

## 2016 STATE LEGISLATIVE REPORT

# ANTI-TRANSGENDER LEGISLATION SPREAD NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGED

**55 anti-transgender bills were filed in 20 states. 3 passed. 26 target children.**

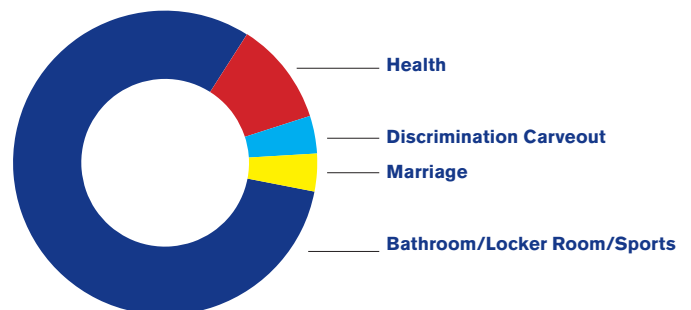
In many ways, 2015 was a great year for transgender people — so great, in fact, that some dubbed it a “transgender tipping point” due to the increased level of public awareness surrounding trans issues. Tragically, there was also an increased level of anti-transgender violence, particularly targeting transgender women of color. In 2015, at least 21 transgender people were victims of fatal violence in the United States, more killings of transgender people than any other year on record. Hard fought losses at the ballot box emboldened opponents to export their transphobic smear campaign to other places. And state legislatures across the country unleashed a slew of anti-transgender bills trying to stem the tide of rising social and legal acceptance of transgender people. **While none of these measures passed in 2015, the 2016 state legislative season threatened to be, and ultimately was, even worse.**

The quantity and diversity of this year’s legislative attempts to undermine the existing legal rights of transgender Americans, particularly transgender and gender nonconforming students, was unprecedented. **Until this year, 2015 had the largest quantity of anti-LGBT and specifically anti-transgender bills state legislatures had ever seen:** HRC tracked 100+ anti-LGBT bills, 21 of which particularly targeted transgender people. These ranged from bills limiting transgender people’s access to medically necessary gender-affirming care, to attempting to undo existing non-discrimination provisions related to transgender people, to placing a serious burden on transgender people’s fundamental constitutional right to marry the person they love. Most of all, however, the bills — 17 of them, more than 80% — attempted to deny transgender people access sex-segregated spaces consistent with their gender identity. None of these 21 bills passed, and only a few survived to be rolled over into the 2016 legislative session.

### 2015

**100+ TOTAL BILLS TRACKED, 21 OF WHICH WERE ANTI-TRANS:**

17 (81%) bathroom/locker room/sports, 2 health (including prisoner healthcare), 1 anti-trans marriage, and 1 discrimination carveout.

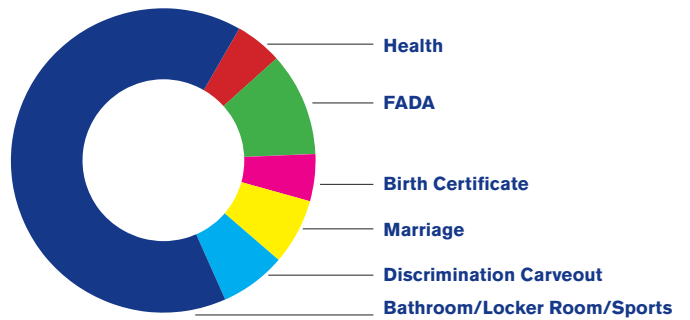




2016

200+ TOTAL BILLS TRACKED, 55 WERE ANTI-TRANS:

- 39 bathroom/locker room/sports,
- 2 health (including prisoner healthcare),
- 3 anti-trans marriage,
- 3 discrimination carveout,
- 2 birth certificate, and
- 6 FADAs.



