

Public Service Denied:

*How Discriminatory Mandates Prevent Qualified Individuals
from Serving on Public Boards*



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Summary

Despite having fostered more than 300 children, Stephen Haile was not eligible to serve on the Arkansas Social Work Licensing Board because of his race.

Despite six years of serving on her district judicial nominating commission, Rachel Raak Law was not eligible to serve on Iowa's State Judicial Nominating Commission because of her sex.

Despite being active in local politics and serving on multiple committees, Micah Broekemeier was not eligible to serve on Iowa's State Judicial Nominating Commission because of his sex.

Stephen's, Rachel's, and Micah's rights were violated when their states treated them differently based on their race or sex.

No one should be denied the opportunity to serve on a public board due to their race or sex. Yet, Pacific Legal Foundation (PLF) found instances in 25 states where such unconstitutional discrimination has been codified.

These mandates threaten the individual right to equality before the law, and without action, the problem is likely to worsen. A vocal group of intellectuals and activists is increasingly asking legislators and governors to factor sex and race into government decision-making. They argue that these aspects of identity fix one's social status as privileged or oppressed.

They advocate overt discrimination against individuals for the sake of group outcomes, viewing individual skin color, sex, and other group membership as more important than individual choices, character, and ability.

We believe that equality before the law requires government decision-making to ignore immutable characteristics, such as race and sex.

Called to Serve

Stephen Haile feels called to serve. He is active in his church and his community and freely gives to those in need. Nowhere is this calling more apparent than in his commitment to disadvantaged youth.

Over nearly two decades, he and his wife Ruth fostered more than 300 children of all ages, from newborns to teenagers, including some with considerable special needs. To Stephen's knowledge, the agency that placed foster children with his family never hesitated to send them a child due to his and his wife's race or any other characteristic.

Stephen and Ruth were so noticeably passionate about foster work that in 2017, the Arkansas Department of Human Services Division of Children and Family Services honored them with an award for being willing to take "hard-to-place children" and for their devotion to "child advocacy and reunification efforts with biological families."¹

In fact, the Division of Children and Family Services was so confident in Stephen and Ruth's ability to meet the needs of foster children that it often granted waivers to Stephen and Ruth to accept more children after Arkansas had changed the rules so that at one time, no family could host more than five foster children (and no more than three children under age five).

Eventually, Stephen and Ruth retired from fostering to care exclusively for an infant daughter, whom they adopted, of one of their former foster children. Stephen continued to support foster families by serving on the Foster Parent Advisory Council until it was shut down during the COVID-19 pandemic.

Retired from fostering but still wanting to serve, Stephen applied for a position on a social worker oversight board. Social workers engage with vulnerable and marginalized populations and participate in life-altering decision-making for the people they serve—exactly the circumstances Stephen dealt with as a foster parent.

Stephen would not be considered for the open board position because he is white. Under an Arkansas law adopted in 1981, the Social Work Licensing Board must adhere to racial quotas. Specifically, the board must be composed of "no fewer than two African-American members."² Because the board had only one black member when Stephen applied, the governor was required to appoint a black candidate to meet the racial quota.³

Fighting for Equality Before the Law

When Stephen realized that he was ruled out from serving his community because of his race, he was shocked and disappointed. "I don't have any qualms with anybody because of their race," Stephen said. "But then I don't feel like anybody's got a right to have any qualms with me because of my race."

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The Fourteenth Amendment to the U.S. Constitution reads in part, "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws."⁴ Arkansas' quota violated Stephen's rights by treating him differently based not on his qualifications, but his race.

PLF is at the forefront of stopping encroachments on the Fourteenth Amendment's clear principle of equality before the law, from challenging a federal loan program that allocated benefits along racial lines to tackling laws that demand a specific sex balance on corporate and government boards.

