services, and other forms of discrimination.”<sup>243</sup> Moreover, LGBT youth have an elevated risk for homelessness, suicide attempts, and depression, and higher rates of substance use than heterosexual youth.

In addition, “[w]hile HIV and AIDS affect Americans across the country and from all walks of life, the epidemic continues to disproportionately impact gay and bisexual men, transgender women, youth 13-24 and communities of color.”<sup>244</sup> For American Indians / Alaska Natives (AI/AN) in particular, HIV and AIDS “pose a major threat.”<sup>245</sup> American Indians are diagnosed with HIV/AIDS at rate of 10.4 per 100,000, and 3,492 AI /AN individuals had been diagnosed with AIDS as of 2007. AI/AN persons with HIV/AIDS are also more likely to be younger in age than non-Native persons with HIV/AIDS, and experience the shortest survival time of any race or ethnicity. And, while the majority of AI/AN HIV exposure has been through male-to-male sexual contact or injection drug use, the percentage contracting HIV through heterosexual contact is increasing.<sup>246</sup>

Aging-related health care issues are also a growing concern for the Two Spirit / LGBT community. There are approximately 1.5 million LGBT elders in the U.S., and by 2030 there will be 3 million LGBT people age 65 and older.<sup>247</sup> Significant health disparities impact LGBT adults as they age, including disability, physical and mental distress, victimization, discrimination, and lack of access to supportive aging and health services.<sup>248</sup> However, often, “LGBT older people don't have access to adequate health care, affordable housing and other social services they need. This can be the result of institutionalized heterosexism, racism, ageism and/or transphobia. But for whatever reason, what it means is that many LGBT older adults—especially people of color—have reduced incomes, and they often avoid the very care providers they need to remain healthy and independent due to perceived or real discrimination when seeking services.”<sup>249</sup>

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## HEALTH CARE DISCRIMINATION

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NOTE: *Transgender Healthcare Insurance Discrimination is covered in Chapter 4, above.*

Two Spirit / LGBT people experience “high rates of discrimination” when attempting to access quality health care,<sup>250</sup> including:

- An outright denial of health care services (experienced by 8% of gay people and 27% of transgender people);
- Harsh or abusive language from health care professionals (experienced by 11% of gay respondents and 21% of transgender respondents);
- A refusal by health care professional to touch them or the use of excessive precautions during treatment (experienced by 11% of gay respondents and 15% of transgender respondents);
- Being personally blamed for their health status or problems (experienced by 12% of gay respondents and 20% of transgender respondents); and
- Physically rough or abusive treatment from a health care professional (experienced 4% of gay respondents and 8% of transgender respondents).<sup>251</sup>

In addition to facing discrimination in the provision of health care services, Two Spirit / LGBT people and those living with HIV “are especially vulnerable to breaches of confidentiality in medical settings, and to violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters.”<sup>252</sup>

Two Spirit / LGBT people of color experience even greater discrimination. A 2009 Lambda Legal study of national health care fairness showed that “in nearly every category of discrimination covered in this survey, people of color respondents were more likely than their white counterparts to experience discrimination and substandard care.”<sup>253</sup> According to the study, Native respondents were far more likely to experience discrimination and substandard care: gay, lesbian, and bisexual Native respondents were most likely to be refused care (14%); experience harsh or abusive language (22%); be blamed for their health status (23%); and experience physically rough or abusive treatment (12%).<sup>254</sup> In addition, Native respondents living with HIV were four times more likely than other respondents living with HIV to experience physically rough or abusive treatment (16%).<sup>255</sup>

The study shows that discrimination against transgender / gender nonconforming Native respondents is even more prevalent: 46% were refused care and 20% experienced physically rough or abusive treatment.<sup>256</sup>

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## APPROACHES TO PREVENTING HEALTH CARE DISCRIMINATION

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Some tribal and/or Indian Health Service (IHS) facilities have adopted policies prohibiting health care discrimination on the basis of sexual orientation. For example, Klamath Tribal Health & Family Services' Patient Rights & Responsibilities states that every patient shall have a right to: "Obtain services without discrimination on the basis of race, ethnicity, gender, age, religion, physical or mental disability, *sexual orientation or preference*, marital status, socio-economic status or diagnosis/condition,"<sup>257</sup> and the Indian Health Center of Santa Clara Valley "serve[s] people from all walks of life, regardless of race, creed, color, religion, sex, *sexual orientation* or disability and take[s] pride in serving our diverse patients and clients."<sup>258</sup>

In addition, the Non-Discrimination Policy Statement of the U.S. Department of Health and Human Services (HHS) includes a prohibition against discrimination by HHS employees on the basis of gender identity or sexual orientation when serving beneficiaries of HHS programs:

It is the policy of the U.S. Department of Health and Human Services to serve all individuals who are eligible for its programs without regard to any non-merit factor. Accordingly, the Department does not tolerate discrimination by its employees when they are serving individuals who are eligible for its programs based on any non-merit factor, including race, national origin, color, religion, sex, *sexual orientation, gender identity*, disability (physical or mental), age, status as a parent, or genetic information.<sup>259</sup>

At the state level, public accommodation laws in approximately 22 states prohibit health care discrimination based on a person's sexual orientation, and prohibit health care discrimination based on a person's gender identity in approximately 14 states.<sup>260</sup>

Finally, the American Medical Association (AMA) has adopted over 25 rules and opinions calling for the equal treatment of LGBT patients, doctors, and medical students, including:

- An AMA ethics opinion, which is a model for how all physicians should practice medicine, states: "Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other basis that would constitute invidious discrimination."<sup>261</sup>
- The AMA has acknowledged that while a doctor has the right to refuse particular treatments or procedures for religious reasons (for example, abortion), this right does not allow doctors to refuse treatment to particular groups of people (such as LGBT persons).<sup>262</sup>

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## HOSPITALS AND ELDER CARE FACILITY VISITATION

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Many Two Spirit / LGBT hospital patients and elder care facility residents face discriminatory treatment with respect to who is permitted to make decisions on their behalf. For example, when no paperwork designates a surrogate decision maker, laws around medical decision-making often limit such rights to a patient's biological family members.

In addition, to promote privacy and protect the security of the facility, hospitals and eldercare facilities place restrictions on who is permitted to visit and when. These rules are often based on the facility's definition of "family"—and may exclude same-sex partners if the facility's definition of family is a narrow one. As a result, many Two Spirit / LGBT people have been denied the right to visit their dying partner due to the lack of recognition of their status as a couple.

In 2010, President Obama issued a Presidential Memorandum to the HHS Secretary on Hospital Visitation. In the memorandum, the President acknowledged the plight of patients who are denied the comfort and support of loved ones simply because the loved ones do not fit into a traditional concept of "family."<sup>263</sup> HHS has since issued new rules governing the treatment that LGBT patients and their families receive in federally funded hospitals. "The new regulations require hospitals to have written visitation policies; to inform patients of their right to designate visitors, including a same-sex spouse or domestic partner; and to not discriminate with respect to visitation rights based on sexual orientation, gender identity, and other characteristics."<sup>264</sup>

Although individuals can complete paperwork to designate a health care decision-maker (advance healthcare directives), and instruct doctors, care providers, and hospital staff about visitation preferences, legislation and inclusive hospital policies could further equality in these areas. Hospital visitation laws can take the form of relationship recognition laws (laws recognizing same-sex marriage, civil unions, or domestic partnerships),<sup>265</sup> designated healthcare agent statutes,<sup>266</sup> or designated visitor statutes governing hospital visitation.<sup>267</sup>

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### SAMPLE NONDISCRIMINATION POLICIES FOR HEALTH AND ELDER CARE FACILITIES

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Non-discrimination policies for hospitals, clinics, medical centers, eldercare facilities, and other health care facilities can demonstrate a "commitment to providing equal treatment and care for all persons, regardless of sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors. Such policies create a safe space in which all patients feel safe and comfortable receiving treatment."<sup>268</sup>



The sample public accommodations provisions set forth in Chapter 4, above, prohibit health care discrimination based on a person's sexual orientation and gender identity. The sample Health / Elder Care Facility Non-Discrimination Policy provided below, could also be included in a tribal health or elder care facility's policies or patient or resident bill of rights. This sample policy is based on the Gay and Lesbian Medical Association's *Non-Discrimination Guidelines for Hospitals* and model language developed by the Human Rights Campaign.<sup>269</sup> For tribal health and elder care facilities that have not adopted a patient bill of rights, other examples include Johns Hopkins, Northwestern Memorial Hospital, California Pacific Medical Center, and Oregon Health & Science University.<sup>270</sup>

### **Health / Elder Care Facility Non-Discrimination Policy**

- A. [Name of hospital, medical center, clinic, or eldercare facility] does not discriminate against any person on the basis of sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors. Our anti-discrimination policy applies to admission, treatment, discharge, or other participation in any of [Name of facility]'s programs, services or activities including, but not limited to:
- All [patient / resident] admissions;
  - All care, whether inpatient, outpatient, or emergency in nature;
  - All [patients / residents'] room, floor, or section assignments or transfers, except in those cases where patient safety or health condition is a necessary consideration;
  - Visitation rights; and
  - Employee assignments to [patient / resident] services.
- B. [Name of facility] will not refer [patients / residents] to hospital-related entities that are known to be in violation of any applicable non-discrimination laws or policies.
- C. [Name of department] is designated to monitor compliance with this policy, to institute a grievance procedure, to investigate allegations of non-compliance involving employees or applicants for employment, and to take action as needed as a result of any such investigation. Questions concerning this policy as they relate to employees or applications for employment should be directed to the [Name of department].
- D. The [Patient / Resident] Bill of Rights of the [name of health or elder care facility] is hereby amended to include the following:
- The following right applies to all [patients / residents] and includes the parents, legal representatives, and family of these [patients / residents]:
- The [patient / resident] has the right to competent, considerate and respectful care in a safe setting that fosters the [patient's / resident's] comfort and dignity and is free from all forms of abuse and harassment, including abuse or harassment based on sexual orientation, gender identity or expression, marital status, or other non-medically relevant factors.

- E. All [patients / residents] shall have the right to designate visitors, including a same-sex spouse or domestic partner.

**Commentary:** *A sample Hospital Visitation Authorization Form is available at [http://www.hrc.org/files/assets/resources/Hospital\\_Visitation.pdf](http://www.hrc.org/files/assets/resources/Hospital_Visitation.pdf).*

- F. [Name of facility] adopts the following definition of “family” for purposes of our facility-wide visitation policy:

“Family” means any person(s) who plays a significant role in an individual’s life. This may include a person(s) not legally related to the individual. Members of “family” include spouses, domestic partners, and both different-sex and same-sex significant others.

“Family” includes a minor patient’s parents, regardless of the gender of either parent. Solely for purposes of visitation policy, the concept of parenthood is to be liberally construed without limitation as encompassing legal parents, foster parents, same-sex parent, step-parents, those serving in loco parentis, and other persons operating in caretaker roles.

**Commentary:** *The federal Nursing Home Reform Act is a comprehensive federal statute that sets forth standards of care and rights for people living in Medicare and/ or Medicaid-certified nursing facilities. Among other things, the NHRA guarantees that: nursing facility staff provide “care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being”; staff maintain patients’ “abilities in activities of daily living,” such as bathing and dressing, unless health problems require changes; patients have “free choice” to choose a physician and to be fully informed about care and treatment; and patients be “free from interference, coercion, discrimination, and reprisal” for exercising their rights under the FNHRA. <sup>271</sup> Tribal elder care facilities may wish to consider adopting similar protections.<sup>272</sup>*

## END OF LIFE

*“[R]ights concerning the death of a spouse/partner and the benefits available to a widower are ‘critically important,’ especially for same-sex couples who may or may not be protected pursuant to state [or tribal] law.”<sup>273</sup>*

One of the most powerful and painful times in any person’s life involves the loss of a loved one. Not only can the grief be overwhelming for the survivors, but the end of life can open a floodgate of legal questions. For example, Two Spirit / LGBT couples whose relationships are not recognized by law may be denied their late partner’s benefits and pensions and/or rights to shared property, even if they were together as a couple for many years.

The privileges, immunities, rights, benefits and responsibilities granted to or imposed on members of same-sex couples at the end of life vary by jurisdiction. Some of the critical end-of-life issues facing same-sex couples include:

- Living will / advance directive;<sup>274</sup>
- The right to make medical decisions (including hospital visitation) (*discussed above*);
- Priority in claiming human remains;
- Priority for a guardianships/conservatorships;<sup>275</sup>
- The right to make anatomical gifts (organ donation);<sup>276</sup>
- Inheritance rights during probate;<sup>277</sup>
- The right to bring a wrongful death action, receive death benefits and crime victim's compensation benefits, and/or file worker's compensation death claims;<sup>278</sup> and
- The rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).<sup>279</sup>

Some jurisdictions, such as Washington and Oregon, have adopted broad domestic partnership laws that treat domestic partners like spouses would be treated for various purposes under the state's laws.<sup>280</sup> Such statutory schemes affect end of life laws in several ways. For example, a decedent's (the person who has passed) domestic partner would be considered the "surviving spouse" for purposes of intestate succession (the person who has passed did not leave a will), and would take priority over the decedent's other family (other than issue) in receiving a portion or all of the decedent's intestate estate.<sup>281</sup> Also, a domestic partner would be protected as a spouse to make decisions about whether to continue or cease life-sustaining treatment (unless a guardian or other health care representative has been appointed).<sup>282</sup>

Other jurisdictions, such as Wisconsin and California, have adopted specific provisions extending to domestic partners the end of life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses.

We envision a world in which all people, including Two Spirit / LGBT people, can experience this final phase of their lives with dignity and with the assurance that their families will be taken care of and provided for. We believe that no one should be prevented from spending life's final moments without family by their side.

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**SAMPLE END-OF-LIFE EQUALITY ORDINANCE**

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The sample End-of-Life Equality Ordinance provided below is based primarily on the Oregon Family Fairness Act<sup>283</sup> and Washington law.<sup>284</sup> This draft ordinance allows tribes that have existing end-of-life laws (probate, guardian and conservator, advance directive, etc.) but lack recognition for same-sex marriage to provide end-of-life protections for same-sex domestic partners and their families through one broad ordinance. Tribes could also consider amending the language of each individual ordinance or policy that provides end-of-life related rights, benefits, or protections to a spouse or based on a marriage in order to specifically extend such rights, benefits, or protections to same-sex domestic partners. For example, Wisconsin<sup>285</sup> and California<sup>286</sup> laws specifically address domestic partner rights.

**End-of-Life Equality Ordinance**

**Section 1. Title.** This ordinance shall be known as the “End-of-Life Equality Ordinance of the [insert name] Tribe.”

**Section 2. Declaration and Policy.** It is the policy of the Tribe that for purposes of the end-of-life privileges, immunities, rights, benefits, and responsibilities that are granted or imposed under Tribal law, domestic partners shall be treated the same as married spouses.

**Section 3. Purpose.** The purpose of this ordinance is to extend to domestic partners the same end-of-life privileges, immunities, rights, benefits, and responsibilities that are granted to or imposed on spouses under Tribal law.

**Section 4. Definitions.** As used in this ordinance:

A. “Domestic partner” means a person joined in a valid domestic partnership that has not been terminated, except by the death of one partner.

B. “Domestic partnership” means a legal relationship, entered into in person between two eligible persons of the same sex, which has been registered and certified pursuant to Tribal law, or a domestic partnership or civil union that is valid in the jurisdiction in which it was created.

C. “End of life” means related to probate and inheritance, medical decision-making, hospital visitation, guardianships, and conservatorships, as well as rights to:

1. Claim human remains;
2. Make anatomical gifts;
3. Bring a wrongful death action;
4. Receive death benefits;

5. Receive crime victim's compensation benefits;
6. File worker's compensation death claims; and
7. Surviving spouse benefits, including but not limited to rights of spousal allowance, homestead allowance, and income for the surviving spouse (*i.e.*, life insurance, pension benefits, social security benefits, etc.).

**Section 5. Health Care and End of Life Privileges, Immunities, Rights, Benefits, and Responsibilities Granted to and Imposed on Domestic Partners.**

A. Any privilege, immunity, right, benefit, or responsibility granted or imposed by the Tribe's health care and end-of life laws, including but not limited to the [insert name and reference to the Tribe's probate, guardianship and conservatorship, medical decision-making, etc. codes or policies], to an individual because the individual is or was a spouse, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.

B. For the purposes of this ordinance:

1. The terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to domestic partnerships or domestic partners as to marital relationships and married persons.
2. References to dissolution of marriage shall apply equally to domestic partnerships that have been terminated, dissolved, or invalidated.
3. Where necessary to implement this ordinance, gender-specific terms, such as husband and wife, used in any statute, rule, or other law, shall be construed to be gender neutral and applicable to individuals in domestic partnerships.

**Section 6. Repeal of Inconsistent Ordinances.** All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent of any conflict with this ordinance.

**Section 7. Severability.** If any provision of this ordinance or the application of any provision of this ordinance to any person or circumstance is held invalid by a court of competent jurisdiction, that provision shall be severed from the ordinance and the remainder of the ordinance shall remain in full force and effect.

**Section 8. No Waiver of Sovereign Immunity.** Nothing in this ordinance shall be construed as a waiver of sovereign immunity of the Tribe or of any Tribal official, agent, or employee.

**Section 9. Effective Date.** [This Ordinance shall become effective immediately upon final passage / This ordinance shall take effect [insert date or condition].]

## CHAPTER 7: BIAS-MOTIVATED (HATE) CRIMES

*“Laws — especially criminal laws — are an expression of society’s values. Hate crime laws both express the social value of equality and foster the development of those values.”<sup>287</sup>*

*“Hate crimes are violent manifestations of intolerance and have a deep impact on not only the immediate victim but the group with which that victim identifies him or herself. They affect community cohesion and social stability. A vigorous response is therefore, important both for individual and communal security.”<sup>288</sup>*

Generally, hate crimes, or bias-motivated crimes, are offenses that are motivated by hatred or bias against a victim based on his or her race, religion, sexual orientation, gender identity, disability, ethnicity, national origin, or other protected characteristic.<sup>289</sup> “The targeted activity—the selection of a victim—is an integral part of the underlying crime.”<sup>290</sup> “It is this motive that makes hate crimes different from other crimes.”<sup>291</sup>

In addition, bias-motivated crimes “differ from ordinary crimes not only because of the motivation of the offender, but also because of the impact on the victim.”<sup>292</sup> “Hate crimes are designed to intimidate the victim and the victim’s community on the basis of their personal characteristics. Such crimes send a message to the victim that they are not welcome; they have the effect of denying the victim’s right to full participation in society. They also send a message to members of the community sharing the characteristic that they also do not belong, and could equally be a target.”<sup>293</sup> A hate or bias-motivated crime thus “victimizes not only the immediate target but every member of the group that the immediate target represents.”<sup>294</sup>

Therefore, bias-motivated crimes “can damage the fabric of society and fragment communities.”<sup>295</sup> They “can cause a broad ripple of discomfiture among members of a targeted group [and] can act like a virus, quickly spreading feelings of terror and loathing across an entire community. Apart from their psychological impacts, violent hate crimes can create tides of retaliation and counterretaliation.”<sup>296</sup>

### “Bias-Motivated” vs. “Hate” Crimes

Hate crimes are commonly referred to as “bias-motivated crimes.” Both terms are used in this Toolkit. The sample tribal law provisions set forth herein use the term “bias-motivated crimes” to expand coverage to include crimes that evidence a bias, if not hate, toward members of a protected group.