As outrageous as the level of the 2015 legislative season's attacks on transgender people was, 2016 proved to be far worse. **A stunning 200+ anti-LGBT bills were filed in 34 states — that's 76% of states that had legislative sessions this year.** These bills ranged from attempts to turn the clock back on marriage equality to bills creating a license to discriminate against same-sex couples with taxpayer dollars to protecting those who peddle the discredited, abusive practice of so-called "conversion therapy". These bills would harm transgender people as well as lesbian, gay, and bisexual people, of course. But of the record 200+ anti-LGBT bills filed, 55 of those bills directly target transgender people. And this year, several of these bills presented serious threats of becoming law — and three did ultimately pass.

55 anti-transgender bills is more than twice as many as were introduced in last year's legislative session, and this year's attacks came in more varieties than they have before. In addition to the bills similar in kind to those we've seen previously — bills attempting to limit transgender people's access to medically necessary care; bills imposing serious, humiliating burdens on transgender people who seek to marry; bills trying to undo existing non-discrimination provisions related to transgender people; and the staggering 39 bills introduced, including HB2 in North Carolina, attempting to limit transgender people from equal access of sex-segregated spaces — there are two new variations on the anti-transgender legislation theme. Legislation making it effectively impossible to correct the gender marker on one's birth certificate surfaced in two states, and five states considered so-called "First Amendment Defense Acts" to permit publicly funded programs to refuse service on the basis of "sincerely-held religious beliefs" that a person's gender is determined by their anatomy at the time of birth. **Unfortunately, three anti-transgender bills passed this year: the infamous HB2 in North Carolina**, which mandates discrimination against transgender people in publicly-owned facilities at the same time it overturned LGBT-inclusive nondiscrimination ordinances, among other harmful provisions; **H.B. 1523 in Mississippi** which allows individuals and businesses to cite religious belief about marriage or gender identity as a legal reason to refuse service to LGBT people, single mothers, unwed parents and others; **and a non-binding legislative resolution passed in Oklahoma** in opposition to the guidance issued by the U.S. Departments of Justice and Education related to discrimination against transgender students in schools.

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The proliferation of these bills is deeply disturbing. They popped up in states around the country, in the Northeast, Midwest, South, and West; in states with gender-identity inclusive non-discrimination laws and those without; and in states led by Democrats and Republicans. While each was undoubtedly an attempt to roll back the clock on equality, they are also each deeply misguided: some of these bills would, if passed, put



states directly at odds with federal law. Many of them would also conflict with other important state laws on the books. And they do so in an effort to address a phantom problem born of fear and a lack of understanding about transgender people. One legislator justified his support of an anti-trans bill in his state by characterizing transgender people as “twisted” — so battling back these bills is really about continuing to tip the scales toward the true tipping point for transgender Americans. An encapsulation of the anti-transgender legislation we’ve seen so far this legislative season is as follows.

## SEX-SEGREGATED SPACES: TALKING ABOUT PRIVACY IN PUBLIC PLACES

Of the explicitly anti-transgender bills under consideration during this legislative session, the vast majority of them have to do with forbidding transgender people from having equal access to bathrooms, locker rooms, and other multi-user facilities in which people are likely to be in some state of undress. Over half of these anti-equal access “bathroom” bills expressly address bathrooms and locker rooms in primary and secondary schools, with several also addressing public institutions of higher learning. About a third of the bills apply to all multi-user bathrooms and similar facilities in the state. Some of the bills apply to buildings owned by the state government, and two bills relate exclusively to school sports. Each of these proposals attempt to restrict where transgender students and adults fit in spaces that are often designated by sex.

These bills are problematic in a number of ways, including that they put the physical and emotional safety of transgender people at risk. If a transgender person is forced to access the sex-segregated space that aligns with their assigned sex at birth, rather than the space that aligns with their authentic sense of self and likely their personal appearance, that person can become a target for attack and physical abuse.

**SCHOOLS.** 26 of the 55 anti-transgender bills filed this year are leveled at transgender children in schools and playing school sports. Research has shown that allowing transgender students to access the space consistent with their gender identity — something compelled for years by laws in 19 states as well as adopted by hundreds of cities and school districts around the country — have not resulted in problems. On the other hand, forcing transgender students to use sex-segregated facilities contrary to their identity can impose real harm on transgender students. The only students at risk in this discussion are transgender students — not the other students who may also be accessing the sex-segregated space.