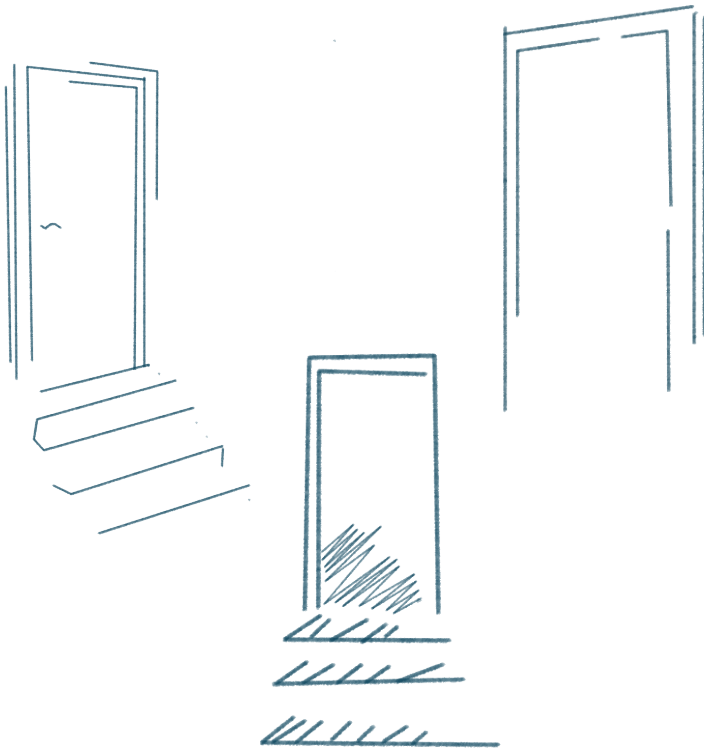
With the help of PLF, Stephen sued the State of Arkansas in January 2023, arguing that the quota violated his right to equal protection.⁵ Stephen asked to be treated as a fully equal individual with the same rights given to any citizen regardless of race.

Legislators Lead by Example

After learning about Stephen Haile and the state's violation of equal protection, Arkansas State Senator Missy Irvin and State Representative Richard Womack introduced a bill to strip the racial quota language from the Social Work Licensing Board's requirements. Just two months after Stephen's lawsuit was filed, the bill passed through both chambers of the state legislature and was signed into law by Governor Sarah Huckabee Sanders in March 2023.⁷

Thanks to quick action by the Arkansas legislature, board candidates must now be judged by their experience and expertise, not their skin color. This protection of Arkansas citizens' Fourteenth Amendment rights is a great victory for Stephen and everyone else in Arkansas.

When faced with the facts of an unjust law—even one with more than 40 years in the books—Arkansas's political leaders acted quickly to remedy it.



Why Equality Before the Law?

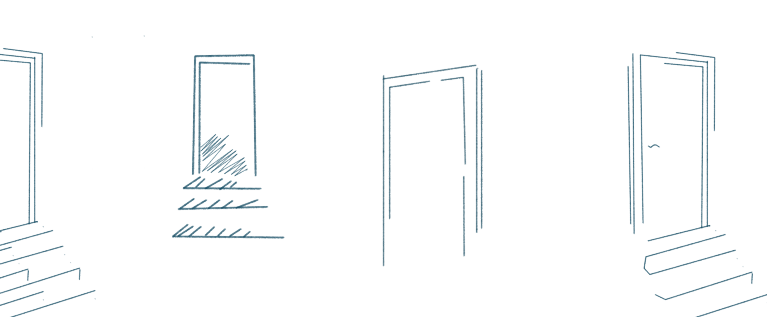
The Fourteenth Amendment to the U.S. Constitution was ratified in 1868 as part of the Reconstruction, an effort to reunify the nation after the Civil War and recognize African Americans as full citizens. The defeated states of the Confederacy resisted the substance of the amendment but were required to ratify it to regain representation in Congress.

The amendment contains guarantees familiar to most Americans regarding citizenship, privileges and immunities, due process, and equal protection. Equal protection was the basis of Stephen's lawsuit in Arkansas.

The animating moral principle of America's founding is that each person is endowed with natural human rights that cannot be taken away by any other person, any majority, or even the state, except by due process of law. The concepts of individual rights and liberties are America's heritage and are the indispensable basis for its future success. The government is a servant of individual rights, established to secure those rights.

Our Constitution creates the legal structure to guarantee that promise. Yet, slavery persisted in glaring contradiction for nearly 100 years after the Founders signed the Declaration of Independence.