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## IMPORTANCE OF LEGISLATION ADDRESSING BIAS-MOTIVATED CRIME

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*“Hate crime laws are important. By explicitly condemning bias motives, they send a message to offenders that a just and humane society will not tolerate such behavior. By recognizing the harm done to victims, they convey to individual victims and to their communities the understanding that the criminal justice system serves to protect them.”<sup>297</sup>*

In addition to their damaging impacts on victims, bias-motivated crimes “have the potential to divide societies, and to create cycles of violence and retaliation. For this reason, a vigorous response to such crimes is necessary.”<sup>298</sup> “Codifying the social condemnation of hate crimes into law is important to affected communities, can help build trust in the criminal justice system, and thus can repair social fissures.”<sup>299</sup>

Moreover, “[i]f hate crimes are treated like other crimes and are not recognized as a special category they are often not dealt with properly. This can manifest itself in ways such as: investigators disbelieving the victim or failing to properly investigate allegations of bias motive; prosecutors minimizing the offence when choosing charges; and courts failing to apply their powers to increase sentences to reflect the motives of the perpetrator.”<sup>300</sup>

In contrast, if the bias motive is considered in the prosecution of hate crimes, “such public acknowledgement reassures the victim that his or her experience has been fully recognized. This in turn can inspire trust in other members of the community that hate crimes will not go unpunished.”<sup>301</sup>

### ***Characteristics of Bias-Motivated Crimes***

- From 1991-2009, over 100,000 hate crimes were reported to the FBI. Hate crimes based on sexual orientation were the second most common type (after race-biased hate crimes), representing 18% of all FBI-reported hate crimes reported in 2009 (1,436 offenses). It is important to note that “although a staggering number of hate crimes were documented in 2009, these crimes are significantly underreported. Actual numbers are much higher.”
- The majority of bias-motivated crimes are committed by strangers, often young white males against persons of other races. Studies estimate that approximately half of all hate crimes are committed by people under 20, with 17-26% committed by juveniles.
- “Most hate crimes are committed not by members of an organized hate group but by individual citizens... The majority of offenders—and passive observers—are merely individuals who believe racial and ethnic stereotypes and act on spur-of-the-moment impulses. Frequently alcohol or drug use is a factor in the commission of hate crimes.”
- “Perhaps the most salient characteristic of bias crimes is that they are more likely to involve a physical assault [and] also are more likely to involve physical injuries. Offenders often use what hate crime experts call ‘imprecise weapons of opportunity,’ such as bricks, bats, clubs, tree limbs, and box cutters. As a result, hate crimes tend to be excessively brutal and result in more serious injuries than common criminal attacks.”

- Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.*

The process of developing and adopting bias-motivated crime laws can also have significant practical benefits for a jurisdiction. First, the legislative and community discussions involved in the proposal and adoption of bias-motivated crime laws “focus attention and raise awareness of the extent and nature of the crimes. The process of passing legislation can thereby improve awareness of and responses to hate crime.”<sup>302</sup> In addition, once legislation has been adopted, training for police, prosecutors, and judges on the implementation of bias-motivated crime laws increases their skills and knowledge, thereby creating an improved criminal justice response to bias-motivated crimes.<sup>303</sup> Specific bias-motivated crime laws also allow for better data collection, which provides the information needed to more effectively allocate training and resources.<sup>304</sup> Finally:

An improved criminal justice response raises the confidence of affected communities. This leads to information and cooperation from communities who may otherwise be wary of the police. This leads to more investigations being resolved, not only in relation to hate crime but also into other matters in which police require community assistance. Thus, legislation increases awareness and enables better scrutiny, which in turn leads to more effective implementation and improved police-community relations.<sup>305</sup>

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#### CHALLENGES TO LEGISLATION ADDRESSING BIAS-MOTIVATED CRIME

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Adopting and enforcing effective bias-motivated crime legislation can be challenging. For example, some commentators believe that “criminal acts motivated by bias can easily be confused with forms of expression protected by the U.S. Constitution”<sup>306</sup> or the Indian Civil Rights Act. Opponents of hate crime laws argue that punishing an offender more harshly when that person commits a crime because of a bias against a class of persons penalizes his or her thoughts and violates the first amendment.”<sup>307</sup>

Enforcement is another challenge in the implementation of successful hate crime legislation. “Even the most comprehensive and coherent law will fail to achieve the aims of the legislature if it is not enforced.”<sup>308</sup>

Finally, an increased sentence for a hate crime only comes at the end of a long sequence of events. “In order for an offender to be subject to a hate crime law, a victim must be willing to report the crime, the police must investigate it carefully, the prosecutor must file a hate crime charge, and the court must convict. Any misstep in the sequence means a lost opportunity to combat hate crime.”<sup>309</sup>



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## APPROACHES TO PREVENTING BIAS-MOTIVATED CRIMES

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Our research has not uncovered any tribal laws specifically addressing hate crimes. At the state level, laws in only 31 states plus the District of Columbia include sexual orientation-based hate crimes, while only 12 states and D.C. have laws that cover gender identity or gender expression-based hate crimes.<sup>310</sup>

The federal Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) was enacted in 2009. The HCPA gives the U.S. Department of Justice (DOJ) authority to investigate and prosecute violent crimes when the victim is selected because of his or her actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. The HCPA only protects individuals from bias-motivated violence (though it does not protect individuals from non-violent hate crimes or hate crimes committed solely against another's property). To prosecute a hate crime based on sexual orientation or gender identity under the HCPA, the government must allege and prove beyond a reasonable doubt that there is an explicit and discrete connection between the hate crime and interstate or foreign commerce. If the DOJ cannot prove such a nexus to federal jurisdiction, the crime cannot be prosecuted as a federal hate crime.<sup>311</sup>

In general, the jurisdictions that have adopted hate crime legislation have used four different types of statutes that address bias-motivated crimes: substantive offenses; penalty enhancements; prohibiting specific actions; and bias-motivated crime training and reporting requirements.<sup>312</sup> Model tribal provisions are provided below for each type of statute. Because we have not found any tribal bias-motivated crime laws, the model provisions provide protection for a range of characteristics—not just sexual orientation and gender identity. In addition, because drafting a hate crime law or revising an existing one involves a series of choices for tribal lawmakers, the model provisions include extensive commentary that discusses key policy choices.

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### PART A: CRIMINAL OFFENSES WITH BIAS MOTIVE

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Some jurisdictions have chosen to prohibit general behaviors motivated by bias. “These statutes punish motive and criminal conduct as one offense.”<sup>313</sup> There are thus two elements to these statutes: 1) a criminal offense; and 2) a bias motive.<sup>314</sup> First, the crime must involve an act that would constitute an offense under ordinary criminal law, such as intimidation, threats, property damage, assault, murder, or other criminal offense.<sup>315</sup>

Second, the criminal offense must have been committed with a bias motive. “This means that the perpetrator intentionally chose the *target* of the crime because of some *protected characteristic*. The *target* may be one or more people, or it may be property associated with a group

that shares a particular characteristic. A *protected characteristic* is a characteristic shared by a group, such as “race”, language, religion, ethnicity, nationality, or any other similar common factor.”<sup>316</sup>

Jurisdictions vary in the types of characteristics they protect.<sup>317</sup> For example, Oregon law recognizes hate crimes motivated by the victim’s race, color, religion, national origin, and sexual orientation, including gender identity.<sup>318</sup> Washington law criminalizes “malicious harassment” and violence against individuals because of their sexual orientation (including gender identity or expression, which is included in the definition of sexual orientation).<sup>319</sup> California’s hate crimes statute protects against crimes motivated by gender, and defines “gender” as “the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim’s sex at birth.”<sup>320</sup>

The following sample hate crime provision prohibiting general behaviors motivated by bias, which could be added to tribal criminal codes, is based on model hate crime legislation developed by the Anti-Defamation League and the Human Rights Campaign,<sup>321</sup> as well as the laws of Oregon,<sup>322</sup> California,<sup>323</sup> and Washington.<sup>324</sup>

**Section x. Definitions.** For purposes of this Section:

A. “Association with a person or group with these actual or perceived characteristics” includes advocacy for, identification with, or being on the grounds owned or rented by, or adjacent to, a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of the characteristics protected in this Section.

B. “Bias-motivated crime” means a crime described in this Section that is intentionally committed, in whole or in part, because of the offender’s perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim, or the victim’s association with a person or group with these actual or perceived characteristics.

**Commentary:** *This is a fairly comprehensive list of protected characteristics. Tribes could consider adding to or deleting characteristics from this list. “The choice of protected characteristics is one of the most important aspects of hate crime laws. There is no precise answer as to which characteristics should be included, but they are usually ones that are apparent or noticeable to others and thus more easily targeted by offenders.”<sup>325</sup>*

C. “Ethnicity” means affiliation with a group of people united or classified together on the basis of common history, nationality or geographic distribution;

D. “Gender identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

E. “Homeless status” means that a person:

1. Lacks a fixed, regular, and adequate nighttime residence; or
2. Has a primary nighttime residence that is:
  - a. A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or
  - b. A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

F. “In whole or in part because of” means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.

G. “Mental or physical disability” means that a person suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict his or her ability to perform the normal activities of daily living.

H. “National origin” includes citizenship, country of origin, and tribal affiliation.

I. “Property” means any tangible personal property or real property.

J. “Race” means a group of people united or classified together on the basis of common history, nationality or geographic distribution.

K. “Reasonable person” means a reasonable person who is a member of a victim’s race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or citizenship.

L. “Religion” means a system of faith and worship, especially such a system recognized and practiced by a particular church, sect or denomination.

M. “Sex” means the condition of being biologically female or male.

N. “Sexual orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.

O. “Threaten” means to communicate, directly or indirectly, the intent to:

1. Cause bodily injury immediately or in the future to the person threatened or to any other person; or
2. Cause physical damage immediately or in the future to the property of a person threatened or that of any other person.

P. “Victim” includes, but is not limited to, a person, family, group, individual, community center, educational facility, entity, office, meeting hall, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.

**Section xx. Bias-Motivated Crimes.**

A. A person commits a bias-motivated crime if he or she intentionally commits one of the following acts, in whole or in part, because of his or her perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim, or the victim’s association with a person or group with these actual or perceived characteristics.

**Commentary:** Tribal legislators will need to determine how “motive” should be defined in the law. “In the popular conception of a hate crime, the offender acts out of hatred or hostility toward a particular characteristic of the victim, such as the victim’s skin colour or ethnic or national origin or religion... This is not, however, a requirement of all hate crime laws. Some hate crime laws only require that the offender intentionally chose the victim because of some protected characteristic of that victim.”<sup>326</sup>

The sample language above addresses crimes that are intentionally committed in whole or in part “because of” the offender’s perception of the victim’s protected characteristic. This approach is broader because it encompasses those offenders who may harbor no hostility toward their victims but nevertheless selected them based on prejudices or stereotyped information about victim vulnerabilities. “For several reasons, a discriminatory selection law is both easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent. First, a discriminatory selection law does not require that hate be proven as an element of the offence. When a hate crime law requires ‘hostility,’ it requires law enforcement to make an assessment of an offender’s mental state — an exercise that may be difficult and one for which most law enforcement are not trained.”<sup>327</sup>

1. Causes physical injury to the victim or another person;
2. Subjects another to offensive physical contact;
3. Causes physical damage to or destruction of the property of the victim or another person; or
4. Tamper or interferes with property, having no right to do so nor reasonable ground to believe that the person has such right, with the intent to cause substantial inconvenience;

5. Threatens a specific person or group of persons, and places that person or members of the group of persons in reasonable fear of harm to person or property.
  - a. The fear must be a fear that a reasonable person would have under all the circumstances.
  - b. Words alone do not constitute a bias-motivated crime unless the context or circumstances surrounding the words indicate the words are a threat.
  - c. Threatening words do not constitute a bias-motivated crime if it is apparent to the victim that the person does not have the ability to carry out the threat.

**Commentary:** *Another option would be to insert specific tribal code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and other appropriate statutorily proscribed criminal conduct.*

- B. It is not a defense to a bias-motivated crime that the accused was mistaken that the victim:
1. Was of or a member of a certain race, color, religion, national origin, gender, sexual orientation, labor organization, marital status, age, homeless status, or economic or social status;
  2. Has a certain mental or physical disability;
  3. Held certain political affiliation or beliefs;
  4. Participated in activities in or on behalf of a labor organization or against a labor organization; or
  5. Was associated with a person or group with these actual or perceived characteristics.
- C. Evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged. Nothing in this chapter shall affect the rules of evidence governing impeachment of a witness.

**Commentary:** *Tribes may wish to provide examples of permissible uses of this evidence.*

- D. A bias-motivated crime under this Section is a \_\_\_\_\_ misdemeanor/ felony.

**Commentary:** *The degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense. Alternate language could read:*

If the underlying offense named in subsection A of this Section is a [Class X] misdemeanor, the offender may be fined not more than [ ] or imprisoned for not more than [ ] years, or both. If the underlying offense named in subsection A of this Section is a felony, the offender may be fined not more than [ ] or imprisoned for not more than [ ], or both.

E. Every person who commits another crime during the commission of a bias-motivated Crime may be punished and prosecuted for the other crime separately.

F. The penalties provided in this Section for a bias-motivated crime do not preclude the victim from seeking any other remedies otherwise available under law.

**Commentary:** *Alternate language could read:*

F. Independent of the existence of any criminal prosecution and the outcome thereof, the victim of a hate crime, or a member of the victim's immediate family, may bring a civil action for damages or other appropriate relief. The court may award actual damages, including damages for emotional distress, or punitive damages. A judgment may include attorney's fees and costs.

*It is also important to note that one of the biggest policy decisions for lawmakers seeking to adopt bias-motivated crime legislation is determining whether the law should create a new substantive offense, or operate as a penalty enhancement for existing crimes, or do both. "There are certain advantages to enacting a law making hate crime a substantive offense. Because part of the importance of hate crime law — for both the individual victim and society at large — is the symbolic value of labeling the offence, a substantive hate crime law explicitly condemns the prohibited bias motive. When hate crimes are enacted as substantive offences, the crime usually has greater visibility and hate crime data is easier to collect. Thus, a substantive hate crime law fulfills the expressive function of criminal law."*<sup>328</sup>

*However, a "substantive hate crime offence requires motive to be proved in order for the accused to be convicted. Prosecutors may be reluctant to press charges regarding a substantive offence if they believe it will be harder to prove."<sup>329</sup> "Training for prosecutors and investigators as to the indicators of motive is an important aspect of overcoming such problems."<sup>330</sup>*

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## PART B: PROHIBITING SPECIFIC ACTIONS

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Some jurisdictions prohibit specific intimidating actions. For example, California, Florida, and Ohio "have passed laws prohibiting specific activity at specific places, such as vandalism and intentional disturbances at places of worship."<sup>331</sup> In addition, "Florida and the District of Columbia have banned acts such as burning a cross or placing a swastika or other symbol on another's property with the intent to intimidate."<sup>332</sup>

The following sample provision is based on model hate crime legislation developed by the Anti-Defamation League<sup>333</sup> and Oregon law.<sup>334</sup>

**Section x. Institutional Vandalism.**

- A. A person commits the crime of institutional vandalism by knowingly abusing:
1. Any Tribal cultural center, long house, community building, sacred site, pow wow grounds, or place used for Tribal community, cultural, traditional, historical, or ceremonial purposes;
  2. Any church, synagogue, or other building, structure, or place used for religious worship or other religious purpose;
  3. Any cemetery, mortuary, or other facility used for the purpose of burial or memorializing the dead;
  4. Any school, educational facility, or community center;
  5. Any Tribal or public monument or structure;
  6. The Tribal flag;
  7. The grounds adjacent to, and owned or rented by, any institution, facility, building, structure, or place described in Subsections (1), (2), (3), or (4) above; or
  8. Any personal property contained in any institution, facility, building, structure, or place described in Subsections (1), (2), (3), or (4) above.
- B. For purposes of this Section, “abusing” means defacing, damaging, defiling, or otherwise physically mistreating in a manner likely to outrage public sensibilities.
- C. Institutional vandalism is punishable as follows:
1. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system] if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another.
  2. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system] if the person does any act described in Subsection (A) that which causes damage to, or loss of, the property of another in an amount in excess of five hundred dollars (\$500).
  3. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe’s penalty classification system] if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another in an amount in excess of one thousand dollars (\$1,000).

4. Institutional vandalism is a [describe level of offense or punishment, based on the Tribe's penalty classification system]if the person does any act described in Subsection (A) that causes damage to, or loss of, the property of another in an amount in excess of five thousand dollars (\$5,000).
5. In determining the amount of damage to or loss of property, damage includes the cost of repair or replacement of the property that was damaged or lost.

D. Irrespective of any criminal prosecution or result thereof, any person or entity incurring injury to his or her person or damage or loss to his or her property as a result of conduct in violation of Subsection (A) of this section shall have a civil action against any and all persons who have violated Subsection (A). Upon prevailing in such civil action, the plaintiff may recover:

1. Both special and general damages, including damages for emotional distress;
2. Punitive damages; and/or
3. Reasonable attorney fees and costs.

### PART C: ENHANCED PENALTIES

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Some jurisdictions provide enhanced penalties for criminal acts motivated by bias.<sup>335</sup> “In Wisconsin, for example, State law provides that the maximum penalty for an offense is enhanced if the defendant intentionally selects the person against whom a crime is committed because of the ‘race, religion, color, disability, sexual orientation, national origin, or ancestry of that person.’”<sup>336</sup> Similarly, in both Oregon and Arizona, evidence of a bias-related motive is an “aggravating factor” allowing judges to depart from sentencing guidelines and impose lengthier terms of imprisonment.<sup>337</sup>

The following sample penalty enhancement language, which could be added to tribal criminal codes, is based on Florida<sup>338</sup> and Wisconsin law.<sup>339</sup>

*NOTE: In state and federal courts, sentencing enhancements based on a bias-related motive must be pled in the indictment and proved beyond a reasonable doubt, unless admitted in a guilty plea.*

#### **Section x. Penalty Enhancements for Certain Offenses.**

**A. Definitions.** For purposes of this Section:



1. “Association with a person or group with these actual or perceived characteristics” includes advocacy for, identification with, or being on the ground owned or rented by, or adjacent to a community center, educational facility, family, individual, office, meeting hall, place of worship, private institution, public agency, library, or other entity, group, or person that has, or is identified with people who have, one or more of the characteristics protected in this Section.
2. “Bias-motivated crime” means a crime described in this Section that is intentionally committed, in whole or in part, because of the offender’s perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim’s association with a person or group with these actual or perceived characteristics.
3. “Gender identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.
4. “Homeless status” means that the victim:
  - a. Lacks a fixed, regular, and adequate nighttime residence; or
  - b. Has a primary nighttime residence that is:
    - i. A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or
    - ii. A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.
5. “In whole or in part because of” means that the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. There is no requirement that the bias be a main factor, or that the crime would not have been committed but for the actual or perceived characteristic.
6. “Mental or physical disability” means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict the victim’s ability to perform the normal activities of daily living.
7. “National origin” includes citizenship, country of origin, and tribal affiliation.
8. “Sexual orientation” means a person’s actual or perceived heterosexuality, homosexuality, bisexuality, asexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression, or behavior differs from that traditionally associated with the individual’s designated sex at birth.

9. “Victim” includes, but is not limited to, a person, family, group, individual, community center, educational facility, entity, office, meeting hall, place of worship, private institution, public agency, library, or other victim or intended victim of the offense.

**B. Penalty enhancements for bias-motivated crimes.** Penalties shall be reclassified as provided in this Section if a person intentionally selects the victim of the crime or selects the property that is damaged or otherwise affected by the crime, in whole or in part, because of his or her perception of the race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim’s association with a person or group with these actual or perceived characteristics, whether or not the person’s perception was correct.

**C. Reclassification of Penalties.** The penalty for any felony or misdemeanor described in this Section shall be reclassified as follows:

1. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].
2. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].
3. [describe original and new level of offense or punishment, based on the Tribe’s penalty classification system].

**Commentary:** *This section should be tailored to fit the Tribe’s classification scheme. The reclassification should provide for the penalty to be at least one degree more serious than that imposed for commission of the underlying offense.*

**D. Perception or Knowledge of Defendant.** It is an essential element of this Section that the record reflects that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this Section.

**E. Special Verdict Required.** This Section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in Subsections (B) and (D).

**F. Not Applicable to Certain Crimes.** This Section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception regarding another's race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or association with a person or group with these actual or perceived characteristics, is required for a conviction for that crime.