These state bills also put schools in a conundrum. Title IX, the federal civil rights law that prohibits discrimination in education, has been interpreted by the federal government to include discrimination protections on the basis of gender identity — and there’s explicit federal guidance to clarify that includes restrooms and locker rooms.

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That means these student-focused bathroom bills put schools in an untenable position: if they comply with state law, they will be running afoul of federal law and therefore risk losing their federal funding. Either way, these bills set states up for expensive litigation — and that litigation has already begun.

Several of these bills also offer what they characterize as a “reasonable accommodation” — that a transgender student be restricted to the use of a single-stall facility (which may or may not exist or be anywhere near where the class-

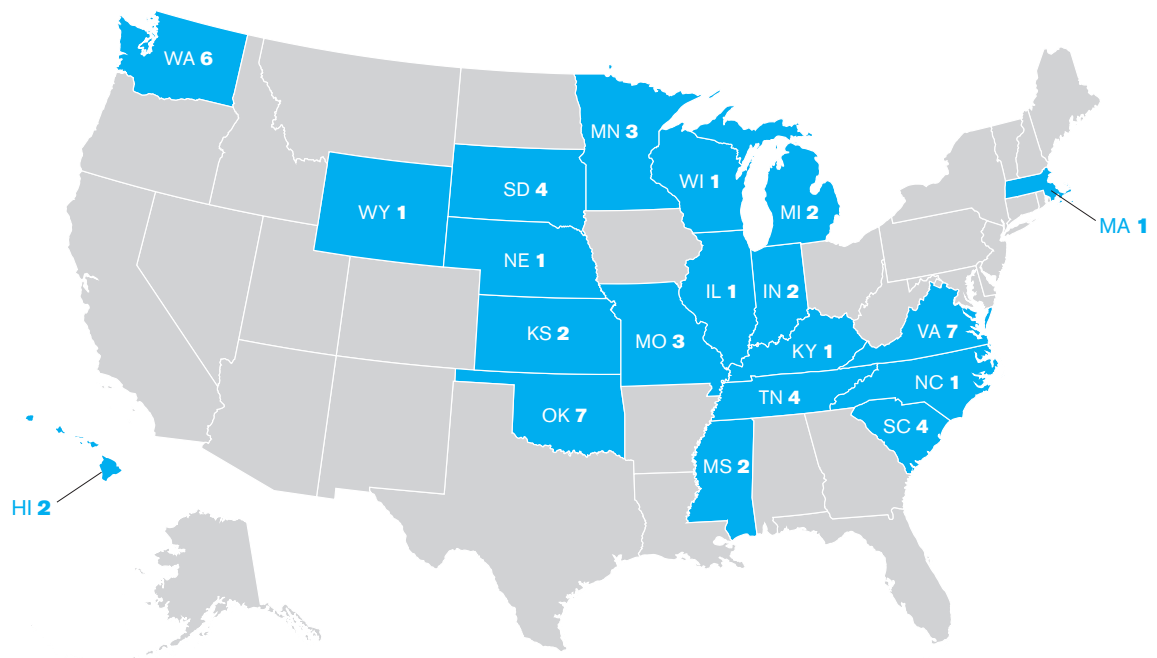
rooms are) or given limited access to a faculty facility (which also presents a host of logistical concerns). But even if these alternatives were convenient, forcing a transgender student to be isolated from their peers and sent to a separate facility is humiliating and degrading for the student. To be clear, compelling a student to use these separate facilities is neither reasonable nor an accommodation. It is simply thinly veiled, federally prohibited discrimination.



**SPORTS.** The principles outlined above also apply to sports — a person should not be forced to participate in a sex-segregated activity, such as many school sports, in a manner inconsistent with their authentic sense of self. The longstanding gender divide in sports sometimes prompts questions about where transgender students fit in, but major sporting associations — including the International Olympic Committee — have recognized those questions are easily resolved and adopted gender-identity inclusive non-discrimination policies. Where state legislators attempt to override the decisions of local sporting entities who have determined they will move forward with a policy that respects transgender students, they are meddling contrary to the best interests of the students, the sport’s governing body, and athletics as a whole.