The Reconstruction Amendments, also known as the Thirteenth, Fourteenth, and Fifteenth Amendments, aimed to remedy that contradiction by promising full equality of liberty. As Justice John Marshall Harlan noted in his *Plessy v. Ferguson* dissent, "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."⁶



Statewide Laws

Public board membership laws in 15 states have race- and/or sex-conscious eligibility mandates that apply to nearly every public board in the state (9 are race-conscious and 13 are sex-conscious).

Board-Specific Laws

PLF also found 63 boards in 14 states (some of which also have statewide laws) with race- or sex-conscious mandates for membership. All 63 mandates include race, while 32 also incorporate sex. Like the statewide mandates, most include language directing appointments to match the population of the state, a local area, or those served by the board. However, eight provisions go further and set a specific race quota. These quotas require one or more members to be of any racial minority, and in three instances, the minority must be black.

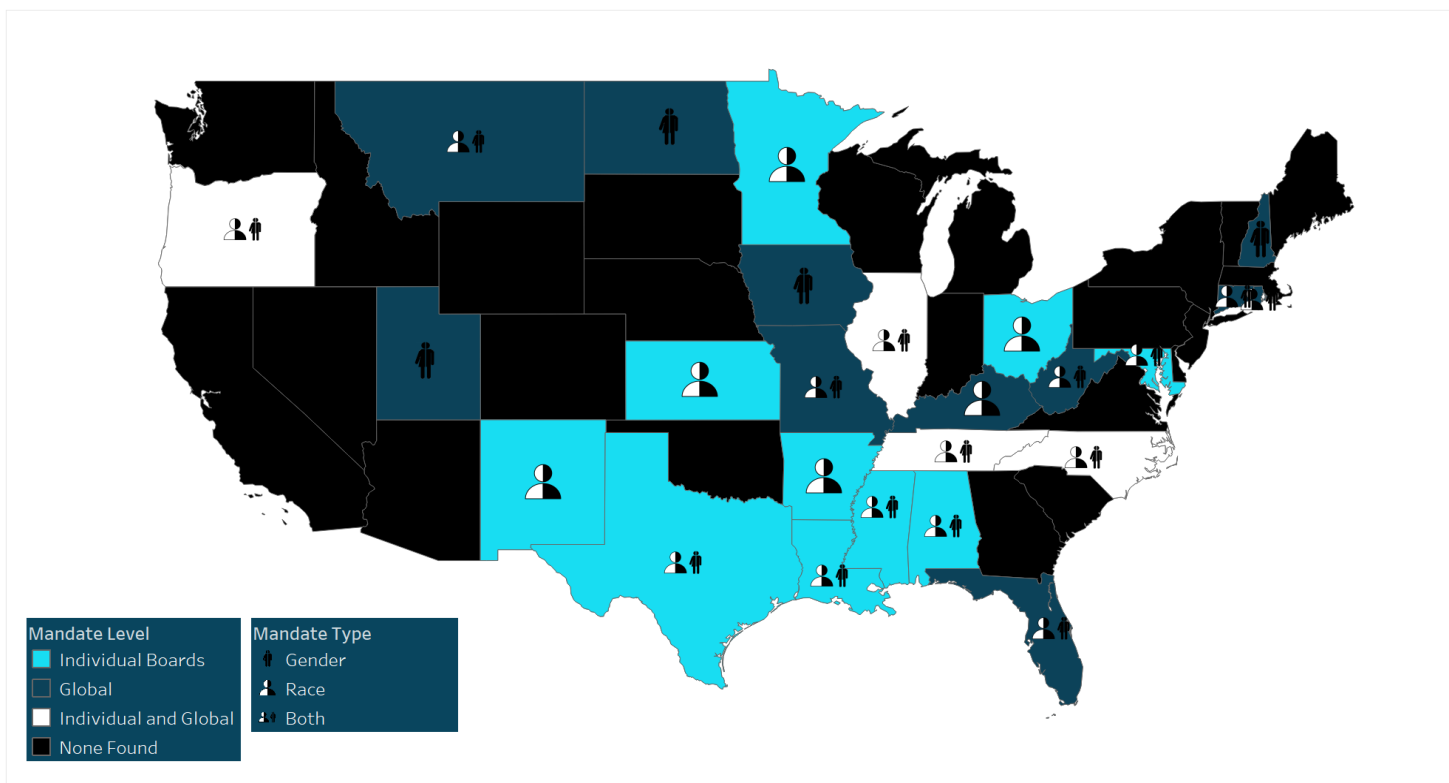
These provisions most often apply to state boards of social work (10 states), medical examination (6 states), pharmacy (6 states), and dentistry (6 states).