**G. Civil Action.** A person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this Section has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

**Commentary:** *Penalty enhancements (also referred to as “aggravating sentencing clauses”) can also be used to create a hate crime law. Penalty enhancements increase the penalty for a base offence when it is committed with a bias motive. When penalty enhancements are used to punish hate crimes, the question of bias motive is usually considered when the offender is sentenced. In other words, an offender must first be found guilty of the base offence, and then the court considers whether there is sufficient evidence of bias to apply a penalty enhancement.”<sup>340</sup>*

*Additional punishment for hate crimes are justified for three main reasons. “First, the symbolic value of the law can and should be utilized to demonstrate society’s rejection of crimes based on bias. ... Second, criminal law penalizes the harm caused. As noted previously, hate crimes have a greater impact on the victim than ordinary crimes, and they also affect others who are members of the victim’s group. The justification for increased sentences is therefore the additional harm caused both to the individual and the community. Third, hate crime laws punish the greater culpability of the perpetrator. The perpetrator’s motive makes the crime more serious than if the offence had been committed without such motive.”<sup>341</sup>*

*A penalty enhancement hate crime law has advantages and disadvantages. Penalty enhancements are easier to incorporate into a penal code, can apply to a wide range of crimes, and failure to prove the facts supporting an enhancement will not jeopardize a conviction on the underlying offense. However, if a court’s decision to enhance the penalty on the basis of a bias motive is not part of the public record, “an accused’s criminal history cannot be used to determine whether he or she has a past history of bias motivated crimes. Moreover, in some states, previous convictions for bias crimes, even if publicly recorded, may only under very limited conditions be allowed as evidence in a later case. Without explicit recognition of the bias motive, the hate crime law loses much of its symbolic weight. Thus, a penalty enhancement, while easier to implement, may not fulfill the expressive function of recognizing and condemning a prohibited bias.”<sup>342</sup>*

**NOTE:** *Tribes may also choose to adopt a combination of approaches to hate crime laws, which could address specific substantive crimes requiring a bias motive, as well as a general penalty enhancement statute for other crimes.*

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## PART D: BIAS-MOTIVATED CRIME REPORTING AND TRAINING

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Many of the jurisdictions that have adopted one of the approaches to hate crime legislation described above also mandate specific bias-motivated crime training and/or data collection requirements. For example, Arizona law requires that the department of public safety must report

and collect data of criminal offenses based on sexual orientation,<sup>343</sup> Massachusetts' crime report unit must collect, summarize, and report hate crime data to the attorney general and others,<sup>344</sup> and the Louisiana Commission on Human Rights must collect and study statewide hate crime data and annually report the data to the governor and members of the legislature.<sup>345</sup>

The following sample language, which could be added to tribal criminal codes, is based on the Anti-Defamation League's and the Human Rights Campaign's model legislation,<sup>346</sup> as well as Oregon<sup>347</sup> and Florida laws.<sup>348</sup>

**Section x. Bias-Motivated Crime: Law Enforcement Training and Reporting.**

**A. Short Title.** This Section may be cited as the "Bias-Motivated Crime Training and Reporting Ordinance."

**B. Bias-Motivated Crimes.** For purposes of this Section, bias-motivated crimes are crimes that are committed, in whole or in part, because of the perceived race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, or economic or social status of the victim or the victim's association with a person or group with these actual or perceived characteristics.

**C. Training Required.** The [insert name of Law Enforcement Department] ("Department") of the [insert name of Tribe] ("Tribe") shall ensure that all police officers and certified reserve officers are trained to investigate, identify, respond to, and report bias-motivated crimes.

**D. Data Collection and Reporting.**

1. "Bias-motivated crimes data" means information, incident reports, records, and statistics relating to hate crimes.
2. The Department shall collect data relating to incidents that are apparently motivated by prejudice based on the perceived race, color, religion, national origin, gender, sexual orientation, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, mental or physical disability, age, homeless status, economic or social status, or citizenship of the victim.
3. The Department shall establish and maintain a central repository for the collection and analysis of the bias-motivated crimes data collected pursuant to this Section.
  - a. Upon establishing such a repository, the Department shall develop a procedure to monitor, record, classify, and analyze the bias-motivated crimes data.

- b. The Department shall submit its procedure to the [Tribal Council/Business Committee] for approval.
  - 4. The Department shall compile the bias-motivated crimes data and report [monthly/annually] to the [Tribal Council/Business Committee] concerning such incidents, in such form and in such manner as prescribed by rules adopted by the Department.
- E. Limitation on Use and Content of Bias-Motivated Crimes Data.** Data collected pursuant to this Section shall be used only for research or statistical purposes and shall not include any information that may reveal the identity of an individual victim of a crime. Dissemination of such information shall be subject to all confidentiality requirements otherwise imposed by law.

## CHAPTER 8: JURY SERVICE

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“A diverse and representative jury is an essential component of a fair and impartial legal system. Unfortunately, many minority groups, including LGBT Americans, continue to face discrimination in the courtroom, denying them equal access to the courts and an equal opportunity to participate in civic life.”<sup>349</sup> Discriminatory treatment in the selection of jurors “undermines the justice system and could hurt crime victims by preventing a fair trial by a jury of their peers. This could have particularly negative impacts on victims or defendants who are LGBT.”<sup>350</sup>

Our research did not uncover any tribal laws, rules, or policies prohibiting discrimination in jury selection on the basis of sexual orientation or gender identity. Without an express statutory prohibition in place, lawyers in tribal courts may disqualify potential LGBT jurors on the basis of their sexual orientation and gender identity.

Currently, only California and Oregon have explicit state laws barring discrimination against LGBT people in jury service.<sup>351</sup> Oregon law states: “Except as otherwise specifically provided by statute, the opportunity for jury service may not be denied or limited on the basis of race, religion, sex, sexual orientation, national origin, age, income, occupation or any other factor that discriminates against a cognizable group in this state.”<sup>352</sup>

According to the California Code of Civil Procedure: “A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, gender identity, or similar grounds.”<sup>353</sup>

Under federal law, discrimination in jury selection is prohibited on the basis of race, color, religion, sex, national origin and economic status. However, a proposed federal Jury ACCESS Act would prohibit discrimination against LGBT people in federal jury service. The proposed law reads:

**SEC. 2. EXCLUSION FROM FEDERAL JURIES ON ACCOUNT OF SEXUAL ORIENTATION OR GENDER IDENTITY PROHIBITED.** Section 1862 of title 28, United States Code, is amended by inserting ‘sexual orientation, gender identity,’ after ‘sex.’<sup>354</sup>

Sample language that could be added to a tribe’s civil procedure or other jury selection rules or law could read: “The opportunity for jury service may not be denied or limited on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, gender identity, or similar grounds,” or: “Exclusion from Tribal Court juries on account of sexual orientation or gender identity is prohibited.”

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## CHAPTER 9: LAW ENFORCEMENT AND CORRECTIONS

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*“Institutionalized discrimination dehumanizes its victim, who is deemed to be someone who can be treated inhumanely. Institutionalized discrimination feeds impunity, denies justice and can incite violence against targeted people or groups.”<sup>355</sup>*

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### POLICE CONDUCT

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“LGBT people continue to be targeted for human rights abuses by the police based on their real or perceived sexual orientation or gender identity.”<sup>356</sup> In a detailed 2005 report, Amnesty International (AI) documented alarming incidences of abuse of LGBT individuals by law enforcement and corrections officers across the country. For example, AI cites numerous reports indicating LGBT individuals have been unduly subjected to “cruel, inhuman and degrading treatment” during searches, arrests, and detention.<sup>357</sup> Although “[s]earches and frisks to determine an individual’s genitally determined sex are never justified and constitute cruel, inhuman and degrading treatment, in contravention of [federal and] international law,”<sup>358</sup> numerous reports have detailed abusive and invasive searches of LGBT individuals—including “gender checks.”

The AI report also reveals serious patterns of police misconduct and brutality targeting LGBT individuals.<sup>359</sup> For example, the study shows that the complaints of LGBT individuals are regularly ignored by law enforcement and that LGBT individuals are often targeted for selective enforcement of laws and regulations, sometimes based on unfounded suspicions of involvement in sex work or under the guise of “morals regulations.” Some law enforcement officers have also been found to engage in gender policing, which involves disparate treatment of individuals who deviate from gender norms (“gender outlaws”). In addition, nonconformity with gender expectations has exposed individuals to profiling, harassment, verbal and physical abuse, invasive searches, and arbitrary arrest and detention by police, as well as a denial of law enforcement protection.<sup>360</sup> And, where law enforcement officers perpetrate verbal, physical, and sexual violence against LGBT individuals, it is often with impunity—creating greater risk and fewer protections for LGBT individuals.<sup>361</sup>

Although police departments in some major cities have recently adopted guidelines and policies to safeguard transgender, intersex, and gender non-conforming individuals and/or have instituted LGBT liaison units,<sup>362</sup> the absence of LGBT-specific laws and policies in most jurisdictions and general lack of LGBT training for law enforcement personnel leaves many LGBT individuals largely unprotected.

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## PRISON / JAIL CONDITIONS

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LGBT individuals often experience abuse, inappropriate placement, and disparate treatment in detention. For example, those who do not conform to societal norms surrounding gender and sexual orientation are often subject to violence at the hands of officers, inmates, and institutions.

LGBT individuals may also be subject to disparate or limited access to medicine and medical care while imprisoned. State prisons have frequently denied transgender-related medical care to inmates. Denying access to such care, including hormone therapy and gender confirming surgery, constitutes “deliberate indifference to a prisoner's medical needs.”<sup>363</sup>

In addition, most corrections authorities house transgender or gender non-conforming prisoners based on their genitalia, with transgender prisoners sometimes placed in “soft cell” or “protective custody” segregated areas.<sup>364</sup> Genitally determined placements can compromise the safety of transgender or gender non-conforming individuals, putting them at higher risk of verbal, physical, and sexual abuse by other detainees.<sup>365</sup> Segregated placements can also result in “isolation and torture-like experiences for transgender inmates.”<sup>366</sup> Despite these increased risks, courts often support decisions of prison officials concerning housing for transgender prisoners.<sup>367</sup>

Some corrections laws and policies have been adopted to promote protections for LGBT inmates, including:

- It is the policy of California’s penal facilities to maintain inmates on any medication they were taking when they were incarcerated.
- Federal prisons and prisons that contract with the U.S. Bureau of Prisons provide services to transgender inmates, including evaluation and treatment for Gender Identity Disorder.
- In 2012, the U.S. Department of Justice enacted equality regulations that apply to all correctional facilities receiving federal funding (including most state and local facilities).<sup>368</sup> The regulations ban genital searches of transgender inmates for purposes of determining gender, address appropriate housing for transgender inmates, and require training for corrections personnel.<sup>369</sup>
- The National Lawyers Guild and the San Francisco Human Rights Commission have developed a “model protocol” on the treatment of transgender prisoners.<sup>370</sup>
- A federal district court found constitutional violations where LGBT inmates were left unprotected from abuse perpetrated by inmates or were isolated as a form of “protection.”<sup>371</sup>
- Some prison systems are developing housing policies that address LGBT concerns, in particular for transgender, intersex, and gender non-conforming individuals.



Despite these advances, nearly 60% of police departments surveyed by AI reported having no policy concerning detention of transgender individuals.<sup>372</sup> Absent formal guidance, law enforcement and corrections actions may continue to deny fair treatment to LGBT inmates.

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### SAMPLE EQUALITY PROTOCOL FOR LAW ENFORCEMENT AND CORRECTIONS

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To put an end to human rights abuses related to law enforcement and corrections and to create a justice system that promotes equality and honors diversity, it is essential that police departments and correctional institutions develop policies and mandate training on Two Spirit / LGBT issues, including relating to searches, arrests, and detention. And, it is critical that officers, inmates, and institutions be held accountable for failure to adhere to equality requirements.<sup>373</sup>

The following sample Equality Protocol for Law Enforcement and Corrections is based on policies adopted by the Los Angeles Police Department<sup>374</sup> and the Chicago Police Department,<sup>375</sup> and a “model protocol” for treatment of transgender inmates developed by the National Lawyers Guild and the City and County of San Francisco Human Rights Commission.<sup>376</sup>

#### **Equality Protocol for Law Enforcement and Corrections**

**A. Purpose.** This protocol establishes [name of Department] policies and procedures for stops, searches, arrests, processing, custody, and detention of Two Spirit, transgender, intersex, and gender non-conforming (hereinafter collectively referred to as “transgender and intersex”) individuals. This protocol is intended to recognize and protect the rights of transgender and intersex individuals and ensure that all officers:

1. Treat all persons with the courtesy and dignity inherently due every person as a human being. Officers will act, speak, and conduct themselves in a professional manner, recognizing their obligation to safeguard life and property, and maintain a courteous, professional attitude in all contacts with the public; and
2. **Not** exhibit any bias or prejudice or otherwise discriminate against a transgender or intersex individual or a group of transgender or intersex individuals.

**B. Definitions.** For purposes of this Section:

1. “Gender expression” means the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.
2. “Gender identity” means an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression, or behavior differs from

that traditionally associated with the individual's sex at birth.

3. "Gender non-conforming" may include exhibiting behavior or gender expression that does not conform to societal gender norms of male and female.
4. "Intersex" means a person born with anatomy (genitalia, chromosomes, or internal reproductive systems) that doesn't seem to fit in the current system of sex assignment.
5. "LGBT" means Two Spirit, gay, lesbian, bisexual, or transgender identified people or people perceived to be Two Spirit, gay, lesbian, bisexual or transgender.
6. "Officers" includes employees of the [name of Department]'s police and corrections departments.
7. "Sex" means the condition of being biologically female or male.
8. "Sexual orientation" means a person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality.
9. "Transgender" is an umbrella term used by many individuals of any sex whose appearance, personal characteristics or behavior differ from stereotypes about how men and women are supposed to be; a political word that binds together multiple communities of people who experience trans oppression.
10. "Two Spirit" is a contemporary umbrella term that refers to the historical and current First Nations people whose individual spirits were a blend of female and male spirits. This term has been reclaimed by Native American LGBT communities in order to honor their heritage and provide an alternative to the Western labels of gay, lesbian, or transgender.

**C. Addressing Transgender and Intersex Individuals; Gender Classification for Department Purposes.**

1. When addressing transgender and intersex individuals, officers will:
  - a. Respectfully treat transgender and intersex individuals in a manner appropriate to the individual's gender expression, respecting the individual's expressed gender without question;
 

**NOTE:** Government-issued identification shall only be acceptable as initial proof of gender identity in the absence of self-identification by the individual or some other obvious expression of gender identity.
  - b. Use pronouns as requested by the transgender or intersex individual (*e.g.*, "she, her, hers" for an individual who self-identifies as a female; "he, him, his" for an individual who self-identifies as a male). In instances in which an individual refuses to self-identify, use non-gendered pronouns, such as "they/them," whenever possible;

**NOTE:** If an officer is uncertain about an individual's preferred pronoun, the officer

will respectfully inquire about which pronoun the individual wishes to be addressed with.

- c. When requested, address a transgender or intersex individual by a name based on the individual's gender identity, rather than the name on the individual's government-issued identification;

**NOTE:** If an officer is uncertain about an individual's preferred name, the officer will respectfully inquire about which name the individual wishes to be addressed with. This name shall be noted as an alias (AKA) if it differs from the individual's legal name as indicated on government-issued identification.

- d. Document and provide any information obtained about an individual's transgender or intersex status (*e.g.*, preferred name and pronoun) to relevant Department employees for the purpose of ensuring continuity of appropriate treatment; and,

2. When addressing transgender and intersex individuals, officers will **not**:

- a. Stop, detain, frisk, or search any person in whole or in part for the purpose of determining that person's gender or in order to call attention to the person's gender expression;

**NOTE:** The above limitation does not prevent an officer from following the established Department procedures relative to ensuring the proper processing of arrestees.

- b. Use language that a reasonable person would consider demeaning or derogatory, in particular, language aimed at a person's actual or perceived gender identity or expression or sexual orientation;
- c. Consider a person's gender identification as reasonable suspicion or evidence that the individual is or has engaged in a crime, including prostitution; or
- d. Disclose an individual's transgender or intersex identity to non-involved persons, including other arrestees, members of the public, or non-officers, absent a proper law enforcement purpose.

3. For Department reporting purposes, an arrestee's gender will be classified as it appears on the individual's government-issued identification card; provided, however, that housing and classification decisions for inmates identified as transgender or intersex will be made on an individualized basis, driven by the safety, security, and programmatic needs of the inmate.

**D. Searches of Transgender and Intersex Individuals.**

1. When conducting searches of transgender and intersex individuals, officers will:

- a. Be responsible for conducting a thorough search in accordance with established Department procedures;

- b. Inquire as to a transgender or intersex individual's preference for search by a male or female officer, and document this preference in the appropriate log. If the individual's gender preference request for a search can be reasonably and expeditiously accommodated without risk to officer safety, the request should be granted;

**NOTE:** If officer or public safety is compromised and an immediate cursory search is necessary, it may be conducted in the field by an officer of either sex. Officers will not endanger themselves or the public to comply with this requirement.

- c. Perform strip searches only if there is reasonable suspicion, based on specific and articulable facts, to believe the individual is concealing a weapon or contraband and a strip search will result in the discovery of the weapon or contraband.

2. When conducting searches of transgender and intersex individuals, officers will **not**:

- a. Perform a search or frisk for the sole purpose of determining an individual's anatomical gender;
- b. Subject transgender and intersex individuals to more frequent or invasive search procedures than non-transgender or intersex individuals;
- c. Inquire about intimate details of an individual's anatomy or surgical status to determine an individual's gender;
- d. Request removal of identity-related items, such as prosthetics, gender-specific clothing, wigs, and cosmetics, inconsistent with requirements for the removal of similar items for non-transgender or intersex individuals;
- e. Presume evidence of criminal misconduct when a transgender or intersex individual is in possession of a needle purportedly for hormonal use, especially if the person being stopped or arrested has documentation from a physician for being in the process of a gender transition; or
- f. Refuse to search a transgender or intersex arrestee based upon the arrestee identifying as transgender or intersex.

**E. Transport and Processing of Transgender and Intersex Arrestees.** When transporting and processing transgender and intersex arrestees, officers will:

1. Ensure an officer of the transgender or intersex individual's gender identity or expression is present during the transport, when requested by a transgender or intersex arrestee;
2. Record a transgender or intersex arrestee's preferred name and gender information on Department reports in accordance with this protocol;
3. If required, provide immediate medical care or medication, including hormone therapy, consistent with care provided to all other persons under Department control; and

**NOTE:** Where necessary, the subject will be transported to the nearest approved medical facility, in accordance with established Department procedures, prior to any further arrest processing.

4. Ensure the paperwork accompanying the prisoner adequately describes any gender identity related issues.

**F. Incarceration: Placement.**

1. Officers will:
  - a. Place all transgender and intersex inmates based on their gender identity, not their genitalia;
  - b. Provide inmates identified as transgender or intersex with individualized housing determinations driven by the safety, security, and programmatic needs of the inmate. For transgender inmates, this should include an individualized initial determination of whether an inmate should be placed in a female or male facility.

**Commentary:** *Tribal law enforcement and corrections agencies may wish to follow the lead of a number of state and local agencies by establishing a multidisciplinary committee structure for making such individualized decisions. While placement based on an inmate's officially documented gender will usually be appropriate for inmates with intersex conditions, these inmates should be given a meaningful opportunity to challenge such placement and to have the most appropriate placement determined by this committee.*

- c. If government-issued identification is not updated or appears inconsistent with the inmate's gender preference, inquire about an inmate's gender preference, and house accordingly;
  - d. If the inmate expresses uncertainty about her or his gender, provide access to an individualized assessment from a social worker to determine appropriate housing; and
  - e. Permit transgender and intersex inmates to wear the same clothing and cosmetics as other inmates of their expressed gender.
2. Officers will **not**:
  1. Use a strip search simply to determine genitalia when assigning the inmate to housing during the intake process;
  2. House any transgender or intersex inmate in a unit based solely on the inmate's birth-identified gender; or
  3. Force any inmate into solitary housing based on transgender or intersex status.

**G. Incarceration: Medical Treatment.**

1. Transgender and intersex inmates shall have access to the same level of medical and mental health care afforded all inmates, including psychotherapy if needed.
2. Jail medical staff will be trained on evaluation and counseling processes used to determine whether hormones are appropriate therapy, so that jail medical staff may:
  - a. Continue the transgender or intersex inmate on his or her evaluation process;
  - b. Begin hormone therapy for an inmate who was has been identified as a candidate for hormone therapy but did not begin therapy prior to incarceration; or
  - c. Determine that a previously undiagnosed inmate is a good candidate for hormone therapy and prescribe that therapy.

**H. Interpretation.** If this protocol conflicts with any Department directive, this protocol will take precedence.

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## CHAPTER 10: IDENTITY DOCUMENTS AND NAME CHANGES

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### IDENTITY DOCUMENTS AND NAME CHANGES

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“Identity documents are needed for many activities of daily life—working, voting, traveling, accessing government institutions, and proving that one is who one claims to be. Yet for many transgender people, accessing this basic proof of identity is out of reach, pushing them further into the margins of society.”<sup>377</sup> The process of changing one’s name and gender markers on identification documents to reflect expressed gender has proven extremely difficult for many transgender, intersex, or gender non-conforming individuals. For example, the process of legally changing identity documents can be costly and cumbersome.

In addition, though many judges will grant name changes if they are convinced that the petitioner is not trying to evade debts or the police, some judges have required medical certification of treatment for gender transition before granting a name change.<sup>378</sup> Individuals who are transitioning or who otherwise “do not meet the requirements for altering the gender on their identification because, for example, they cannot afford hormones or cannot afford or do not wish to undergo sex reassignment surgery, may not be able to obtain identification consistent with their gender expression.”<sup>379</sup>

The lack of identity documents that accurately reflect an individual’s current name and gender identity often leads to the use of pronouns and other identifiers that are not consistent with the individual’s preference or gender presentation—and thus, do not allow the individual to fully express their gender. Even worse, when transgender individuals produce identification that does not match their gender expression, they may be regarded as suspicious and put themselves at increased risk of harassment and abuse. In some cases, such identification has been confiscated by officers alleging it is fraudulent.<sup>380</sup>

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### IDENTITY DOCUMENTS AND NAME CHANGES AND THE LAW

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Our research has not uncovered any tribal laws specifically addressing transgender rights relating to name changes or identity documents. At the state level, laws and regulations addressing name changes and identity documents vary. Some states allow common law name changes (though less frequently in this age of identity fraud). Name changes can also be made via court order, which, depending on the state, may or may not require additional information from an individual’s medical provider concerning treatment related to gender transition.