**RESTROOMS IN PUBLIC PLACES — FROM THE COFFEE SHOP TO CITY HALL.** About a third of the anti-equal access “bathroom” bills under consideration in state legislatures would apply to all multi-user restrooms, locker rooms, and similar facilities within the state. North Carolina’s HB2 is an example: among other things, HB2 mandates that people using restrooms in publicly-owned facilities (including everything from airports to highway rest stops to the DMV to City Hall) do so according to the sex indicated on their birth certificate. Most people use public facilities on a daily basis at work and school, and at restaurants and other public places without a second thought. However, every day too many transgender people are forced to choose between this most basic need and avoiding harassment or intimidation. Transgender people often go to great lengths to avoid using the bathroom or to seek out single-occupancy facilities rather than risk their safety by using facilities contrary to their identity and gender expression, and bills that force them to use such facilities are hugely damaging. Some of the bills proposed this session would, if passed, impose criminal penalties upon a transgender person who accessed a sex-segregated space consistent with their identity. Others would condition access to such a space based on whether or not they’ve had surgery — a deeply personal matter which a person should not need to discuss publicly and which, given that restrooms have stalls for privacy, is totally irrelevant. Occupants of a restroom have no right to know anything about the genitalia of the other occupants. Indecent exposure, sexual assault, or any other illegal activity is criminal and should be punished accordingly — but those safety issues are wholly unrelated to equal access to bathrooms. The lawmakers behind these anti-equal access bills claim to be addressing safety concerns, but these are a red herring: rather, they are simply perpetuating fear and misunderstanding about transgender people.

## 2016 ANTI-TRANS BILLS





HUMAN  
RIGHTS  
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## **FADA: SINCERELY HELD RELIGIOUS BELIEF THAT SEX IS BIOLOGICAL?**

This legislative season has seen a new type of anti-transgender legislation emerge: it is a variation of a so-called “First Amendment Defense Act” (FADA) that protects a person or agency from the normal consequences of engaging in prohibited discrimination if the person or agency discriminating is doing so as a result of a sincerely held religious belief or moral conviction. In this context, the person or agency discriminating can be a public official, a person working at a public agency, or a private individual or agency who receives funds, licensing, or other recognition or benefits from the state — and who would stand to lose that recognition or benefits due to discriminatory behavior.

Generally these FADA bills have been designed to defend those who have religious beliefs opposing same-sex marriage and whose failure to serve same-sex couples would put their ongoing benefit or recognition from the state in jeopardy. This year, some of these bills additionally include a new provision which would also exempt people from the consequences of discrimination if they have a belief or conviction that there are “distinct and immutable biological sexes that are determined by anatomy and genetics at the time of birth”.

The consequences of allowing recipients of public funds to discriminate with taxpayer are simply unacceptable, as is interfering with a state's ability to rescind the license of a professional engaging in malpractice. These FADA bills are both radical and harmful to the LGBT community — and these new, explicitly anti-transgender provisions put a particularly fine point on the anti-LGBT animus motivating these bills. Mississippi passed such a law this year, and enforcement of the law has already been suspended by a federal court due to the likelihood of the law being found unconstitutional.

## **PREEMPTION BILLS: IF WE SAY NO TO EQUALITY, YOU HAVE TO SAY NO TOO**

Hundreds of cities, counties, and school districts around the country have taken action to extend non-discrimination protections of their own volition where the state has been slow or refused to act. In some situations — like a school board working to comply with Title IX by adopting a policy of non-discrimination against lesbian, gay, bisexual or transgender students — the entities are responding to critically important external stakeholders. For cities and counties, the voices calling for these vital non-discrimination protections are businesses, chambers of commerce, and community leaders who know that treating people fairly is a requirement for a city or county to be able to attract and retain top talent. But state legislatures who would rather turn the clock back on equality are increasingly turning to laws that usurp the abilities of these local jurisdictions to pass such laws. Several state legislatures this year are considering these bills in several permutations, but only North Carolina's HB2 passed into law. Among its discriminatory provisions, HB2 overturned Charlotte's LGBT-inclusive nondiscrimination ordinance and prohibited other cities from passing such ordinances. Additionally, it also prohibited cities from passing ordinances setting a mandatory living wage.