Race- and Sex-Conscious Mandates Across the States

PLF conducted original research examining membership requirements in all 50 states for boards that license 20 different occupations (see Appendix). Our researchers found that at least 25 states have race- or sex-conscious mandates or quotas for public board membership.

Race- and sex-conscious mandates require an attempt to match appointments to the population of either the state, a local population, or those served by the board. Quotas require a specific count based on race or sex.

States with Race or Sex Mandates for Licensing Board Membership



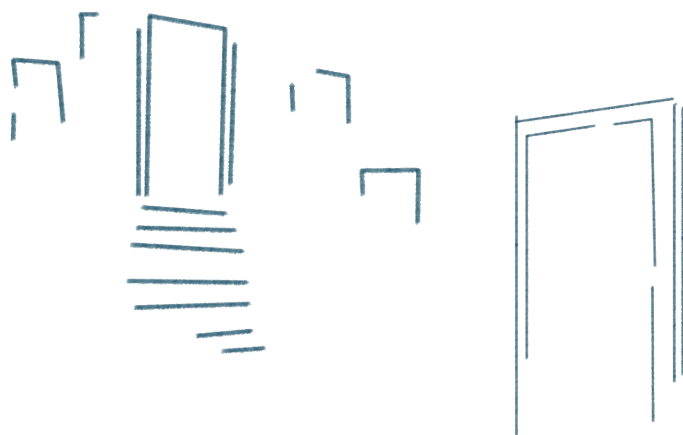
Serving Together

PLF is still fighting for the rights of others like Stephen who want to serve their communities. In Iowa, Rachel Raak Law, Micah Broekemeier, and Chuck Hurley want to seek elected positions in the State Judicial Nominating Commission. They can't, however, because state law requires one male and one female commissioner per district. These elections are staggered, and the seat available in each of their districts doesn't match their sex.⁸

Rachel cannot legally seek a seat on the commission because the other seat in her district is held by a woman. Micah and Chuck cannot legally seek seats on the commission because the other seats in their districts are held by men. Iowa's law violates the equal protection guaranteed by the Fourteenth Amendment.

All people should have the opportunity to be considered for service on public boards. No one should be shut out by mandates that prioritize race and sex over other qualifications.

State legislators can vindicate the principle that every individual should be treated equally before the law. They can support individuals such as Stephen, Rachel, Micah, and Chuck by changing the race- and sex-conscious mandates in their own state governments. Legislators can also help fight calls for equity over equality by stopping discrimination on public boards.



Appendix

PLF surveyed 2022 state statutes and regulatory rules across all 50 states. We looked for race- and sex-conscious language for licensing boards across 20 occupations that require a license in every state:

1. Accountant
2. Architect
3. Barber
4. Chiropractor
5. Cosmetologist
6. Dental Hygienist
7. Dentist
8. Funeral Director
9. Land Surveyor
10. Nurse
11. Occupational Therapist
12. Optometrist
13. Pharmacist
14. Psychologist
15. Physical Therapist
16. Physician
17. Podiatrist
18. Psychologist
19. Social Worker
20. Veterinarian

The statutory language was categorized as either a mandate (makeup of the board should match the population) or a quota (a specific number of seats are allocated for a specific race or sex).

Race- and Sex-Conscious Membership Mandates That Apply to Most Public Boards

State	Statute	Category
Connecticut	Conn. Gen. Stat. § 4-9b (2021)	Race & Sex
Florida	Fla. Stat. § 760.80 (2020)	Race & Sex
Illinois	5 Ill. Comp. Stat. 310/2 (1991)	Sex
Iowa	Iowa Code § 69.16A (2009)	Sex
Kentucky	Ky. Rev. Stat. Ann. § 12.070 (1994)	Race
Missouri	Mo. Rev. Stat. § 324.021 (2008)	Race & Sex
Montana	Mont. Code Ann. § 2-15-108	Race & Sex
New Hampshire	N.H. Rev. Stat. Ann. § 21.33(a) (2015)	Sex
North Carolina	N.C. Gen. Stat. Ann. § 143-157.1	Sex
North Dakota	N.D. Cent. Code § 54-06-19 (1989)	Sex
Oregon	Or. Rev. Stat. § 182.100 (1981); Or. Rev. Stat. § 236.115 (1997)	Race & Sex
Rhode Island	R.I. Gen. Laws § 28-5.1-3.1	Race & Sex
Tennessee	Tenn. Code Ann. § 10-7-601; 10-7-607 (1997)	Race
Utah	Utah Code Ann. § 67-1-11 (1992)	Sex
West Virginia	W. Va. Code § 18B-2A-1 (2000)	Race & Sex