Almost all states allow gender marker changes to birth certificates; however, in most states, changing the gender marker on one's birth certificate requires proof of surgical treatment or other "appropriate" clinical gender transition treatment in addition to a court-ordered name change.<sup>381</sup> Even if one succeeds in changing the gender marker on his or her birth certificate, this does not guarantee that individual will be legally recognized in accordance with his or her gender expression. Some courts have ignored the corrected birth certificate, instead looking to whether the individual has undergone sex reassignment surgery (SRS), especially in cases determining validity of marriage under state law.<sup>382</sup>

Rules vary from state to state concerning changing gender markers on identity documents, and about half of the states no longer require any proof of SRS to change gender markers on drivers' licenses.<sup>383</sup> In addition, individuals may be able to obtain a court order declaring a legal change of gender, which courts in other jurisdictions are supposed to honor and enforce.<sup>384</sup>

The U.S. State Department no longer requires proof of SRS to issue passports and consular birth certificates to transgender people, and instead requires proof of "appropriate clinical treatment for gender transition to the new gender." This broader rule recognizes that there are various stages of gender transition, and allows even those who are in the beginning phases to change their names and genders on identity documents. Three other federal agencies (the Office of Personnel Management, the Veterans Health Administration, and the U.S. Citizenship and Immigration Services) have recently adopted similar changes.<sup>385</sup> The Social Security Administration also allows individuals to change gender markers on Social Security records with a U.S. passport reflecting the gender change, an amended birth certificate, a court order, or a medical certification concerning treatment for gender transition, in addition to the standard documentation required.<sup>386</sup>

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### EQUALITY CONSIDERATIONS CONCERNING IDENTITY DOCUMENTS

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Where tribes have laws or policies concerning identity documents, including tribal identification cards, tribes should consider using inclusive language and processes that accommodate transgender, intersex, and gender non-conforming individuals. For example, because restrictive requirements mandating court orders or medical proof that one has undergone transition procedures create unnecessary roadblocks and disparately impact those who cannot afford transition procedures,<sup>387</sup> tribes could adopt procedures that do not require a court order or proof of SRS in order to change a person's gender on identity documents.

In addition, tribal vital records, enrollment departments, records manager, and other agencies should ensure that tribal records reflect the appropriate gender status for transgender, intersex, and gender non-conforming individuals. Keeping the tribal identification name change process simple and hassle-free will help encourage individuals who have transitioned or are



transitioning between genders to update their records, thus increasing the accuracy of such records.

Finally, for tribes that wish to consider even greater protections for Two Spirit / LGBT people, Argentina's transgender bill of rights, which passed in May 2012, may serve as an excellent model. Among other protections, the bill allows people to change their gender on identity documents without approval from a judge or a doctor.<sup>388</sup>

## GLOSSARY OF TWO SPIRIT / LGBT DEFINITIONS

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The following words and definitions can be useful when talking about Two Spirit / LGBT communities. Language and ideas are molded by culture, class, race, and ethnicity. The oppression of Two Spirit / LGBT people is built directly in to language and ultimately is the result of Western colonization. It is difficult to articulate concepts that directly challenge the very basic structures that our communities have been forced to assimilate into over centuries. Many communities and individuals use different words or concepts than the ones presented here. Part of working toward justice within our communities is working to arrive at better ways to communicate together.

### WORDS ABOUT SEXUAL IDENTITIES

- **Two Spirit:** Contemporary umbrella term that refers to the historical and current First Nations people whose individual spirits were a blend of female and male spirits. This term has been reclaimed by Native American LGBT communities in order to honor their heritage and provide an alternative to the Western labels of gay, lesbian, or transgender.
- **LGBT or LGBTQQ:** Shorthand for lesbian, gay bisexual, trans, queer and questioning people.
- **Queer:** An inclusive identity used by some people to describe sexual or gender identities that don't fit mainstream definitions.
- **Gay:** A person whose sexual desire is towards their own gender, most commonly used for men.
- **Lesbian:** A woman whose sexual desire is towards other women.
- **Straight/Heterosexual:** A person whose sexual desire is towards people of the opposite gender.
- **Bisexual:** A person whose sexual desire is towards men or women.
- **Questioning:** A person who is exploring their sexual or gender identity.
- **Sexual orientation:** A person's identity in relation to whom they are attracted to; a person's actual or perceived heterosexuality, homosexuality, bisexuality, or asexuality. Sexual orientation and gender identity are **DISTINCT** components of a person's identity (please see below).
- **Homophobia:** The hatred or fear of lesbians and gay men - sometimes leading to acts of violence and expressions of hostility. Homophobia is not confined to any one segment of society, and can be found in people from all walks of life. Organized hate groups have viciously attacked gay and lesbian people and have used especially violent language in attempting to persecute and intimidate them.

## WORDS ABOUT GENDER AND GENDER IDENTITIES

- **Two Spirit:** Contemporary umbrella term that refers to the historical and current First Nations people whose individual spirits were a blend of female and male spirits. This term has been reclaimed by Native American LGBT communities in order to honor their heritage and provide an alternative to the Western labels of gay, lesbian, or transgender.
- **Trans/Transgender:** An umbrella term used by many individuals of any sex whose appearance, personal characteristics, or behavior differ from stereotypes about how men and women are supposed to be; a political word that binds together multiple communities of people who experience trans oppression.
- **Sex:** Refers to biological and physiological characteristics; often defined as “female” and “male.”
- **Gender:** Socially constructed roles, behaviors, activities, and attributes. Gender is often defined as “feminine” and “masculine.”
- **Assigned sex:** What a doctor determines to be a person’s physical sex at birth.
- **Gender identity:** A person’s internal sense of self; how they relate to their gender(s); an individual’s actual or perceived gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth
- **Gender expression:** The manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice or mannerisms
- **Transition:** Usually used to refer to the process of affirming a transgender person’s gender identity. This may include a medical process in which changing social gender presentation (through clothing, gender pronouns, name and more) is a key component.
- **Transition-related care:** Describes health care that transgender people may access during transition. This can include counseling, hormones (like testosterone or estrogen), hormone blockers, and/or genital and non-genital surgeries. This care is pejoratively referred to as “a sex change,” which is neither preferred nor accurate.
- **Cisgender:** Having a gender identity that is commonly considered to match a person’s assigned sex. Someone who does not identify as transgender or gender nonconforming.
- **Transsexual:** A person who adopts a sex identity different from the sex assigned at birth, and who may or may not take hormones or alter their body surgically. This is an older term and is not used as commonly as the term trans/transgender.
- **Intersex:** A person born with anatomy (genitalia, chromosomes, or internal reproductive systems) that doesn’t seem to fit in the current system of sex assignment.
- **Transphobia:** The hatred or fear of transgender and gender nonconforming people. This sometimes leads to acts of violence and expressions of hostility. Transphobia is not confined to any one segment of society, and can be found in people from all walks of life. Organized hate groups have viciously attacked transgender people and have used especially violent language in attempting to persecute and intimidate them.

## ENDNOTES

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<sup>1</sup> Members of our community who identify as Two Spirit, lesbian, gay, bisexual, transgender, questioning, bi-gender, intersex, asexual, genderqueer, or other similar terms will be referred to collectively as “Two Spirit / LGBT” in this Toolkit.

<sup>2</sup> Center for American Progress, *The State of Gay and Transgender Communities of Color in 2012*, <http://www.americanprogress.org/issues/lgbt/news/2012/04/13/11493/the-state-of-gay-and-transgender-communities-of-color-in-2012/>.

<sup>3</sup> Williams Institute, *Poverty in the LGB Community* (March 2009).

<sup>4</sup> National Transgender Discrimination Survey, *Injustice at Every Turn: A Look at American Indian and Alaskan Native Respondents in the National Transgender Discrimination Survey* (October 2012), [http://www.thetaskforce.org/reports\\_and\\_research/ntds\\_nativeamerican\\_respondents](http://www.thetaskforce.org/reports_and_research/ntds_nativeamerican_respondents).

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

<sup>6</sup> ELIZABETH M. DIAZ & JOSEPH G. KOSCIW, PH.D. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, SHARED DIFFERENCES: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS OF COLOR IN OUR NATION’S SCHOOLS (2009).

<sup>7</sup> Center for American Progress, *supra* note 2.

<sup>8</sup> Centers for Disease Control and Prevention, *HIV/AIDS among American Indians and Alaska Natives*, <http://www.cdc.gov/hiv/resources/factsheets/aian.htm>.

<sup>9</sup> Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 1, 349-364 (July 1, 2006), <http://pediatrics.aappublications.org/content/118/1/349.full>; GLAD, *Marriage: Tips and Traps*, <http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf>.

<sup>10</sup> Wikipedia, *Same-Sex Marriage in the United States*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States) (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2004), <http://www.cbo.gov/doc.cfm?index=5559>).

<sup>11</sup> Human Rights Campaign, *An Overview of Federal Rights and Protections Granted to Married Couples*, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples>. For example, the U.S. Supreme Court case that struck down the federal Defense of Marriage Act involved Edith Windsor and Thea Spyer, who married in Canada in 2007. When Spyer died in 2009, Windsor was forced to pay \$363,053 in taxes on Spyer’s estate—taxes she would not have had to pay if she’d been Spyer’s husband. *United States v. Windsor*, 570 U. S. \_\_\_\_ (2013).

<sup>12</sup> Other laws include: laws relating to immunity from compelled testimony and the marital communication privilege; laws providing a spouse with the right to a surname change without petitioning the court; laws relating to anatomical gifts; laws governing pay for military service; legal requirements for assignment of wages; laws providing for causes of action related to or dependent upon spousal status (including wrongful death, emotional distress, loss of consortium, and other torts and contract actions); laws providing domestic violence protections; law prohibiting discrimination based upon marital status; and laws related to tuition assistance for higher education for surviving spouses or children.

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<sup>13</sup> *Same-Sex Marriage in the United States*, *supra* note 10 (citing Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 10); M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (Chicago: University of Chicago Press 2003)).

<sup>14</sup> For a more comprehensive list of benefits available to spouses but not same-sex couples, *see Marriage: Tips and Traps*, *supra* note 9; Pawelski et al., *supra* note 9, at 349-364.

<sup>15</sup> For a more comprehensive list of these challenges, *see* Pawelski et al., *supra* note 9, at 349-364; *Marriage: Tips and Traps*, *supra* note 9; *Same-Sex Marriage in the United States*, *supra* note 10 (internal citations omitted); Human Rights Campaign, *Domestic Partner Benefits: Related Laws and Regulations*, <http://www.hrc.org/resources/entry/domestic-partner-benefits-related-laws-and-regulations>. For a more comprehensive list of benefits available to spouses but not same-sex couples, *see Marriage: Tips and Traps*, *supra* note 9; Pawelski et al., *supra* note 9, at 349-364.

<sup>16</sup> For a more comprehensive discussion of the benefits that marriage can provide to children, *see* Pawelski et al., *supra* note 9, at 349-364; *Marriage: Tips and Traps*, *supra* note 9.

<sup>17</sup> Pawelski et al., *supra* note 9, at 349-364.

<sup>18</sup> *See, e.g., id.*; *Marriage: Tips and Traps*, *supra* note 9; *Same-Sex Marriage in the United States*, *supra* note 10 (citing *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 10; BADGETT, *supra* note 13).

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

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

<sup>21</sup> National Conference of State Legislators, *Civil Unions & Domestic Partnership Statutes*, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>.

<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.,* Tara Parker Pope, *How Hospitals Treat Same-Sex Couples* (May 12, 2009), <http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/>.

<sup>24</sup> Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, *AZ. JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* Vol. 26, No. 2, 524-525 (2009), <http://www.ajicl.org/AJICL2009/Bushyhead.pdf> (accessed May 11, 2012) (internal citations omitted).

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

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

<sup>27</sup> *Id.* (citing *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008)).

<sup>28</sup> Pawelski et al., *supra* note 9, at 349-364; *Marriage: Tips and Traps*, *supra* note 9.

<sup>29</sup> Wikipedia, *Same-sex marriage in Massachusetts*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Massachusetts](http://en.wikipedia.org/wiki/Same-sex_marriage_in_Massachusetts).

<sup>30</sup> *Id.* (citing *The Impact of Extending Marriage to Non-Resident Same-Sex Couples on the Massachusetts Budget*, <http://escholarship.org/uc/item/2q65153b>).

<sup>31</sup> Pawelski et al., *supra* note 9, at 349-364 (citing *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, *supra* note 10). *See also* *Same-Sex Marriage in the United States*, *supra* note 10. The CBO believed

that the “marriage penalty tax” would be a significant factor in the projected increase. In addition, “[a]lthough Social Security payments and spending on insurance coverage for partners of federal workers would rise over time, other expenditures such as Medicaid and Supplemental Security Income would decrease. The net result would be a savings of nearly \$1 billion per year.” *Id.*

<sup>32</sup> See, e.g., Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>. See also Tulalip Tribal Code, Existing marriages, §4.20.030(1), at <http://www.codepublishing.com/wa/Tulalip/> (making all marriages valid under the laws of the jurisdiction where and when performed valid within the jurisdiction of the Tulalip Tribes); Leonard Forsman, *SAME-SEX MARRIAGE LAW REFLECTS SUQUAMISH TRIBAL VALUES, JURIST* – Hotline (Sept. 14, 2011), <http://jurist.org/hotline/2011/09/leonard-forsman-same-sex-marriage.php>. (“In October 2011, the Suquamish Tribal Council amended its existing Marriage and Divorce Ordinance to permit marriages regardless of the couple’s gender. The amendment passed by a unanimous vote of the council and allows same-sex couples to receive the same treatment and benefits as opposite-sex couples. At least one person entering the marriage must be an enrolled member of the Suquamish Tribe. The amendment also provides for tribe members in civil unions entered in recognized jurisdictions to convert the union into a Suquamish Tribal marriage.”); *Santa Ysabel Tribe First in California to Support Same-Sex Marriage* (June 28, 2013), <http://indiancountrytodaymedianetwork.com/2013/06/28/santa-ysabel-tribe-first-california-support-same-sex-marriage-150179>; Waganakising Odawa Tribal Code: Little Traverse Bay Bands of Odawa Indians, Title XIII, Chapter 1. Marriage, <http://www.narf.org/nill/Codes/ltraverse/t13.pdf>. See also, e.g., *Little Traverse Band Recognizes Same-Sex Marriages* (March 28, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/28/little-traverse-band-recognizes-same-sex-marriages-148418>; Pokagon Band of Potawatomi Indians, Marriage Code, <http://www.pokagon.com/sites/default/files/assets/group/tribal-council/form/2013/marriage-code-3-9-13-1369-1173.pdf>. See also, e.g., *Pokagon Band issues marriage certificate to same-sex couple* (June 21, 2013), <http://www.indianz.com/News/2013/010181.asp>; *Colville Tribes amend code to recognize same-sex marriages* (September 9, 2013), <http://www.indianz.com/News/2013/011057.asp>. However, the following tribal nations have refused to recognize same-sex marriage: Cherokee Nation, Sault Ste. Marie Tribe of Chippewa Indians, Chickasaw Nation, Iowa Tribe of Oklahoma, Muscogee Creek Nation, and Navajo Nation. Wikipedia, *Same-sex marriage under United States tribal jurisdictions*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_under\\_United\\_States\\_tribal\\_jurisdictions](http://en.wikipedia.org/wiki/Same-sex_marriage_under_United_States_tribal_jurisdictions).

<sup>33</sup> Heide Brandes, *Native American gay couple to take advantage of tribal law to marry* (October 22, 2013), <http://www.reuters.com/article/2013/10/23/us-usa-gaymarriage-oklahoma-idUSBRE99M02020131023>.

<sup>34</sup> See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (April 3, 2009) (“If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded.”); New York, Marriage Equality Act, <http://open.nysenate.gov/legislation/bill/A8354-2011>; Connecticut sH.B., Substitute Senate Bill No. 899, Public Act No. 09-13, <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm>. See also *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008); Vt., S.115: An act relating to civil marriage, [www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf](http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf); New Hampshire, 2009 N.H. Laws ch. 59, H.B. 73, <http://news.findlaw.com/wsj/docs/blrts/nh-same-sex-marriage.html>; *Judge legalizes same-sex marriage in New Jersey; Christie vows to appeal* (September 27, 2013), [http://www.nj.com/politics/index.ssf/2013/09/nj\\_superior\\_court\\_gay\\_marriage\\_ruling.html](http://www.nj.com/politics/index.ssf/2013/09/nj_superior_court_gay_marriage_ruling.html) (citing *Garden State Equality v. Dow*). However, same-sex marriage is prohibited by legislation or constitutional amendment in Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming. *Same Sex Marriage Fast Facts* (September 14, 2013), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html>.

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<sup>35</sup> District of Columbia, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Bill 18-482, <http://www.dccwatch.com/council18/18-482.htm>.

<sup>36</sup> These countries include Argentina, Belgium, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay - plus some parts of Mexico and Brazil. *By the numbers: Same-sex marriage* (August 29, 2013), <http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage/index.html>. For example, Canada's Civil Marriage Act is available at <http://www.canlii.org/en/ca/laws/stat/sc-2005-c-33/latest/sc-2005-c-33.html>.

<sup>37</sup> Bushyhead, *supra* note 24, at 534-535.

<sup>38</sup> *Id.* (internal citations omitted).

<sup>39</sup> *Id.*, at 531 (internal citations omitted).

<sup>40</sup> *Id.*, at 534-535 (internal citations omitted).

<sup>41</sup> Insert this WHEREAS only if your Tribe/ Nation has adopted such laws and measures.

<sup>42</sup> See Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>; Waganakising Odawa Tribal Code: Little Traverse Bay Bands of Odawa Indians, Title XIII, Chapter 1. Marriage, <http://www.narf.org/nill/Codes/ltraverse/t13.pdf>; Pokagon Band of Potawatomi Indians, Marriage Code, <http://www.pokagon.com/sites/default/files/assets/group/tribal-council/form/2013/marriage-code-3-9-13-1369-1173.pdf>; Vt., S.115: An act relating to civil marriage, [www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf](http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf).

<sup>43</sup> Statutes of the Confederated Tribes of the Umatilla Indian Reservation, Family Law Code, Chapter 13: Domestic Partnerships, <http://www.umatilla.nsn.us/Family%20Law%20Code.pdf>; Coquille Indian Tribal Code, Chapter 740: Marriage and Domestic Partnership, <http://www.coquilletribe.org/documents/740MarriageandDomesticPartnership.pdf>. Fond du Lac Band of Lake Superior Chippewa, Ordinance #4/10, as amended: Marriage, Domestic Partnership & Divorce, <http://www.fdlrez.com/ordpdfs/2010/04-10%20Marriage%20Domestic%20Partnership%20%20Divorce%202013.04.10.pdf>; Oregon Family Fairness Act, <http://www.leg.state.or.us/07reg/measures/hb2000.dir/hb2007.en.html>; WASH REV. CODE, Ch. 26.60, <http://apps.leg.wa.gov/RCW/default.aspx?cite=26.60&full=true>; Cal. Assembly Bill 205, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.html); Cal. Fam. Code, § 297-297.5, <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=00001-01000&file=297-297.5>; NRS Chapter 122A, <http://www.leg.state.nv.us/NRS/NRS-122A.html> (Domestic partners in Nevada are eligible for benefits that are similar to the rights and responsibilities of marriage, except that employers are not required to provide health care coverage for domestic partners). These rights, benefits, and responsibilities include: hospital visitation rights and medical decision-making for partners; automatic parentage of non-biological parents for children born after the Domestic Partnership is established; significant legal and financial obligations for partners; and dissolution provisions similar to legal divorce. Basic Rights Oregon, *Domestic Partnership Resource Guide* (2007), <http://www.basicrights.org/wp-content/uploads/2011/09/BRO-Domestic-Partnership-Resource-Guide-2008.pdf>.

<sup>44</sup> Del. Civil Union and Equality Act, [http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+30/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis146.nsf/vwLegislation/SB+30/$file/legis.html?open).

<sup>45</sup> R.I. H.B. 6103: An Act Relating to Domestic Relations – Civil Unions, <http://www.rilin.state.ri.us/BillText11/HouseText11/H6103Aaa.pdf>. Note: §15-3.1-5 of Rhode Island's law exempts conscience and religious organizations and their staff from providing services related to the

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solemnization / celebration of a civil union and from treating a civil union as valid, if to do so would violate their sincerely held religious beliefs.