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While in some cases these can appear more benign than the flagrantly anti-transgender “bathroom” bills, they have the same effect — or are sometimes even worse. They also similarly put schools in a situation where they have to choose between abiding by state law or forfeiting their federal funding and risking a federal lawsuit. By meddling in local affairs they also take away local jurisdictions’ ability to decide what is in their own best interest.

## THEY’RE CALLED “PRIVATE” PARTS FOR A REASON

One of the most unfortunate themes in the slate of anti-transgender bills introduced across the country this legislative season has been an emphasis on euphemistically describing — and writing into state law — the current or former state of transgender people’s genitals. Some bills try to chastely allude to “chromosomes” or “deoxyribonucleic acid” (DNA) — disregarding that few people have tested their own DNA to know for sure what chromosomes they have — while the more coarse bills use the more colorful descriptors “anatomical sex” or “biological sex”. These bills insist that sex is as determined at birth and as recorded on a birth certificate. Others go even further, insisting that if a birth certificate is going to be accepted by a government agency for any reason (such as a school using a birth certificate to determine age) it must be accepted as the final word on all matters (such as mandating that transgender students must play sports based on their sex assigned at birth). Another would overturn existing state law to mandate that a sex designation on a birth certificate could only be changed in the case of a typographical error.

People are more complex than what can be determined in the first moments after birth, and imposing some unchangeable measure of who people are based on a description of their genitals is as foolish as it is reductive.

These laws lead to an invasion of privacy for all people — in fact, one legislator revised his anatomy-based bill after outcry that it would require inspections by adults of all children’s bodies before they were allowed to use school restrooms and locker rooms. Further, most people would consider it to be outrageous and unacceptable to be asked to describe their genitals to a stranger — be that stranger a clerk issuing marriage licenses, a proprietor engaged in gender-policing their customers, or a middle-school classmate. And yet these offensive bills all require this kind of disclosure of transgender people in various ways.

Reducing any person to a description of their genitals is offensive and absurd. People are more complex than what can be determined in the first moments after birth, and imposing some unchangeable measure of who people are based on a description of their genitals is as foolish as it is reductive. Regulations like these have no place in state law.

## MEAN-SPIRITED AND OUTDATED: ANTI-TRANSGENDER MARRIAGE BILLS

In a year with an unprecedented number of anti-LGBT bills it perhaps isn’t a surprise that many of those proposals are in response to states being forced to grapple with marriage by same-sex couples. Unfortunately, some of these expressly target transgender people who seek to marry. One bill would require an applicant for a marriage license to disclose whether they’d ever undergone “a sex reassignment”, and then would print the answer on the marriage license when issued. Another would require a “husband” to be a “natural-born male as defined by the person’s original certificate of birth” and wife as a “natural-born” female also accord-

ing to her original birth certificate. The first bill would result in a humiliating and wholly unnecessary invasion of privacy; the second, which may be an ill-conceived attempt to circumvent marriage equality, would result in making marriage by transgender people difficult or even impossible. These legislatures are fighting a battle about marriage that they have already lost, and they are continuing to try to place burdens on people exercising their fundamental constitutional right to marry.

## STATE INTERFERING WITH MEDICALLY NECESSARY CARE

A smaller number of bills are targeting a critically important concern: they are limiting transgender people's access to medically necessary healthcare. Whether it be through doubling down on existing exemptions around transition-related care that appear in state disability law, or in trying to avoid financial responsibility for medically necessary care for inmates of the state, states continue to defy medical best practices in excluding transgender people from access to health care services they need.

Winning over hearts and minds has always been crucial in winning the fight for equality for LGBT Americans, and the anti-transgender fearmongering manifested by this wave of anti-transgender legislation is a stark reminder of how much work remains to be done in educating Americans about who transgender people are. HRC will continue to work with our state and national partners to vigorously oppose and defeat anti-equality legislation and to advance critically needed protections at the state and federal level for all LGBT people.

## 2015–2016 ANTI-TRANS BILLS