Race- and Sex-Conscious Membership Mandates for Specific Boards

State	Statute/Rule	Board	Category
Alabama	AL Code § 34-7B-2 (2013)	Cosmetology and Barbering	Race & Sex
Alabama	Ala. Code § 34-26-21 (2021)	Examiners in Psychology	Race & Sex
Alabama	Ala. Code § 34-22-40 (2021)	Optometry	Race & Sex
Alabama	Ala. Code § 34-30-50 (2021)	Social Work Examiners	Race*
Alabama	Ala. Code § 34-39-6 (2021)	Occupational Therapy	Race & Sex
Alabama	Ala. Code § 34-23-90 (2021)	Pharmacy	Race & Sex
Alabama	Ala. Code § 34-1-3 (2021)	Public Accountancy	Race & Sex
Alabama	Ala. Code § 34-29-63 (2021)	Veterinary Medical Examiners	Race & Sex
Alabama	Ala. Code § 34-9-40 (2021)	Dental Examiners	Race & Sex
Alabama	Ala. Code § 34-21-2 (2021)	Nursing	Race & Sex
Alabama	Ala. Code § 34-24-192 (2021)	Physical Therapy	Race & Sex
Alabama	Ala. Code § 34-24-310 (2021)	Medical Licensure Commission	Race & Sex
Alabama	Ala. Code § 34-2-38 (2021)	Registration of Architects	Race & Sex
Alabama	Ala. Code § 34-24-140 (2021)	Chiropractic Examiners	Race*
Alabama	Ala. Code § 34-11-30 (2021)	Licensure for Professional Engineers and Land Surveyors	Race & Sex
Arkansas	Ark. Code Ann. § 17-92-201 (2020)	Pharmacy	Race*
Illinois	225 Ill. Comp. Stat. 20/6 (2021)	Social Work Examining and Disciplinary	Race
Kansas	Kan. Stat. Ann. § 74-2701 (2021)	Cosmetology	Race*
Louisiana	La. Stat. Ann. § 37:341	Barber Examiners	Race*
Louisiana	La. Stat. Ann. § 37:1172	Pharmacy	Race & Sex
Louisiana	La. Stat. Ann. § 37:2403 (2021)	Physical Therapy	Race & Sex
Louisiana	La. Stat. Ann. § 37:753 (2021)	Dentistry	Race*
Louisiana	La. Stat. Ann. § 37:832 (2021)	Embalmers and Funeral Directors	Race & Sex
Louisiana	La. Stat. Ann. § 37:2353 (2021)	Examiners of Psychologists	Race & Sex
Louisiana	La. Stat. Ann. § 37:1263 (2021)	Medical Examiners	Race*
Louisiana	La. Stat. Ann. § 37:914 (2021)	Nursing	Race & Sex
Louisiana	La. Stat. Ann. § 37:1042 (2021)	Optometry Examiners	Race & Sex
Louisiana	La. Stat. Ann. § 37:2704 (2021)	Social Work Examiners	Race & Sex
Maryland	Md. Code Ann., Health Occ. § 4-202 (2021)	Dental Examiners	Race & Sex
Maryland	Md. Code Ann., Bus. Occ. & Prof. § 8-202 (2021)	Nursing	Race & Sex
Maryland	Md. Code Ann., Health Occ. § 12-202 (2021)	Pharmacy	Race & Sex
Minnesota	Minn. Stat. § 148E.025 (2021)	Social Work	Race*
Mississippi	Miss. Code Ann. § 73-53-8 (2020)	Examiners for Social Workers and Marriage and Family Therapists	Race & Sex
Mississippi	Miss. Code Ann. § 73-43-3 (2020)	Medical Licensure	Race & Sex