<sup>46</sup> Hawaii's Reciprocal Beneficiaries law provides limited state rights to two parties bound as reciprocal beneficiaries, including same-sex couples, relatives, and friends. Haw. Rev. Stat., Ch. 572C, <http://www.capitol.hawaii.gov>.

<sup>47</sup> ME. REV. STAT., Ch. 701, Tit. 22, §2710, <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>. In Wisconsin, registered domestic partners are eligible for inheritance and survivor protections, family and medical leave, medical/hospital visitation rights, and exemption from the real estate transfer fee. Wis. Stat., Ch. 770: Domestic Partnership, <https://docs.legis.wisconsin.gov/statutes/statutes/770>.

<sup>48</sup> National Conference of State Legislators, *supra* note 21 (citing Illinois Religious Freedom Protection and Civil Union Act, S.B. 1716 (Pub. Act 96-1513)).

<sup>49</sup> Pawelski et al., *supra* note 9, at 349 -364.

<sup>50</sup> See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. Mich. J.L. Reform 683, 690 (2001) ("The notion of families during the formative periods of the United States Constitution, the Bill of Rights and the Thirteenth and Fourteenth Amendments, contemplated a patriarchal household in which the father presided over and controlled his wife and their children.").

<sup>51</sup> Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 Colum. Hum. Rts. L. Rev. 509, 522 (2010) (citing Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 Utah L. Rev. 569, 570 (1996)).

<sup>52</sup> Committee on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 3 (2002), <http://pediatrics.aappublications.org/content/109/2/339.full>. However, where laws have not been improved to recognize the rights and responsibilities of LGBT and other non-traditional families, children may be "denied legal ties of one of their parents, undermining family stability and permanency—and parents' ability to act as effective guardians of their children." *All Children Matter: How Legal and Social Inequities Hurt LGBT Families*, <http://action.familyequality.org/site/DocServer/AllChildrenMatterCondensedFinal10192011.pdf?docID=2403>.

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

<sup>54</sup> GLAD, *Adoption Questions & Answers*, at 1 (November 2011), <http://www.glad.org/uploads/docs/publications/adoption.pdf>.

<sup>55</sup> Often, the legal relationship between the birth parents and the child ends upon adoption. However, some tribes recognize customary adoptions, which provide children with permanent homes without compelling a termination of parental rights, and are often a more culturally-appropriate option. See, e.g., California Indian Legal Services, *Tribal Customary Adoption*, <http://www.calindian.org/alerts/62-2010-alert/99-tribal-customary-adoption> (January 8, 2010). In addition, some jurisdictions allow an "open adoption" in which the adoptive family provides some information to or access to the child to the birth family. *Adoption Questions & Answers*, *supra* note 54, at 2-3.

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

<sup>57</sup> Wikipedia, *LGBT Adoption*, [http://en.wikipedia.org/wiki/LGBT\\_adoption](http://en.wikipedia.org/wiki/LGBT_adoption).



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<sup>58</sup> *Adoption Questions & Answers*, *supra* note 54, at 1.

<sup>59</sup> These states include Rhode Island, New Jersey, New York, Indiana, Maine, California, Connecticut, Illinois, Massachusetts, Oregon, Vermont, Florida, Arkansas, New Hampshire, Washington, Hawaii, Iowa, Nevada, Delaware, and Colorado. *LGBT Adoption*, *supra* note 57. “Since constitutions and statutes usually fail to address the adoption rights of LGBT persons, judicial decisions often determine whether they can serve as parents either individually or as couples.” *Id.* Adoption by same-sex couples is currently legal in fourteen countries (plus some territories of three other countries). *LGBT Adoption*, *supra* note 57. With one exception (Siletz Juvenile Code, § 8.039, recognizes adoption by domestic partners), we did not find any tribal statutes or tribal court cases addressing adoption by same-sex couples or LGBT individuals.

<sup>60</sup> Mississippi bans adoptions by same-sex couples, and Utah bans adoptions by unmarried cohabiting couples, thereby effectively excluding same-sex couples. *Adoption Questions & Answers*, *supra* note 54, at 4 (citing Miss. Code Ann. § 93-17-3; Ut. Code §78-30-1(3)(b)). In addition, courts have ruled that second-parent adoptions are not available under current law in Kentucky, Nebraska, and Ohio. Human Rights Campaign, *Parenting Laws: Joint Adoption*, [http://www.hrc.org/files/assets/resources/parenting\\_laws\\_maps.pdf](http://www.hrc.org/files/assets/resources/parenting_laws_maps.pdf); NRCPPFC & AdoptUsKids, *LGBT Adoptive and Foster Parenting* (October 2010), [http://www.hunter.cuny.edu/socwork/nrcfcp/info\\_services/download/LGBTAdoptiveandFosterParenting.pdf](http://www.hunter.cuny.edu/socwork/nrcfcp/info_services/download/LGBTAdoptiveandFosterParenting.pdf). Florida’s 3-decade ban on adoptions by gay individuals was ruled unconstitutional in September 2010. *Id.*

<sup>61</sup> *Adoption Questions & Answers*, *supra* note 54, at 4. “Social conservatives view family makeup as the next battleground after passing marriage amendments in 11 states in 2004.” *Id.* For example, in 2006, efforts were underway in at least 16 states “to introduce constitutional amendments prohibiting gay and lesbian individuals and couples from fostering or adopting children.” Pawelski et al., *supra* note 9, at 349-364. *Id.* Similarly, in early 2011, three states considered bills or policies that would limit adoption rights for unmarried and/or same-sex couples. Dana Rudolph, *HHS Urges Child Welfare Agencies to Better Serve LGBT Youth* (April 20, 2011), <http://www.keenewsservice.com/2011/04/20/hhs-urges-child-welfare-agencies-to-better-serve-LGBT-youth/>.

<sup>62</sup> *Adoption Questions & Answers*, *supra* note 54, at 1.

<sup>63</sup> *All Children Matter*, *supra* note 52.

<sup>64</sup> *LGBT Adoption*, *supra* note 57.

<sup>65</sup> ACLU, *In re: Gill - The Child Welfare Position*, [http://www.aclu.org/lgbt-rights\\_hiv-aids/re-gill-child-welfare-position](http://www.aclu.org/lgbt-rights_hiv-aids/re-gill-child-welfare-position).

<sup>66</sup> Wikipedia, *Same Sex Marriage and the Family*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_and\\_the\\_family](http://en.wikipedia.org/wiki/Same-sex_marriage_and_the_family) (citing Pawelski et al., *supra* note 9). American Academy of Pediatrics has also stated: “Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or the opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.” ACLU, *supra* note 65.

<sup>67</sup> American Bar Association, *Report*, at 2, <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/103d.authcheckdam.pdf>.

<sup>68</sup> *Adoption Questions & Answers*, *supra* note 54, at 11-12 (citing American Bar Association, Resolution 109B (adopted Feb. 8, 1999)).

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<sup>69</sup> North American Council on Adoptable Children, *NACAC Position Statements*, <http://www.nacac.org/policy/positions.html#Gay>.

<sup>70</sup> Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, <http://www.cwla.org/programs/culture/glbtposition.htm>.

<sup>71</sup> American Medical Association (2004), [www.ama-assn.org/meetings/public/annual04/204a04.rtf](http://www.ama-assn.org/meetings/public/annual04/204a04.rtf). In addition, the American Psychiatric Association “supports initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives.” American Academy of Pediatrics, News Release (February 14, 2002), available at [hcs.org/sites/default/files/.../Positions%20on%20GLBT%20parents.pdf](http://hcs.org/sites/default/files/.../Positions%20on%20GLBT%20parents.pdf).

<sup>72</sup> *All Children Matter*, *supra* note 52. In many jurisdictions, there is a shortage of adoptive parents, although federal law has spurred states to move children into permanent homes more quickly. *Adoption Questions & Answers*, *supra* note 54, at 2.

<sup>73</sup> Human Rights Campaign, *Issue: Adoption*, <http://www.hrc.org/issues/adoption>.

<sup>74</sup> Rudolph, *supra* note 61 (citing a 2007 study by the Williams Institute at UCLA).

<sup>75</sup> *Adoption Questions & Answers*, *supra* note 54, at 2.

<sup>76</sup> *Id.*, at 3.

<sup>77</sup> *Id.* For example, single parent adoption by LGBT individuals now happens in every New England state. *Id.*

<sup>78</sup> Tulalip Tribal Code, §81.3.2.4(A)(1), [http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/beda\\_chelh/bedachelh\\_youth\\_code.pdf](http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/beda_chelh/bedachelh_youth_code.pdf); Grand Ronde Tribal Code, §7.16(b)(3)(A)(i), [http://www.grandronde.org/uploadedfiles/webroot\\_content/departments/tribal\\_court/tribal\\_court\\_packets/adoption%20packet.pdf](http://www.grandronde.org/uploadedfiles/webroot_content/departments/tribal_court/tribal_court_packets/adoption%20packet.pdf). *See also* Colville Tribal Code, §5-2-371, <http://www.colvilletribes.com/media/files/5-2.pdf> (a minor child may be adopted by “any adult person...”)

<sup>79</sup> Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Tribal Code, §4-8-3, <http://ctclusi.org/sites/default/files/4-8.pdf>.

<sup>80</sup> Confederated Tribes of Siletz Indians, Juvenile Code, §8.039(c)(2), <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%2007-16-10.pdf>.

<sup>81</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 60.

<sup>82</sup> OR. REV. STAT. §109.309(1) (“Any person may petition the circuit court for leave to adopt another person...”); Wash. Rev. Code § 26.33.140; N.J. STAT. ANN., § 9:3-43; VT. STAT. ANN. TIT. 15A § 1-102(A); D.C. CODE § 16-302.

<sup>83</sup> *See, e.g.*, ALASKA STAT. § 25.23.020; ARIZ. REV. STAT. § 8-103; CO. REV. STAT. § 19-5-202; ALA. CODE § 26-10A-5; ME. REV. STAT. ANN tit. 18-A § 9-301; N.Y. DOM. REL. § 110.

<sup>84</sup> *Adoption Questions & Answers*, *supra* note 54, at 3 (citing *Adoption of M.A.*, 930 A.2d 1088 (2007) (permitting lesbian couple to proceed with adoption; *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (joint adoption petitions by unmarried couples, both opposite- and same-sex, should be granted or rejected on a case-by-case basis, based on the best interest of the child); *In the Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995) (“the state’s adoption law ‘does not prohibit adoption by a couple, neither of whom is a biological parent.’”). For example, in 2007, the Maine Law Court ruled that Maine’s adoption law allows joint petitions by unmarried couples,

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regardless of whether the couple is adopting from the state or forming a legal relationship between the child and the second parent. *Id.*, at 14 (citing *Adoption of M.A.*, 930 A.2d 1088 (Me. 2007)).

<sup>85</sup> These states include: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont and Washington. Human Rights Campaign, *Parenting Laws: Joint Adoption*, [http://www.hrc.org/files/assets/resources/parenting\\_joint-adoption\\_062013.pdf](http://www.hrc.org/files/assets/resources/parenting_joint-adoption_062013.pdf).

<sup>86</sup> *Id.*, at 3.

<sup>87</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 60.

<sup>88</sup> N.Y. COMP. CODES R. & REGS tit. 18, § 421.16(h)(2), <http://www.dos.ny.gov/info/nycrr.html>.

<sup>89</sup> Oregon DHS, *Adoption* frequently asked questions, <http://www.oregon.gov/dhs/children/fosteradopt/pages/adopt/faq.aspx> (emphasis added). Similarly, according to the Vermont Department of Children and Families, to apply to adopt a child: “You must be at least 21 years old. You can be single, married, living with a partner, or joined through a civil union. You can live in a house or apartment, but you must have enough room to house a child. You must have sufficient income to support your family. Applications are considered regardless of race, ethnicity, gender, religion, or sexual orientation.” Vt. Dep’t of Children and Families, *Who Can Apply*, <http://dcf.vermont.gov/projectfamily/adopting/who>. See also Wa. Dep’t of Social and Health Services, *Adoption in Washington State*, at 4, <http://www.dshs.wa.gov/pdf/Publications/22-1096.pdf> (stating that same-sex couples can adopt a child). In addition, Connecticut’s Department of Children and Families website states: “Foster care and adoption by same gender couples (both married and those couples living in the same household) is permissible and supported.” Conn. Dep’t of Children and Families, *Frequently Asked Questions*, <http://www.ct.gov/dcf/cwp/view.asp?a=2561&Q=314314#Samegender>.

<sup>90</sup> N.J. ADMIN. CODE 10:121C-2.6(a), <http://www.njcpac.org/admin.asp?uri=2081&action=15&di=143&ext=pdf&view=yes>. See also *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995) (finding that DYFS is prohibited from discriminating against prospective adoptive parents on the basis of sexual orientation). See also MD. CODE REGS. 07.05.03.09(A)(2), <http://www.dsd.state.md.us/comar/getfile.aspx?file=07.05.03.09.htm> (an individual’s application to be an adoptive parent may not be denied due to “the applicant’s or adoptive child’s race, color, culture, national origin, sexual orientation, or ethnic heritage”).

<sup>91</sup> NEV. ADMIN. CODE 127.351, <http://www.leg.state.nv.us/nac/NAC-127.html>.

<sup>92</sup> Human Rights Campaign, *Parenting Laws: Joint Adoption*, [http://www.hrc.org/files/assets/resources/parenting\\_joint-adoption\\_062013.pdf](http://www.hrc.org/files/assets/resources/parenting_joint-adoption_062013.pdf).

<sup>93</sup> “According to a report by the Williams Institute, in 2007 there were 270,000 children in the United States who lived with same-sex couples. Of these, one-quarter, or 65,000, were adopted.” *LGBT Adoption*, *supra* note 57 (citing Adam Romero, *Census Snapshot*, Williams Institute, December 2007).

<sup>94</sup> Katharine Swan, *All About Second Parent Adoptions for Gay Families*, <http://www.therainbowbabies.com/SecondParentAdoption.html>

<sup>95</sup> For example, if a child is born using donor insemination, the partner of the birth mother may be a legal stranger to the child, despite acting as a parent from birth. Swan, *supra* note 94.

<sup>96</sup> For a more detailed discussion of the issues involved in assisted reproductive technologies, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86

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B.U.L.Rev. 227-294 (2006); *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005); *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906 (2012); *Adoption Questions & Answers*, *supra* note 54

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Adoption Questions & Answers*, *supra* note 54, at 9.

<sup>100</sup> *Id.*, at 11-12.

<sup>101</sup> *All Children Matter*, *supra* note 52.

<sup>102</sup> *Adoption Questions & Answers*, *supra* note 54, at 11-12 (citing *Adoption of Tammy*, 416 Mass. 205, 215 (1993)).

<sup>103</sup> For example, in states that recognize same-sex marriages, “a child born during a marriage is presumed to be the child of both spouses, including a child born to a married woman with the use of donor sperm, who is presumed to be the child of the ‘husband,’ and therefore presumably of the partner.” *Marriage: Tips and Traps*, *supra* note 9 (citing MASS. GEN. LAWS ch. 209C, § 6). However, this presumption does not provide the same level of protection as a family would gain by going through the legal process of jointly adopting a child born during the marriage. For more discussion of the presumption of paternity, *see, e.g.*, Lambda Legal, *Gartner v. Newton*, <http://lambdalegal.org/in-court/cases/gartner-v-newton>; Zack Ford, *Iowa Judge: Both Same-Sex Parents’ Names Belong On Birth Certificates* (January 5, 2012), <http://thinkprogress.org/lgbt/2012/01/05/398283/iowa-judge-both-same-sex-parents-names-belong-on-birth-certificates/>.

<sup>104</sup> *Adoption Questions & Answers*, *supra* note 54, at 12. For example, in *Miller-Jenkins v. Miller-Jenkins*, Janet and Lisa, parties to a civil union in Vermont, had a child named Isabella. Janet did not adopt Isabella, and when Janet and Lisa separated, Lisa moved to Virginia and used the lack of an adoption—and Virginia’s laws hostile to same-sex relationships—to prevent Janet from having contact with Isabella. The resulting litigation, which began in 2004, has involved two state Supreme Courts, and made several trips to the U.S. Supreme Court. *Id.*

<sup>105</sup> *Id.* at 11-12.

<sup>106</sup> *Id.* (citing *Coparent or Second-Parent Adoption by Same-Sex Parents*, *supra* note 52, at 339-40).

<sup>107</sup> Human Rights Campaign, *American Bar Association*, <http://preview.hrc.org/issues/1590.htm> (quoting the American Bar Association’s position statement).

<sup>108</sup> Confederated Tribes of Siletz Indians, *Juvenile Code*, §8.039(c)(2), <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%2007-16-10.pdf>.

<sup>109</sup> Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, *Tribal Code*, §4-8-3(b), <http://ctclusi.org/sites/default/files/4-8.pdf>.

<sup>110</sup> National Gay and Lesbian Task Force, *Second-Parent Adoption in the U.S.*, <http://www.outfront.org/files/pg332/Secondparentadoption.pdf> (citing CONN. GEN. STAT. § 45a-724(3) (2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (2004); COLO REV. STAT. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5)(2007); *Conn. s.H.B. 5830*, <http://www.cga.ct.gov/2000/act/pa/2000PA-00228-R00HB-05830-PA.htm>); CAL. FAM. CODE § 9000(f) (2004) (registered domestic partners only); *Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554 (Ca. 2003) (state’s adoption law extends to same-sex couples not registered as domestic partners). In addition, “Appellate courts have ruled that state adoption laws permit second-parent adoption in California, District of Columbia, Illinois, Indiana, Massachusetts, New

Jersey, New York, and Pennsylvania.” Pawelski et al., *supra* note 9, at 349-364. *See also Adoption Questions & Answers, supra* note 54, at 15 (citing numerous cases).

<sup>111</sup> National Gay and Lesbian Task Force, *Second-Parent Adoption in the U.S.*, <http://www.outfront.org/files/pg332/Secondparentadoption.pdf>. These states include: Alabama, Alaska, Delaware, Hawaii, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, Iowa, Louisiana, Maryland, Minnesota, New Hampshire, Nevada, New Mexico, Oregon, Rhode Island, Texas, Washington, and West Virginia. *Id.*

<sup>112</sup> National Gay and Lesbian Task Force, *Second-Parent Adoption in the U.S.*, <http://www.outfront.org/files/pg332/Secondparentadoption.pdf> (citing *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998); *Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994)).

<sup>113</sup> *Adoption Questions & Answers, supra* note 54, at 9.

<sup>114</sup> *Id.*, at 2 (citing VT. STAT. ANN. TIT. 15A, §1-102(B)).

<sup>115</sup> Co. HB 07-1330, [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/digest2007a/07digest.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/digest2007a/07digest.pdf).

<sup>116</sup> Child Welfare Information Gateway, *Stepparent Adoption*, [https://www.childwelfare.gov/pubs/f\\_step.pdf#page=1&view=Introduction](https://www.childwelfare.gov/pubs/f_step.pdf#page=1&view=Introduction).

<sup>117</sup> Nolo, *Stepparent Adoptions*, <http://www.nolo.com/legal-encyclopedia/stepparent-adoptions-29643.html>.

<sup>118</sup> Movement Advancement Project, *Foster and Adoption Laws*, [http://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws).

<sup>119</sup> Nolo, *Stepparent Adoptions*, <http://www.nolo.com/legal-encyclopedia/stepparent-adoptions-29643.html>. *See also, e.g.*, Cal. Family Code, §§ 9000-9007, <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=08001-09000&file=9000-9007>; Mass. Gen. L. ch. 210; Confederated Tribes of Siletz Indians, Juvenile Code, §8.039(c)(2), <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Juvenile%20Code%20Final%2007-16-10.pdf>.

<sup>120</sup> Swan, *supra* note 94.

<sup>121</sup> Nancy Polikoff, *Beyond (Straight and Gay) Marriage*, <http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html>.

<sup>122</sup> Ian Lovett, *Measure Opens Door to Three Parents, or Four* (July 13, 2012), <http://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html?pagewanted=all>.

<sup>123</sup> Aaron Sankin, *California Multiple Parents Bill: Proposed Legislation Would Allow Children To Have Three Or More Parents* (July 2, 2012), [http://www.huffingtonpost.com/2012/07/02/california-multiple-parents-bill\\_n\\_1644613.html](http://www.huffingtonpost.com/2012/07/02/california-multiple-parents-bill_n_1644613.html).

<sup>124</sup> Co. HB 07-1330, [http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/\\$FILE/wptemp.txt](http://www.leg.state.co.us/clics/clics2007a/csl.nsf/b404d50252f9cdcf85256d6d000d18cb/02f7babc52f718bd87257268007869de/$FILE/wptemp.txt).

<sup>125</sup> *All Children Matter, supra* note 52.

<sup>126</sup> Human Rights Campaign, *Laws and Regulations*, <http://www.hrc.org/laws-and-legislation/state>. *See id.* for a more complete discussion of state custody and visitation laws.

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<sup>127</sup> See, e.g., Swinomish Tribal Code, §7-04.010 (“In any proceeding between parents under this Chapter, the best interest of the child shall be the standard by which the Tribal Court determines and allocates parental responsibilities. The Tribe recognizes the fundamental importance of the parent-child relationship and that the relationship between the child and each parent should be fostered unless inconsistent with the best interest of the child. The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, tribal and cultural ties, health and stability, and physical care.”); Coquille Indian Tribal Code, §743.100 (similar language); NY CLS DOM. REL. §70 (“In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.”); MASS. GEN. LAWS, ch. 208, § 28; § 31 (“In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child’s present or past living conditions adversely affect his physical, mental, moral or emotional health.”).

<sup>128</sup> *Id.* (citing *In re Marriage of Collins*, 51 P.3d 691 (Or. Ct. App. 2002)). The court reversed a trial court’s modification of custody in favor of a heterosexual father, finding that the trial court relied too heavily on a non-exhibitionist display of intimacy (kissing in bed) between the child’s mother and her same-sex partner. See also *Id.*, citing *A. v. A.*, 514 P.2d 358 (Or. Ct. App. 1973) (refusing to modify a lower court’s award of custody to a gay father, finding that there was no evidence that the children were exposed to deviant sexual acts or that the welfare of the children was being adversely affected in any substantial way by their father’s sexual orientation.); *In re Marriage of Ashling*, 599 P.2d 475 (Or. Ct. App. 1979) (“finding that a visitation agreement that restricted the mother’s visitation to ‘times and places that petitioner does not have with her, in her home, or around the children, any lesbians,’ was not justified. The court reasoned that as long as the mother’s sexual life remained discreet, regardless of her sexual orientation, there was no reason to restrict visitation.”).

<sup>129</sup> *Laws and Regulations*, *supra* note 127 (citing *Paul C. v. Tracy C.*, 209 A.D.2d 955 (N.Y. App. Div. 1994)). See also *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (“Natural parents should be denied custody only if they are unfit to further the welfare of their children. ... In the total absence of evidence suggesting a correlation between the mother’s homosexuality and her fitness as a parent, we believe that the [trial] judge’s finding that a lesbian household would adversely affect the children to be without basis in the record.”).

<sup>130</sup> American Civil Liberties Union and the National Center for Transgender Equality, *Protecting the Rights of Transgender Parents and Their Children: a Guide for Parents and Lawyers*, at 5, <http://www.aclu.org/transgender-parent-guide>. Sadly, we know that Two Spirit people who identify as transgender are far more likely to face obstacles as parents within our legal system due to transphobia. While we are not able to cover the full scope of those challenges in this Toolkit, the American Civil Liberties Union (ACLU) and the National Center for Transgender Equality (NCTE) have co-authored a short guide for transgender parents and their children. See American Civil Liberties Union and the National Center for Transgender Equality, *Protecting the Rights of Transgender Parents and their Children: A Guide for Parents and Lawyers*, <https://www.aclu.org/transgender-parent-guide>.

<sup>131</sup> American Bar Association, *Sexual Orientation as a Factor in Child Custody & Visitation Cases* (1995), [http://www.americanbar.org/groups/child\\_law/policy/child\\_custody\\_and\\_support.html](http://www.americanbar.org/groups/child_law/policy/child_custody_and_support.html).

<sup>132</sup> D.C. CODE § 16-914(a)(1)(A), <http://government.westlaw.com/linkedslice/default.asp?SP=DCC-1000>.

<sup>133</sup> See, e.g., DC Code: § 16-831.03, <http://dccode.org/simple/sections/16-831.03.html>.

<sup>134</sup> See, e.g., Jill L. Mullins, *Washington’s Recognition of Non-Biological Parental Relationships* (January 15, 2012), <http://www.mckinleyirvin.com/blog/child-custody/washingtons-recognition-of-non-biological-parental-relationships/> (describing *In re the Parentage of L.B.*, in which the Washington Supreme Court created a new legal doctrine, entitled “de facto parentage” that permits non-biological parents to establish

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their parental rights to their children and seek custody or residential time with them. The case involved two lesbian partners who, during the course of a lengthy, committed relationship, decided to use artificial insemination to conceive a child. One partner carried and gave birth to the child, L.B., but both partners cared for L.B. equally, and L.B. referred to each of them as her mother. When the couple decided to end their relationship, the partner who had birthed L.B. denied her ex-partner any access to L.B., arguing that she had no legal relationship with the child and thus had no right to ever see her again. The court disagreed, recognizing the rights of non-biological parents for the first time, and finding that a biological parent is able to seek child support from a de facto parent if that biological parent is the primary residential parent of the children); ACLU, U.S. Supreme Court Declines Lesbian 'De-Facto Parent' Case, Letting Landmark Gay Family Decision Stand (October 10, 2000), [https://www.aclu.org/lgbt-rights\\_hiv-aids/us-supreme-court-declines-lesbian-de-facto-parent-case-letting-landmark-gay-fam](https://www.aclu.org/lgbt-rights_hiv-aids/us-supreme-court-declines-lesbian-de-facto-parent-case-letting-landmark-gay-fam) (describing M.J.B. v. V.C., which involved twins who were raised jointly by their biological mother and her partner (V.C.), who raised the children together until their breakup. An appellate court granted V.C. the right to visitation with the twins, a decision upheld by the New Jersey Supreme Court, which outlined broad standards for non-biological parents recognizing that "psychological parenthood" could entitle them to visitation or custody of children).

<sup>135</sup> DC Code: § 16-831.01, <http://dcode.org/simple/sections/16-831.01.html>. See also 2013 California Rules of Court, Rule 5.502(10), [http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5\\_502](http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_502) ("De facto parent" means a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period").

<sup>136</sup> Jessica Arons, Future Choices: Assisted Reproductive Technologies and the Law (December 17, 2007), <http://www.americanprogress.org/issues/women/report/2007/12/17/3728/future-choices-assisted-reproductive-technologies-and-the-law/>.

<sup>137</sup> Tulalip Tribes, Paternity and Child Support Code, §86.1.8(a), [http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/child\\_support\\_enforcement/child\\_support\\_code.pdf](http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/child_support_enforcement/child_support_code.pdf).

<sup>138</sup> Northern Arapaho Family Support Ordinance, Title 10, §502, <http://www.northernarapaho.com/sites/northernarapaho.com/files/NA%20Code%20Title%2010%20Family%20Support%205-13-08.pdf>; Swinomish Tribal Community, Domestic Relations Code, § 7-05.050, [http://www.narf.org/nill/Codes/swinomishcode/7\\_5.pdf](http://www.narf.org/nill/Codes/swinomishcode/7_5.pdf); Laws of the Confederated Salish and Kootenai Tribes, Codified, § 3-1-209, [www.cskt.org/gov/docs/CSKT.Laws.Codified.2013.docx](http://www.cskt.org/gov/docs/CSKT.Laws.Codified.2013.docx); Bishop Paiute Tribe, Paternity Ordinance No.93-02, §VI, <http://www.bishoppaiutetribe.com/assets/ordinances/Paternity%20Ordinance.pdf>.

<sup>139</sup> DC Code: § 16-831.01, <http://dcode.org/simple/sections/16-831.01.html>. See also 2013 California Rules of Court, Rule 5.502(10), [http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5\\_502](http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_502); Delaware Code, Title 13, § 8-201, <http://delcode.delaware.gov/title13/c008/sc02/index.shtml>.

<sup>140</sup> *LGBT Families: Facts at a Glance* (October 2011), [http://www.americanprogress.org/issues/2011/10/pdf/all\\_children\\_facts.pdf](http://www.americanprogress.org/issues/2011/10/pdf/all_children_facts.pdf).

<sup>141</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 60; Pawelski et al., *supra* note 9, at 349-364. However, Arkansas' regulation prohibiting gay and lesbian foster parenting was declared unconstitutional in December 2004. *Id.* In addition, in February 2006, a Missouri court overturned a state policy prohibiting foster parenting by gay and lesbian individuals and/or same-gender couples. *Id.*

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

<sup>143</sup> *LGBT Adoptive and Foster Parenting*, *supra* note 60.

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<sup>144</sup> National Center for Lesbian Rights, *AB 458 FACT SHEET: California Foster Care Non-Discrimination Act*, [http://www.nclrights.org/site/DocServer/ab458\\_fact\\_sheet.pdf?docID=1321](http://www.nclrights.org/site/DocServer/ab458_fact_sheet.pdf?docID=1321).

<sup>145</sup> Omaha Tribe of Nebraska, Ordinance No. 04-98 of the Omaha Tribal Council (9-23-04), Title 24, §24-1-1, <http://omaha-nsn.gov/wp-content/uploads/2013/08/Title-24-Foster-Home-Licensing-Standards.pdf>.

<sup>146</sup> Hoopa Valley Tribe, Child / Family Assistance Code, §14.19.06, <http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20une%2019%202008.pdf>.

<sup>147</sup> *Id.*

<sup>148</sup> Rudolph, *supra* note 61.

<sup>149</sup> Child Welfare League of America, *CWLA Best Practice Guidelines: Serving LGBT Youth in Out-of-Home Care* (2006), <http://www.nclrights.org/site/DocServer/bestpracticeslgbtyouth.pdf?docID=1322>. See also Rudolph, *supra* note 61 (noting that a higher percentage of LGBT youth exist in the child welfare system and among those living on the streets than would be expected based on the estimated percentage of LGBT people in the general population).

<sup>150</sup> North American Council on Adoptable Children, *NACAC Position Statements: LGBTQ Children and Youth in Foster Care*, <http://www.nacac.org/policy/positions.html#LGBTQyouth>. Many LGBTQ youth have entered the foster care system due to their family or their culture's reaction to their sexual orientation or gender identity.

<sup>151</sup> *Id.*

<sup>152</sup> *CWLA Best Practice Guidelines*, *supra* note 149.

<sup>153</sup> Rudy Estrada and Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, <http://www.nclrights.org/legal-help-resources/resource/the-legal-rights-of-young-people-in-state-custody-what-child-welfare-and-juvenile-justice-professionals-need-to-know-when-working-with-lgbt-youth/>.

<sup>154</sup> North American Council on Adoptable Children, *NACAC Position Statements: LGBTQ Children and Youth in Foster Care*, <http://www.nacac.org/policy/positions.html#LGBTQyouth>.

<sup>155</sup> North American Council on Adoptable Children, *NACAC Position Statements: LGBTQ Children and Youth in Foster Care*, <http://www.nacac.org/policy/positions.html#LGBTQyouth>.

<sup>156</sup> Hoopa Valley Tribe, Child/Family Assistance Code, §14.19.06(23), <http://www.narf.org/nill/Codes/hoopacode/Title%2014%20Child%20Family%20Assistance%20Code%20une%2019%202008.pdf>.

<sup>157</sup> Estrada et. al, *supra* note 153.

<sup>158</sup> Alameda Co. Soc. Serv. Agency, *Department of Children and Family Services LGBT Policy*, <http://pathwaytohome.org/adoption/LGBTPolicyFinalapproved3-6-07.pdf>. See also Children's Aid Soc. of Toronto, *Board Governance Policy: Equitable Child Welfare Services Relating to Sexual Orientation and Gender Identity/Expression*, <http://www.torontocas.ca/files/Equitable%20Child%20Welfare%20Serv%20Rel.%20S-0%20&%20Gender%20Policy.adopted.mar-08.pdf>.

<sup>159</sup> City of N.Y., Div. of Child Prot. (2009), [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/assessing\\_safety\\_LGBT\\_youth\\_signed\\_0522009.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/assessing_safety_LGBT_youth_signed_0522009.pdf). Similarly, "Connecticut policy provides: 'The Department of Children and Families has an obligation to ensure fair, equal, and non-discriminatory treatment of all individuals who identify themselves as Lesbian,



Gay, Bisexual, Transgender, Questioning and Intersex....' This policy, and others like it in Illinois and Massachusetts, as well as in the cities of New York and Los Angeles, serve as clear statements of support for LGBT youth and demonstrate a commitment to providing non-discriminatory care." Estrada et. al, *supra* note 153.

<sup>160</sup> California, AB 458: California Foster Care Non-Discrimination Act, [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0451-0500/ab\\_458\\_bill\\_20030908\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_458_bill_20030908_chaptered.html).

<sup>161</sup> Out of Home Youth Advocacy Council, *Creating Inclusive Services for LGBT Youth in Out of Home Care Training Resources*, at 10 (March 2007), [http://www.nclrights.org/site/DocServer/Preface\\_OHYAC\\_training\\_FINAL.pdf?docID=2921](http://www.nclrights.org/site/DocServer/Preface_OHYAC_training_FINAL.pdf?docID=2921).

<sup>162</sup> *Id.*, at 28.

<sup>163</sup> *Id.*, at 38-39.

<sup>164</sup> Human Rights Campaign, *Pass EDNA Now*, <http://sites.hrc.org/sites/passendanow/index.asp>.

<sup>165</sup> ACLU, *Employment Non-Discrimination Act*, [http://www.aclu.org/hiv-aids\\_lgbt-rights/employment-non-discrimination-act](http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act).

<sup>166</sup> Human Rights Campaign, *What is EDNA?*, [http://sites.hrc.org/sites/passendanow/learn\\_more.asp](http://sites.hrc.org/sites/passendanow/learn_more.asp).

<sup>167</sup> Crosby Burns and Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment* (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

<sup>168</sup> Crosby Burns and Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment* (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>; *Injustice at Every Turn: A Look at American Indian and Alaska Native Respondents in the National Transgender Discrimination Survey*, [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_native\\_american\\_2.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_native_american_2.pdf).

<sup>169</sup> Crosby Burns and Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment* (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

<sup>170</sup> Badgett, *supra* note 13. In addition, the gap in differential treatment of gay male job applicants was significantly smaller in states or local areas with nondiscrimination laws that included sexual orientation: 8.7% received invitations compared with 5.3% in states without such protections. However, the heterosexual applicants still received more favorable treatment than their gay counterparts. *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* "A key link between policies and productivity is disclosure of one's sexual orientation. Many studies have demonstrated that fear of discrimination keeps LGB workers, particular from revealing their sexual orientation in the workplace... Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers' goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health. So when fear of discrimination causes LGB employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGB people themselves. The time as well as social and psychological

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energy that is required to maintain a hidden identity would, from an employer's perspective, be better used on the job." *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *What is EDNA?*, *supra* note 166.

<sup>175</sup> Badgett, *supra* note 13.

<sup>176</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>177</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>178</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>179</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>180</sup> *The Affordable Care Act: Real Benefits for LGBT People* (09/06/2013), [http://www.huffingtonpost.com/sean-cahill/the-affordable-care-act-real-benefits-for-lgbt-people\\_b\\_3867921.html](http://www.huffingtonpost.com/sean-cahill/the-affordable-care-act-real-benefits-for-lgbt-people_b_3867921.html). In addition to prohibiting public and private health insurers from discriminating on the basis of sexual orientation, gender identity or HIV status, the Affordable Care Act will improve access to health care for LGBT people in other important ways, including:

- Subsidies will allow millions of low and middle-income people, including LGBT people, to afford to buy health insurance. Same-sex partners in states that don't recognize same-sex relationships will have more affordable insurance options.
- The Patient's Bill of Rights phases out annual and lifetime limits on coverage, ends preexisting condition exclusions, and ends arbitrary rescission of insurance coverage, all of which are especially important for transgender people and people living with HIV/AIDS.
- Preventive services, including HIV testing, depression screening, and tobacco use screening, which may be particularly important to LGBT people, will be considered Essential Health Benefits and covered by insurance.

The Secretary of Health and Human Services is authorized to expand the collection of sexual orientation and gender identity data on national health surveys, which will provide greater understanding of LGBT health issues. *Id.*

<sup>181</sup> Other expert associations that have identified transgender health care as being medically necessary include the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the American Congress of Obstetricians and Gynecologists, the Endocrine Society, the National Association of Social Workers, and the World Professional Association for Transgender Health. Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>182</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

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<sup>183</sup> NOTE: “Removing transgender-specific exclusions also does not prohibit plans from denying coverage for services that are not medically necessary, that are experimental, or that are comparatively more expensive than other treatments.” Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>184</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>185</sup> ACLU, *Know Your Rights - Transgender People and the Law*, <https://www.aclu.org/translaw>.

<sup>186</sup> Andrew Cray and Kellan Baker, (October 3, 2012), *FAQ: Health Insurance Needs for Transgender Americans*, <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans/>.

<sup>187</sup> Insurance Gender Non-Discrimination Act, AB 1586, [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_1551-1600/ab\\_1586\\_bill\\_20050929\\_chaptered.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1551-1600/ab_1586_bill_20050929_chaptered.html).

<sup>188</sup> Shoshone-Bannock Tribes, Worker Protection Ordinance, §401, <http://www.shoshonebannocktribes.com/tero/PDF/Worker%20Protection%20Ordinance.PDF> (emphasis added).

<sup>189</sup> Mandan Hidatsa and Arikara Nation, Employment Rights and Contracts Preference Ordinance, §206(a), [http://mhatero.com/attachment/cms/AXT\\_3\\_IL6J.pdf](http://mhatero.com/attachment/cms/AXT_3_IL6J.pdf). See also Poarch Creek Indians, Tribal Employment Rights Ordinance, §33-4-1, [http://www.poarchcreekindians.org/ms/pdf/11/0822\\_tero.pdf](http://www.poarchcreekindians.org/ms/pdf/11/0822_tero.pdf) (“The Tribal Council finds ... [t]he practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction records, membership in the national guard, or any other reserve component of the military forces of the United States adversely affects the welfare of the Reservation and deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living.”).

<sup>190</sup> Stockbridge-Munsee Tribe, Employee Rights Ordinance, § 53.3, <http://mohican-nsn.gov/Departments/Legal/Ordinances/Ch%2053%20Employee%20Rights.pdf> (emphasis added).

<sup>191</sup> See, e.g., Tulalip Tribes, Tribal Employee Rights Ordinance, <http://www.tulaliptribes.com/>; Bishop Paiute Tribe, Tribal Employee Rights Ordinance, <http://bishoptero.com/PDFs/TERO%20Reference%20Guide.pdf> (emphasis added).

<sup>192</sup> *What is EDNA?*, *supra* note 166. The following states protect against employment discrimination on the basis of both sexual orientation and gender identity: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington. In addition to the states listed above, the following states prohibit discrimination based on sexual orientation: Delaware, Maryland, New Hampshire, New York, and Wisconsin. Human Rights Campaign, *Why is it needed?*, [http://sites.hrc.org/sites/passendanow/why\\_is\\_it\\_needed.asp](http://sites.hrc.org/sites/passendanow/why_is_it_needed.asp).

<sup>193</sup> *Id.*

<sup>194</sup> Employment Non-Discrimination Act (H.R. 1397 & S. 811), <http://www.govtrack.us/congress/bills/112/hr1397/text>. ENDA was introduced in the 112th Congress on April 6, 2011 by Representative Barney Frank in the House (H.R. 1397) and on April 13, 2011 by Senator Jeff Merkley in the Senate (S. 811). The U.S. Senate Committee on Health, Education, Labor and Pensions hosted a committee hearing on ENDA on June 12, 2012.

<sup>195</sup> *What is EDNA?*, *supra* note 166. EDNA “is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The bill explicitly prohibits preferential treatment and quotas and does not permit disparate impact suits. In addition, it exempts small businesses, religious organizations and the military, and does not require that domestic partner benefits be provided to the same-sex partners of employees.” *Id.* See also U.S. Department of Labor Wage and Hour Division, Administrator’s Interpretation No. 2010-3: Clarification of the Definition of “son or daughter” in Family and Medical Leave Act (June 22, 2010), [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf); Barack Obama, *Memorandum: Federal Benefits and Non-Discrimination* (June 17, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/).

<sup>196</sup> Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007), <http://www.leg.state.or.us/07reg/measures/sb0001.dir/sb0002.intro.html>.

<sup>197</sup> California Fair Employment and Housing Act, <http://finduslaw.com/california-fair-employment-housing-act-feha-government-code-12900-12996>; California Civil Rights Act of 2007, [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_14\\_bill\\_20070919\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_14_bill_20070919_enrolled.pdf); California Equal Benefits Ordinance, [ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab\\_0001-0050/ab\\_17\\_bill\\_20031011\\_chaptered.pdf](ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_bill_20031011_chaptered.pdf).