Race- and Sex-Conscious Membership Mandates for Specific Boards

State	Statute/Rule	Board	Category
New Mexico	N.M. Code R. § 16.63.1.12 (2021)	Social Work Examiners	Race
North Carolina	N.C. Gen. Stat. § 90-3 (2020)	Medical Board	Race & Sex
North Carolina	N.C. Gen. Stat. § 90B-5 (2021)	Social Work Certification and Licensure Board	Race & Sex
Ohio	Ch. 4754 Sec. 4757.03	Counselor, Social Worker, and Marriage and Family Therapist	Race
Oregon	Or. Rev. Stat. § 675.310 (2021)	Occupational Therapy Licensing	Race
Oregon	Or. Rev. Stat. § 679.230 (2021)	Dentistry	Race
Oregon	Or. Rev. Stat. § 683.250 (2021)	Optometry	Race
Oregon	Or. Rev. Stat. § 688.160 (2021)	Physical Therapy	Race
Oregon	Or. Rev. Stat. § 675.100 (2021)	Psychology	Race
Oregon	Or. Rev. Stat. § 677.235 (2021)	Medical	Race
Oregon	Or. Rev. Stat. § 678.140 (2021)	Nursing	Race
Oregon	Or. Rev. Stat. § 684.130 (2021)	Chiropractic Examiners	Race
Oregon	Or. Rev. Stat. § 675.590 (2021)	Social Workers	Race
Oregon	Or. Rev. Stat. § 689.115 (2019)	Pharmacy	Race
Tennessee	Tenn. Code Ann. § 63-4-102 (2021)	Chiropractic Examiners	Race
Tennessee	Tenn. Code Ann. § 63-5-103 (2021)	Dentistry	Race
Tennessee	Tenn. Code Ann. § 63-11-102 (2021)	Examiners in Psychology	Race
Tennessee	Tenn. Code Ann. § 63-6-102 (2021)	Medical Examiners	Race & Sex
Tennessee	Tenn. Code Ann. § 63-7-202 (2021)	Nursing	Race
Tennessee	Tenn. Code Ann. § 63-13-216 (2021)	Occupational Therapy	Race & Sex
Tennessee	Tenn. Code Ann. § 63-10-302 (2021)	Pharmacy	Race
Tennessee	Tenn. Code Ann. § 63-13-318 (2021)	Physical Therapy	Race & Sex
Tennessee	Tenn. Code Ann. § 63-3-103 (2021)	Podiatric Medical Examiners	Race
Tennessee	Tenn. Code Ann. § 63-23-101 (2021)	Social Worker Licensure	Race
Tennessee	Tenn. Code Ann. § 63-12-104 (2021)	Veterinary Medical Examiners	Race
Tennessee	Tenn. Code Ann. § 62-1-104 (2021)	Accountancy	Race
Tennessee	Tenn. Code Ann. § 62-2-201 (2021)	Examiners for Architects and Engineers	Race & Sex
Tennessee	Tenn. Code Ann. § 62-18-103 (2021)	Examiners for Land Surveyors	Race
Texas	Tex. Occ. Code Ann. § 252.001 (West 2021)	Dental Examiners	Race & Sex
*Quota			

Endnotes

¹ Arkansas News Bureau, “State agency honors foster families,” *Swimes.com*, Gannett Co., Inc., May 17, 2017, <https://www.swtimes.com/story/news/state/2017/05/17/state-agency-honors-foster-families/209688290071>

² Ark. Code Ann. § 17-103-201 (2020)

³ Ark. Code Ann. § 17-103-201 (2020)

⁴ Fourteenth Amendment

⁵ *Haile v. Hutchinson*

⁶ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), overruled by *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954)

⁷ AR LEGIS 254 (2023), 2023 Arkansas Laws Act 254 (S.B. 264)

⁸ *Law v. Gast*

Authors

Laura D’Agostino is an attorney with Pacific Legal Foundation’s Equality and Opportunity practice. Since joining PLF in 2021, she has helped clients nationwide fight governmental discrimination to ensure that all people are treated equally before the law.

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Acknowledgements

The authors thank Carol Park, Cassi Corbin, Alexandre Jund, Nishant Saxena, and Michelle Wu for data collection.



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