<sup>198</sup> Co. S.B. 07-025: An Act Concerning the Expansion of Employment Non Discrimination Protections, and Making an Appropriation Therefor, [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2007a/sl\\_295.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/sl2007a/sl_295.pdf).

<sup>199</sup> Blackfeet Nation, The Blackfeet Tribal Employment Rights Ordinance & Safety Enforcement Act of 2009, [http://www.btero.com/blackfeet\\_tero\\_2010.pdf](http://www.btero.com/blackfeet_tero_2010.pdf).

<sup>200</sup> Nottawaseppi Huron Band of the Potawatomi, Fair Employment Practices Code, <http://www.nhbpi.com/pdfs/legal/Title%20V-02%20Fair%20Tribal%20Employment%20Practices%20Code.pdf>.

<sup>201</sup> California Fair Employment and Housing Act, <http://finduslaw.com/california-fair-employment-housing-act-feha-government-code-12900-12996>; California Civil Rights Act of 2007, [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_14\\_bill\\_20070919\\_enrolled.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_14_bill_20070919_enrolled.pdf); California Equal Benefits Ordinance, [ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab\\_0001-0050/ab\\_17\\_bill\\_20031011\\_chaptered.pdf](ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_bill_20031011_chaptered.pdf).

<sup>202</sup> Lisa Mottet and Justin Tanis, *Opening the door to the inclusion of transgender people: The Nine Keys to Making Lesbian, Gay, Bisexual and Transgender Organizations Fully Transgender-Inclusive*, 56-57, [http://transequality.org/Resources/opening\\_the\\_door.pdf](http://transequality.org/Resources/opening_the_door.pdf)

<sup>203</sup> Center for American Progress. *Why We Need Protections in Housing, Health Care, and Public Accommodations*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/>.

<sup>204</sup> Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/>.

<sup>205</sup> *Gay Couples Face Rental Discrimination, Study Finds* (June 19, 2013), <http://abcnews.go.com/Business/gay-lesbian-couples-suffer-rental-discrimination/story?id=19438537>. “Straight couples were favored over gay male couples 15.9 percent of the time; straight couples were favored over lesbians 15.6 percent of the time, according to the study. The study measured the treatment same-sex couples received from rental agents when making email inquiries about apartments advertised online, as compared to straight couples.” *Id.*

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<sup>206</sup> Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*, <http://www.hrc.org/resources/entry/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and>.

<sup>207</sup> *Injustice at Every Turn: A Look at American Indian and Alaska Native Respondents in the National Transgender Discrimination Survey*, [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_native\\_american\\_2.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_native_american_2.pdf).

<sup>208</sup> *Injustice at Every Turn: A Look at American Indian and Alaska Native Respondents in the National Transgender Discrimination Survey*, [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_native\\_american\\_2.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_native_american_2.pdf).

<sup>209</sup> Center for American Progress, *supra* note 206.

<sup>210</sup> *Id.*

<sup>211</sup> Philadelphia Commission on Human Relations, *Public Accommodations Discrimination*, <http://www.phila.gov/HumanRelations/DiscriminationAndEnforcement/WhatIsDiscrimination/Pages/PublicAccommodationsDiscrimination.aspx>.

<sup>212</sup> <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (citing *Sexual Orientation and Housing Discrimination in Michigan, A Report of Michigan's Fair Housing Centers*).

<sup>213</sup> <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (citing *Sexual Orientation and Housing Discrimination in Michigan, A Report of Michigan's Fair Housing Centers*).

<sup>214</sup> Tribal Court Clearinghouse, Model Tribal Housing Code, §1-4-4(F), <http://www.tribal-institute.org/codes/overview.htm> (emphasis added).

<sup>215</sup> Coquille Indian Housing Authority, Request for Proposals, [http://www.coquilletribe.org/documents/7-RoofingRFPGroup6-3-BedroomTypeA06-22-12\\_000.pdf](http://www.coquilletribe.org/documents/7-RoofingRFPGroup6-3-BedroomTypeA06-22-12_000.pdf) (emphasis added).

<sup>216</sup> OR. REV. STAT. § 659A.403 (prohibiting discrimination in place of public accommodation on account of race, color, religion, sex, sexual orientation, national origin, marital status or age).

<sup>217</sup> WASH. REV. CODE § 49.60.130-175, 176, 178, 180, 190, 200, 215, 222-225, 300; WASH. ADMIN. CODE § 356-09-020 (prohibiting discrimination based on sexual orientation in the areas of real property transactions, credit and insurance and public accommodations. The definition of sexual orientation includes gender identity and expression).

<sup>218</sup> HAW. REV. STAT. §515-2 (prohibiting discrimination based on sexual orientation and gender identity in employment, public accommodations and housing).

<sup>219</sup> CAL. GOV. CODE §§ 12920; 51; California Civil Rights Act of 2007 (prohibiting discrimination based on gender identity, appearance and behavior in the areas of employment (public and private), housing, and public accommodations).

<sup>220</sup> Human Rights Campaign, *HRC Statement on New HUD Non-Discrimination Regulations*, <http://www.hrc.org/press-releases/entry/hrc-statement-on-new-hud-non-discrimination-regulations>.

<sup>221</sup> ACLU, LGBT Youth & Schools, <https://www.aclu.org/lgbt-rights/lgbt-youth-schools>.

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<sup>222</sup> Gay, Lesbian & Straight Education Network, *2011 National School Climate Survey: LGBT Youth Face Pervasive, But Decreasing Levels of Harassment*, <http://www.glsen.org/cgi-bin/iowa/all/library/record/2897.html?state=research&type=research>.

<sup>223</sup> Human Rights Campaign, Student Non-Discrimination Act, <http://www.hrc.org/laws-and-legislation/federal-legislation/student-non-discrimination-act>.

<sup>224</sup> Gay, Lesbian & Straight Education Network, *2011 National School Climate Survey: LGBT Youth Face Pervasive, But Decreasing Levels of Harassment*, <http://www.glsen.org/cgi-bin/iowa/all/library/record/2897.html?state=research&type=research>.

<sup>225</sup> Oregon Safe Schools & Communities Coalition, *Oregon schools tighten anti-bullying policies* (June 10, 2013), <http://www.oregonsafeschools.org/wp-content/uploads/Safe-Schools-Press-Release1.pdf>.

<sup>226</sup> “Discrimination often affects transgender and gender nonconforming students in particular ways that prevent them from fully participating in the school environment and impacts their ability to learn. Discrimination can take forms such as ignoring or failing to respond to ongoing bullying and harassment, holding the student to strict or unreasonable applications of a school dress code that results in discipline and may prevent them from attending class, preventing students from using appropriate restrooms, harassment by teachers and staff, and even expulsion.” Gay, Lesbian, and Straight Education Network, Model District Policy on Transgender and Gender Nonconforming Students, <http://transequality.org/Resources/Model%20District%20Trans%20and%20GNC%20Policy%20FINAL.pdf>.

<sup>227</sup> *All Children Matter*, *supra* note 52.

<sup>228</sup> *Injustice at Every Turn: A Look at American Indian and Alaska Native Respondents in the National Transgender Discrimination Survey*, [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_native\\_american\\_2.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_native_american_2.pdf). In addition, respondents who were harassed and abused by teachers show “dramatically worse health and other outcomes compared to those who do not experience such abuse. Peer harassment and abuse also had highly damaging effects.” *Id.* Nearly half of transgender students report regularly skipping school because of safety concerns, clearly impacting their ability to receive an education, and nearly one in six (15%) of transgender and gender nonconforming students face harassment so severe that they are forced to leave school. Transgender students who experience high levels of harassment had grade point averages about half a grade lower, and were also less likely to plan to go to college. Furthermore, the effects of school victimization may extend into adulthood. LGBT young adults who were targeted with LGBT-biased bullying and victimization in secondary school show elevated rates of depression, suicidal ideation, and risk for STDs and HIV. Gay, Lesbian, and Straight Education Network, Model District Policy on Transgender and Gender Nonconforming Students, <http://transequality.org/Resources/Model%20District%20Trans%20and%20GNC%20Policy%20FINAL.pdf>.

<sup>229</sup> *2009 Oregon Safe Schools Implementation Toolkit*, at 4, <http://www.oregonsafeschools.org/documents/safeschoolstoolkit.pdf>.

<sup>230</sup> *Id.*

<sup>231</sup> Among these states are Washington, Oregon, California, Colorado, Minnesota, Iowa, Illinois, Arkansas, N. Carolina, Maryland, New Jersey, Rhode Island, Vermont, New Hampshire, and Maine. *Laws and Regulations*, *supra* note 127.

<sup>232</sup> ACLU, *supra* note 185.

<sup>233</sup> Human Rights Campaign, Student Non-Discrimination Act, <http://www.hrc.org/laws-and-legislation/federal-legislation/student-non-discrimination-act>.

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<sup>234</sup> Oregon Equality Act, Pub. L. No. 100, Or. S.B. 2 (2007), <http://www.leg.state.or.us/07reg/asures/sb0001.dir/sb0002.intro.html>; CAL. ED. CODE § 220, <http://codes.lp.findlaw.com/cacode/EDC/1/d1/1/2/3/s220>; CONN. GEN. STAT. § 10-15c, <http://www.cga.ct.gov/2011/pub/chap164.htm#Sec10-15c.htm>; N.H. REV. STAT. § 193-F:1 et. seq., <http://www.ndaa.org/pdf/Cyberbullying%20-%20Schools%20and%20Public%20Libraries2011.pdf>. See also § 105 ILL. COMP. STAT. §5/27-23.7, <http://ilga.gov/legislation/ilcs/fulltext.asp?DocName=010500050K27-23.7>; MINN. STAT. §363A.03 et seq., <https://www.revisor.mn.gov/statutes/?id=363a.13>.

<sup>235</sup> Equal Access Act, 20 USC § 4071, <http://www.law.cornell.edu/uscode/text/20/4071>, <http://www.law.cornell.edu/uscode/text/20/4071>.

<sup>236</sup> Vancouver School Board, *Lesbian, Gay, Bisexual, Transgender, Transsexual, Two-Spirit, Questioning Policy* (Feb. 2004), <http://www.safeschoolscoalition.org/VancouverSchoolBoardLGBTQ-POLICY-FEB2004.pdf>; Burnaby Board of Education, *Policy # 5.45: Homophobia / Hererosexism*, [http://www.lifesitenews.com/images/pdfs/burnaby\\_policy.pdf](http://www.lifesitenews.com/images/pdfs/burnaby_policy.pdf); School District No. 5, *Sexual Orientation*, § 3.35 (May 2, 2006), [http://bctf.ca/uploadedFiles/Social\\_Justice/Issues/Homophobia/SD5SexualOrientation.pdf](http://bctf.ca/uploadedFiles/Social_Justice/Issues/Homophobia/SD5SexualOrientation.pdf).

<sup>237</sup> Washington State, *Policy No. 3207 Students - Prohibition of Harassment, Intimidation, and Bullying; Procedure No. 3207P Prohibition of Harassment, Intimidation, and Bullying* (December 2010), <http://www.safeschoolscoalition.org/lawpolicy-models.html>.

<sup>238</sup> ACLU, *supra* note 185.

<sup>239</sup> *Id.*

<sup>240</sup> San Francisco Unified School District Policy, Article 5, SECTION: Non-Discrimination for Students and Employees, <http://www.transgenderlaw.org/college/sfusdpolicy.htm>; Gay, Lesbian, and Straight Education Network, Model District Policy on Transgender and Gender Nonconforming Students, <http://transequality.org/Resources/Model%20District%20Trans%20and%20GNC%20Policy%20FINAL.pdf>.

<sup>241</sup> *Lesbian, Gay, Bisexual, and Transgender Health*, <http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=25>

<sup>242</sup> Jeff Krehely, *How to Close the LGBT Health Disparities Gap* (December 21, 2009), [http://www.americanprogress.org/issues/2009/12/pdf/lgbt\\_health\\_disparities.pdf](http://www.americanprogress.org/issues/2009/12/pdf/lgbt_health_disparities.pdf)

<sup>243</sup> Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (citing *Sexual Orientation and Housing Discrimination in Michigan, A Report of Michigan's Fair Housing Centers*).

<sup>244</sup> HRC Issue Brief: HIV/AIDS and the LGBT Community, <http://www.hrc.org/resources/entry/hrc-issue-brief-hiv-aids-and-the-lgbt-community>.

<sup>245</sup> Felicia S. Hodge and Karabi Sinha, *Safer Sexual Practices and HIV Screening Behavior among Rural California American Indians*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3102512/> (citing 2008 CDC study).

<sup>246</sup> *Id.*

<sup>247</sup> National Gay and Lesbian Task Force, *Aging*, <http://www.thetaskforce.org/issues/aging>.

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- <sup>248</sup> The Aging and Health Report: *Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults*, <http://caringandaging.org/wordpress/wp-content/uploads/2011/05/Full-Report-FINAL-11-16-11.pdf>.
- <sup>249</sup> National Gay and Lesbian Task Force, *Aging*, <http://www.thetaskforce.org/issues/aging>.
- <sup>250</sup> Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (citing *Sexual Orientation and Housing Discrimination in Michigan, A Report of Michigan's Fair Housing Centers*).
- <sup>251</sup> Center for American Progress, *Gay and Transgender Discrimination Outside the Workplace*, <http://www.americanprogress.org/issues/lgbt/report/2011/07/19/9927/gay-and-transgender-discrimination-outside-the-workplace/> (citing *Sexual Orientation and Housing Discrimination in Michigan, A Report of Michigan's Fair Housing Centers*).
- <sup>252</sup> Lambda Legal, *Health Care Fairness*, <http://www.lambdalegal.org/issues/health-care-fairness>.
- <sup>253</sup> Lambda Legal, *When Health Care Isn't Caring: LGBT People of Color and People of Color Living with HIV*, [http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert\\_lgbt-people-of-color.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_lgbt-people-of-color.pdf).
- <sup>254</sup> *Id.*
- <sup>255</sup> *Id.*
- <sup>256</sup> *Id.*
- <sup>257</sup> Klamath Tribal Health & Family Services, *Patient Rights & Responsibilities*, <http://www.klamathtribalhealth.org/wp-content/uploads/2013/06/Patient-Registration-Packet.pdf> (emphasis added).
- <sup>258</sup> Indian Health Service, Dental Clinic: San Jose, [http://www.ihs.gov/dentaldir/index.cfm?fuseaction=OutsideDirectory.displayfacility&fac\\_id=415&area=6&u=62](http://www.ihs.gov/dentaldir/index.cfm?fuseaction=OutsideDirectory.displayfacility&fac_id=415&area=6&u=62) (emphasis added).
- <sup>259</sup> U.S. Dep't of Health and Human Serv., Non-Discrimination Policy Statement (April 2011), <http://www.hhs.gov/asa/eo/nondiscrimination/index.html> (emphasis added).
- <sup>260</sup> Nolo, *Health Care Antidiscrimination Laws Protecting Gays and Lesbians*, <http://www.nolo.com/legal-encyclopedia/health-care-antidiscrimination-laws-protecting-32296.html>. States prohibiting discrimination based on gender identity include: California, Iowa, Oregon, Colorado, Maine, Rhode Island, Minnesota, Vermont, Hawaii, New Jersey, Washington, Illinois, and New Mexico, plus the District of Columbia. *Id.*
- <sup>261</sup> Nolo, *Health Care Antidiscrimination Laws Protecting Gays and Lesbians*, <http://www.nolo.com/legal-encyclopedia/health-care-antidiscrimination-laws-protecting-32296.html>.
- <sup>262</sup> For more information about promoting equality in health care, see, e.g., the Joint Commission's *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community*, [http://www.jointcommission.org/assets/1/18/LGBTFieldGuide\\_WEB\\_LINKED\\_VER.pdf](http://www.jointcommission.org/assets/1/18/LGBTFieldGuide_WEB_LINKED_VER.pdf).
- <sup>263</sup> Department of Health and Human Services, Centers for Medicare & Medicaid Services, *Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients* (11/17/2010), <http://www.lambdalegal.org/in-court/legal->



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docs/exec\_us\_20101117\_hhs-changes-to-visitation-rights (citing memorandum available at: <http://www.whitehouse.gov/the-press-office/presidentialmemorandum-hospital-visitation>).

<sup>264</sup> Lambda Legal, *HHS Releases Finalized Hospital Visitation Regs: Lambda Legal, NHeLP and GLMA say 'Good First Step'*, [http://www.lambdalegal.org/news/us\\_20101117\\_hhs-hospital-visitation-regs](http://www.lambdalegal.org/news/us_20101117_hhs-hospital-visitation-regs) (citing 42 CFR Parts 482 and 485).

<sup>265</sup> These states include California, Connecticut, Colorado, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont and Washington. Human Rights Campaign, *Hospital Visitation Laws*, [http://www.hrc.org/files/assets/resources/hospital\\_visitation\\_laws\\_062013.pdf](http://www.hrc.org/files/assets/resources/hospital_visitation_laws_062013.pdf).

<sup>266</sup> For example, in Wisconsin, a same-sex domestic partner has visitation rights in various health-care settings, similar to the visitation rights afforded to a spouse. Howard A. Sweet, *Matters Affected by Creation of a Same Sex Domestic Partnership*, 82 WISCONSIN LAWYER 11 (November 2009), <http://www.wisbar.org/AM/Template.cfm?Section=Search&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=87323> (citing WIS. STAT. § 1392).

<sup>267</sup> Human Rights Campaign, *Hospital Visitation Laws*, [http://www.hrc.org/files/assets/resources/hospital\\_visitation\\_laws\\_062013.pdf](http://www.hrc.org/files/assets/resources/hospital_visitation_laws_062013.pdf).

<sup>268</sup> Gay and Lesbian Medical Association, *Non-Discrimination Guidelines for Hospitals*, [http://www.hrc.org/files/assets/resources/GLMA\\_-\\_Sample\\_Non-Discrimination\\_Policy.pdf](http://www.hrc.org/files/assets/resources/GLMA_-_Sample_Non-Discrimination_Policy.pdf).

<sup>269</sup> Gay and Lesbian Medical Association, *Non-Discrimination Guidelines for Hospitals*, [http://www.hrc.org/files/assets/resources/GLMA\\_-\\_Sample\\_Non-Discrimination\\_Policy.pdf](http://www.hrc.org/files/assets/resources/GLMA_-_Sample_Non-Discrimination_Policy.pdf); Human Rights Campaign, *LGBT-Inclusive Definitions of Family*, <http://www.hrc.org/resources/entry/lgbt-inclusive-definitions-of-family>.

<sup>270</sup> Oregon Health & Science University, *Inclusive Policies and Practices*, <http://www.ohsu.edu/xd/health/services/diversity-and-inclusion/inclusive-policies-and-practices/>; Northwestern Memorial Hospital, Patient Bill of Rights and Responsibilities, <http://www.nmh.org/ccurl/313/974/3953-12-Patient-Rights-2C-F.pdf>; California Pacific Medical Center, Patient Rights & Responsibilities, [http://www.cpmc.org/services/pt\\_rights.html](http://www.cpmc.org/services/pt_rights.html); Johns Hopkins, Patient Bill of Rights and Responsibilities, [http://www.hopkinsmedicine.org/the\\_johns\\_hopkins\\_hospital/\\_docs/bill\\_of\\_rights.pdf](http://www.hopkinsmedicine.org/the_johns_hopkins_hospital/_docs/bill_of_rights.pdf).

<sup>271</sup> Lambda Legal, *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates*, [http://www.lambdalegal.org/publications/trt\\_trans-aging-were-still-here](http://www.lambdalegal.org/publications/trt_trans-aging-were-still-here).

<sup>272</sup> For more about the Nursing Home Reform Act, see, e.g., Elder Parent Help, LLC, *Rights Under the Nursing Home Reform Act*, <http://www.elderparenthelp.com/rights-under-the-nursing-home-reform-act>.

<sup>273</sup> Bushyhead, *supra* note 24 (internal citations omitted).

<sup>274</sup> “An advance directive is a written instruction, such as a living will or durable power of attorney for health care... is designed to direct the health care of the patient to whom it applies. An advance directive takes effect when the patient to whom it applies becomes incompetent to make medical decisions... If there is Tribal law that governs advance directives, it will apply for those Tribal members living on that Tribe’s reservation.” Indian Health Service, *Indian Health Manual*, §§3-26, [http://www.ihs.gov/ihtm/index.cfm?module=dsp\\_ihm\\_pc\\_p3c26](http://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p3c26). We did not find any tribal laws regarding advance directives or durable power of attorney for health care. In Oregon, however, a living will or advance directive may be used to appoint a durable power of attorney to make health care decisions and dictate health care instructions concerning life-sustaining treatment. OR. REV. STAT. Ch. 127; Bushyhead, *supra* note 24. An

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advance directive or living also permits tribal members to express their desire for traditional practices, such as traditional burials and avoidance of autopsy, organ donation, embalming, or burial delays.

<sup>275</sup> Jurisdictions differ regarding the order of priority for appointing a guardian or conservator. For example, the Coquille Tribe grants priority to an incapacitated person's parent, but permits the Tribal Court to appoint someone other than the parent(s) upon a showing that the preference should be rebutted. Bushyhead, *supra* note 24; Coquille Indian Tribe, Ch. 375 – Conservatorship and Guardianship Ordinance, <http://www.coquilletribe.org/documents/375Guardianship.pdf>. The Court may appoint a “conservator and/or guardian who is most suitable and willing to serve,” and may consider factors such as “the relationship by blood or marriage of the proposed conservator and/or guardian of the proposed ward.” *Id.* In contrast, the Uniform Guardianship and Protective Proceedings Act gives a spouse priority for letters of guardianship, if the incapacitated person has not nominated a guardian or appointed a health care proxy. *Id.* (citing Unif. Guardianship & Protective Proc. Act § 5-310, 8II U.L.A. 362-63 (Supp. 2008)). In another approach, Washington permits any “suitable person over the age of eighteen years, or any parent under the age of eighteen years or, if the petition is for appointment of a professional guardian, any individual or guardianship service that meets any certification requirements established by the administrator for the courts” to be appointed guardian of the person and/or the estate of an incapacitated person.” WASH REV. CODE §11.88.020(1). *See also* White Mountain Apache, Probate Code, <http://www.wmat.nsn.us/Legal/Probate.html> (outlining preferences for the appointment of a guardian).

<sup>276</sup> For example, in Wisconsin, a domestic partner can consent to organ donations from the deceased partner and can authorize an autopsy of the deceased partner's body. Sweet, *supra* note 264.

<sup>277</sup> Key issues include the right of a same-sex partner to a share of intestate succession where the decedent partner dies intestate, and the right to a forced share election against a will if disinherited. For example, in Oregon, a decedent's domestic partner would be considered the decedent's “surviving spouse” for the purpose of intestate succession. As the surviving spouse, the surviving partner would take priority over the decedent's other family (other than the decedent's issue) in receiving a portion or all of the decedent's intestate estate. In Wisconsin, a surviving domestic partner has certain rights to select personal property and may be can seek the assignment of the decedent's property interest in the home the domestic partners shared. Sweet, *supra* note 264 (citing 2009 WIS. ACT 28, §§3260; 3262 (amending WIS. STAT. §§861.21; 861.33)). For an example of a BIA-approved tribal probate code, *see* Confederated Tribes of the Umatilla Indian Reservation, Inheritance Code (April 7, 2008), <http://www.umatilla.nsn.us/InheritanceCode.pdf>.

NOTE: The American Indian Probate Reform Act “may find its way into the analysis of same-sex couple spousal rights when [tribes] whose members own ‘trust and restricted lands,’ pass laws allowing same-sex marriage. In these cases, the AIPRA, as an Act of Congress, discriminates against same-sex spouses by employing the federal definition of spouse for intestate succession.” Bushyhead, *supra* note 24 (citing 1 U.S.C. § 7; 25 U.S.C. § 2206(a)(2)).

<sup>278</sup> For example, in Wisconsin, a surviving same-sex domestic partner may, maintain a wrongful death action, receive death benefits if the deceased partner was killed as a crime victim and/or was a police officer or firefighter killed in the line of duty, receive victim compensation if the deceased partner was killed or injured while trying to prevent a crime or while assisting a law enforcement officer, and file worker's compensation death claims similar to those available to a surviving spouse. Sweet, *supra* note 264 (citing 2009 WIS. ACT 28, §§ 2159; 3269; 3357-3359).

<sup>279</sup> “Regardless of whether the decedent spouse executed a will before his/her death, the surviving spouse may still be entitled to benefits such as wage benefits, spousal allowance, and homestead rights. First, a surviving spouse has a right to recover wages earned by his/her deceased spouse but not yet paid for, in an amount not exceeding \$10,000. Second, a surviving spouse has a right to spousal allowance, which is a benefit granted by a presiding probate court when the exempt property retained by a surviving spouse is insufficient for his/her care and maintenance. Finally, a spouse retains ‘probate homestead’ rights to possess the (non-

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trust) property until his/her death without threat that the homestead will be sold to satisfy a lien or judgment against it.” Bushyhead, *supra* note 24 (citing OR. REV. STAT. §652.190; OR. REV. STAT. §18.395; OR. REV. STAT. § 18.395).

<sup>280</sup> See, e.g., Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

<sup>281</sup> Bushyhead, *supra* note 24.

<sup>282</sup> OR. REV. STAT. ch. 127; Bushyhead, *supra* note 24. Unless an individual designates a health care representative in an advance directive or living will (or other document valid under applicable law), tribal or state law will determine who is entitled to make those decisions. Bushyhead, *supra* note 24. Where one domestic partner is incapacitated and has a terminal condition, is permanently unconscious, etc., and does not have an advance directive or appointed health care representative, guardian, or other person authorized to make health care decisions, the other domestic partner would have priority to serve as the incapacitated partner’s health care representative. OR. REV. STAT. §127.635.

<sup>283</sup> Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300 - 106.340.

<sup>284</sup> WASH. REV. CODE, Title 11, <http://apps.leg.wa.gov/rcw/default.aspx?cite=11.04.015>.

<sup>285</sup> 2009 WIS. ACT 28, <https://docs.legis.wisconsin.gov/2009/related/acts/28/3247>.

<sup>286</sup> CAL. PROBATE CODE, §§ 20-88; 8461; 8462; 6401; 6402; 1813.1; 1895, [http://www.leginfo.ca.gov/.html/prob\\_table\\_of\\_contents.html](http://www.leginfo.ca.gov/.html/prob_table_of_contents.html).

<sup>287</sup> *Id.*

<sup>288</sup> OSCE Office for Democratic Institutions and Human Rights, *Hate Crime Laws - A Practical Guide*, at 11 (March 9, 2009), <http://www.osce.org/odihr/36426>.

<sup>289</sup> Bureau of Justice Assistance, *A Policymaker’s Guide to Hate Crimes*, at ix, (November 1999), <https://www.ncjrs.gov/pdffiles1/bja/162304.pdf>.

<sup>290</sup> *Id.*

<sup>291</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 16-17.

<sup>292</sup> *Id.*, at 17. See also *A Policymaker’s Guide to Hate Crimes*, *supra* note 289, at x.

<sup>293</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 17. See also *A Policymaker’s Guide to Hate Crimes*, *supra* note 289, at x.

<sup>294</sup> *Id.*, at x.

<sup>295</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 17. See also *A Policymaker’s Guide to Hate Crimes*, *supra* note 289, at x.

<sup>296</sup> *Id.*, at x.

<sup>297</sup> *Id.*

<sup>298</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 7.

<sup>299</sup> *Id.*, at 21-22.

<sup>300</sup> *Id.*

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*, at 22.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *A Policymaker's Guide to Hate Crimes*, *supra* note 289, at ix.

<sup>307</sup> *Id.*, at 27-28. "Such opponents consider hate crime laws to be 'viewpoint discrimination' and challenge the grounds upon which the proponents of the laws rely as purely speculative. They assert, for example, that penalty enhancement cannot be justified on the grounds that injury to society is greater when a crime is motivated by bias. They claim that retaliatory crimes do not necessarily increase when crimes are bias motivated, citing examples of certain religious groups that, in accordance with the tenets of their religion, will not retaliate when attacked, and certain disabled persons who cannot retaliate. They also argue that all crimes, not only those motivated by bias, are dehumanizing and distressing to the victim; therefore, a rash of any type of crime, not just hate crime, is likely to generate community unrest and injure society as a whole." *Id.* See also Michael Shively, *Study of Literature and Legislation on Hate Crime in America*, <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf> for further discussion of identified strengths and weaknesses of hate crime legislation.

<sup>308</sup> Assessments should evaluate, among other questions: Are hate crimes being prosecuted? Are defendants being convicted? What are the problems in actual practice? Are potential victims and potential offenders aware of the law?

<sup>309</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 57.

<sup>310</sup> Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, at 9, [http://www.hrc.org/files/assets/resources/Hate\\_Crimes\\_Guide\\_FINAL.pdf](http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf). "Of the 12 states that include coverage of gender identity or gender expression, four have done so by defining sexual orientation to include an individual's gender identity or expression. Although the Human Rights Campaign advocates enumerating gender identity or expression separately from sexual orientation, it is clear that the four state laws that use an expanded definition of sexual orientation are designed to achieve the same end." *Id.*

<sup>311</sup> Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, at 74, [http://www.hrc.org/files/assets/resources/Hate\\_Crimes\\_Guide\\_FINAL.pdf](http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf). The Act also enables the DOJ to assist state and local jurisdictions with the investigation and prosecution of bias-motivated crimes of violence, and requires the FBI to track statistics on hate crimes based on gender and gender identity and hate crimes committed by and against juveniles. *Id.*

<sup>312</sup> *Id.*, at 27-28. For further discussion of the hate crime legislation approaches taken by U.S. states, see Human Rights Campaign, *State Laws & Policies*, <http://www.hrc.org/resources/entry/state-laws-policies>; *Study of Literature and Legislation on Hate Crime in America*, *supra* note 307.

<sup>313</sup> *State Laws & Policies*, *supra* note 312.

<sup>314</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 16-17.

<sup>315</sup> *Id.*, at 16. "The term 'hate crime' or 'bias crime', therefore, describes a type of crime, rather than a specific offence within a penal code." *Id.*

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<sup>316</sup> *Id.*, at 16-17.

<sup>317</sup> *State Laws & Policies*, *supra* note 312. See also *A Policymaker's Guide to Hate Crimes*, *supra* note 289, at xiii.

<sup>318</sup> *State Laws & Policies*, *supra* note 312.

<sup>319</sup> *Id.* (citing WASH. REV. CODE § 9A.36.080).

<sup>320</sup> *Id.* note 245(citing CAL. PEN. CODE § 422.76).

<sup>321</sup> Anti-Defamation League, *ADL Approach to Hate Crime Legislation*, §b - Text of ADL Model Legislation, [http://www.adl.org/99hatecrime/text\\_legis.asp](http://www.adl.org/99hatecrime/text_legis.asp); Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, at 13-14, [http://www.hrc.org/files/assets/resources/Hate\\_Crimes\\_Guide\\_FINAL.pdf](http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf).

<sup>322</sup> OR. REV. STAT. Ch. 166.

<sup>323</sup> CAL. PEN. CODE §422.56.

<sup>324</sup> WASH. REV. CODE § 9A.36.080.

<sup>325</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 38. For example, 46 states have statutes specifying race, ethnicity, and/or religion as traits identifying protected groups. Over 50% of states specify sexual orientation, gender, and/or disabilities as targets of bias or prejudice, while relatively few states specify age (27%) or political affiliation (12%). *Study of Literature and Legislation on Hate Crime in America*, *supra* note 307, at 19.

<sup>326</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 46.

<sup>327</sup> *Id.*, at 48.

<sup>328</sup> *Id.*, at 35.

<sup>329</sup> *Id.*, at 35. In addition, in some jurisdictions, “there is the additional problem that courts can only consider the offence with which the accused is indicted. Hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proven. This is a disadvantage of substantive offences, and can cause prosecutors either to avoid using the hate crime laws, or to accept a guilty plea to the base offence in order to ensure the offender is convicted.” *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *A Policymaker's Guide to Hate Crimes*, *supra* note 289, at 27-28.

<sup>332</sup> *Id.*.

<sup>333</sup> Anti-Defamation League, *supra* note 321.

<sup>334</sup> OR. REV. STAT. Ch. 166.

<sup>335</sup> *A Policymaker's Guide to Hate Crimes*, *supra* note 289, at 27-28.

<sup>336</sup> *Id.*

<sup>337</sup> *State Laws & Policies*, *supra* note 312 (citing ARIZ. REV. STAT. §13-701(D(15)); § 41-1750). Arizona law defines sexual orientation as a protected group. However, sexual orientation is defined only as heterosexual or homosexual. *Id.* (citing ARIZ. REV. STAT. §13-701(D(15))).

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<sup>338</sup> FLA. STAT. §775.085.

<sup>339</sup> WIS. STAT. §939.645.

<sup>340</sup> *Hate Crime Laws - A Practical Guide*, *supra* note 288, at 31-34.

<sup>341</sup> *Id.*, at 22-23.

<sup>342</sup> *Id.*, at 36.

<sup>343</sup> *State Laws & Policies*, *supra* note 312 (citing ARIZ. REV. STAT. §13-701(D(15))).

<sup>344</sup> *Id.* (citing MASS. ANN. LAWS ch. 22C, §§ 32-35).

<sup>345</sup> *Id.* (citing LA. REV. STAT. 15:1204.4).

<sup>346</sup> Anti-Defamation League, *supra* note 321; Human Rights Campaign, *A Guide to State Level Advocacy Following Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, at 13-14, [http://www.hrc.org/files/assets/resources/Hate\\_Crimes\\_Guide\\_FINAL.pdf](http://www.hrc.org/files/assets/resources/Hate_Crimes_Guide_FINAL.pdf).

<sup>347</sup> OR. REV. STAT. §181.550.

<sup>348</sup> FLA. STAT. §877.19.

<sup>349</sup> Eric Lesh, *A Measure to Ban LGBT Discrimination in Jury Selection Advances in the Senate* (July 29, 2013), <http://www.lambdalegal.org/blog/measure-to-ban-lgbt-discrimination-in-jury-selection-advances-senate>.

<sup>350</sup> Human Rights Campaign, *Juror Non-Discrimination Act/Jury ACCESS Act*, <http://www.hrc.org/laws-and-legislation/federal-legislation/juror-non-discrimination-act-jury-access-act>.

<sup>351</sup> Andy Birkey, *Minnesota Senators offer bill to end anti-LGBT discrimination in jury service* (January 17, 2013), <http://www.tcdailyplanet.net/news/2013/01/17/minnesota-senators-offer-bill-end-anti-lgbt-discrimination-jury-service>.

<sup>352</sup> ORS § 10.030(1), <http://www.oregonlaws.org/ors/10.030>.

<sup>353</sup> California Code of Civil Procedure, §231.5, [http://www2.courtinfo.ca.gov/protem/courses/jury/stats/ccp\\_231\\_5.htm](http://www2.courtinfo.ca.gov/protem/courses/jury/stats/ccp_231_5.htm).

<sup>354</sup> S. 38: Jury ACCESS Act, <http://www.govtrack.us/congress/bills/113/s38/text>.

<sup>355</sup> AMNESTY INTERNATIONAL, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S.* 2 (2005).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 2-4, 36, 45-46, 49, 89. For example, in one New York City survey of LGBT youth, 59 out of 60 respondents reported they had experienced police harassment or violence and over one quarter of respondents felt they had been targeted based on their sexual orientation. A 2001 Los Angeles survey of transgender women revealed that 14% of respondents experienced physical abuse by a police officer and 37% experienced verbal abuse by a police officer.

<sup>358</sup> *Id.* at 54, 58.

<sup>359</sup> *Id.* at 2-4, 36, 45-46, 49, 89.

<sup>360</sup> *Id.* at 3-4, 13, 16, 23, 54-55, 66. The likelihood and severity of police action against the targeted individual may correlate with the visibility of the perceived gender variance.

<sup>361</sup> *Id.* at 2-4.

<sup>362</sup> Karen Ocamb, *LAPD Announces Historic New Trans Guidelines and Policies*, LGBT POV (Apr. 13, 2012), [http://lgbtpov.frontiersla.com/2012/04/13/lapd-announces-historic-new-trans-guidelines-and-policies/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+lgbtpov%2FhMHW+%28LGBT+POV%29](http://lgbtpov.frontiersla.com/2012/04/13/lapd-announces-historic-new-trans-guidelines-and-policies/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+lgbtpov%2FhMHW+%28LGBT+POV%29); Kate Sosin, *Chicago Police Department adopts transgender policy*, WINDY CITY TIMES (Sep. 4 2012), <http://www.windycitymediagroup.com/lgbt/Chicago-Police-Department-adopts-transgender-policy/39316.html>; *Boston Police Department Issues Guidelines for Interactions with Transgender Individuals*, THE RAINBOW TIMES (June 11, 2013), <http://www.therainbowtimesmass.com/2013/06/11/boston-police-department-issues-guidelines-for-interactions-with-transgender-individuals/#>; LGBT Liaison Unit, ATLANTA POLICE DEPARTMENT, <http://www.atlantapd.org/lgbtliaison.aspx>.

<sup>363</sup> ACLU, *Know Your Rights - Transgender People and the Law*, <https://www.aclu.org/translaw>. Such neglect has been found to be in violation of U.S. Constitutional protections against cruel and unusual punishment under the Eighth Amendment. For instance, the Seventh Circuit recently recognized rights of transgender prisoners when it affirmed a ruling striking down a Wisconsin state law banning hormone therapy and surgery for transgender inmates. *Id.* However, most courts have been reluctant to order prisons to provide the care—especially if prison medical officials do not consider the care to be “medically necessary.” *Id.*

<sup>364</sup> Transgender Law Center, *California Transgender Law 101*, [http://icenter.ucsd.edu/\\_files/pao/diversity-abroad/ca\\_trans\\_law\\_101\\_overview.pdf](http://icenter.ucsd.edu/_files/pao/diversity-abroad/ca_trans_law_101_overview.pdf); ACLU, *supra* note 363; Amnesty International, *supra* note 355, at 59.

<sup>365</sup> AMNESTY INTERNATIONAL, *supra* note 355, at 3, 60.

<sup>366</sup> ACLU, *supra* note 363.

<sup>367</sup> *Id.*

<sup>368</sup> 42 USC § 15601 *et seq.*

<sup>369</sup> 28 CFR Part 115; ACLU, *supra* note 363.

<sup>370</sup> Murray D. Scheel and Claire Eustance, *Model Protocols on the Treatment of Transgender Persons by San Francisco County Jail*, National Lawyers Guild and City and County of San Francisco Human Rights Commission (August 7, 2002), [www.transgenderlaw.org/resources/sfprisonguidelines.doc](http://www.transgenderlaw.org/resources/sfprisonguidelines.doc).

<sup>371</sup> *See, e.g.*, *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006) (finding due process violations where officials failed to respond to LGBT inmates’ complaints of harassment and abuse and where the “protection” provided was placement in isolation).

<sup>372</sup> AMNESTY INTERNATIONAL, *supra* note 355, at 14, 59, 92.

<sup>373</sup> *Id.* at 58.

<sup>374</sup> Los Angeles Police Department, *Police Interactions with Transgender Individuals* (Apr. 10, 2012), [www.lapdonline.org/police\\_commission/pdf\\_view/50773](http://www.lapdonline.org/police_commission/pdf_view/50773).

<sup>375</sup> Chicago Police Department, *General Order G02-01-03: Interactions with Transgender, Intersex, and Gender Nonconforming (TIGN) Individuals* (Aug. 21, 2012), <http://directives.chicagopolice.org/directives/data/a7a57b38-1394a4ae-75313-94a4-b606a68cfab99615.html?hl=true>.

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<sup>376</sup> Scheel, et. al, *supra* note 370.

<sup>377</sup> Andrew Cray and Jack Harrison, *ID Accurately Reflecting One's Gender Identity Is a Human Right* (December 18, 2012), <http://www.americanprogress.org/issues/lgbt/report/2012/12/18/48367/id-accurately-reflecting-ones-gender-identity-is-a-human-right/>.

<sup>378</sup> ACLU, *supra* note 363. Moreover, many institutions are interpreting the Patriot Act to require name changes on accounts only if the account holder produces a court-ordered name change. Transgender Law Center, *supra* note 364.

<sup>379</sup> AMNESTY INTERNATIONAL, *supra* note 355, at 18.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> Lambda Legal, *Know Your Rights FAQ About Identity Documents*, <http://www.lambdalegal.org/know-your-rights/transgender/identity-document-faq>. In some instances, it is easier to change gender markers on identification if one's physician or social worker fills out standardized forms from the identification-issuing agency rather than submitting separate letters concerning medical treatment. This standardizes the process and eliminates some subjectivity in agency decision-making. *Id.*

<sup>384</sup> ACLU, *supra* note 363.

<sup>385</sup> Lambda Legal, *supra* note 384.

<sup>386</sup> U.S. Social Security Administration, *FAQs: Changing Gender on Social Security's records*, [http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/1667/~/changing-gender-on-social-security%27s-records](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/~/changing-gender-on-social-security%27s-records).

<sup>387</sup> In addition, as a deeply personal matter, it should not be left to the discretion of a judge or a doctor whether an individual can "legally" express his or her gender.

<sup>388</sup> Lambda Legal, *supra* note 384.