

QUEER AND TRANS FOSTER YOUTH OF COLOR: Mapping the Margins¹ of the Child Welfare System

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1. The phrase “mapping the margins” originates from Professor Kimberlé Crenshaw’s article *Mapping the Margins*. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991). The phrase is deployed here as this article rests heavily on Crenshaw’s foundational theory of intersectionality and aims to uncover the experiences of foster youth who find themselves at the intersection of a marginalized race and sexual or gender identity.

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I. INTRO

D.S., a Native American Trans youth, spent over a year of her time in foster care living day to day out of hotel rooms.² Washington’s Department of Children, Youth, and Families (DCYF) tried to place D.S. in an all-boys facility and when she refused, the agency forced her to sleep in a social worker’s car.³ A DCYF social worker told D.S. that “she would not be ‘passable’ as a trans person, [and] that she would never go anywhere in life.”⁴ Despite that D.S. legally changed her name to match her gender identity, the state refused to update it in her files.⁵ D.S. was placed in a Juvenile Rehabilitation Center and upon her release subjected to “a stringent supervision plan.”⁶ D.S. was denied mental health care despite a record of suicidal ideations.⁷ When interviewed about her lawsuit against DCYF, D.S. stated “The state likes to act as if they care Certain social workers may care, but at the end of the day queer people of color get nothing.”⁸

This paper centers the experiences of queer and trans foster youth of color (QTFYOC) like D.S. and explores what barriers they may face and protection they may rely on within the child welfare system. LGBTQ youth make up a significant portion of foster youth, and the majority of LGBTQ youth in the foster care system are youth of color.⁹ Given their overrepresentation in the foster care system, this paper makes explicit a focus on traditionally marginalized youth at the intersection of race with sexual orientation and gender

2. Tara Urs, Opinion, *The State is Failing LGBTQIA+ Children in Foster Care*, N.Y. TIMES, October 13, 2021, <https://www.seattletimes.com/opinion/the-state-is-failing-lgbtqia-children-in-foster-care>.

3. Complaint at 21, D.S. v. Washington (filed Jan. 1, 2021).

4. Urs, *supra* note 2.

5. Urs, *supra* note 2.

6. Complaint at 20, D.S. v. Washington (filed Jan. 1, 2021).

7. Complaint at 19, D.S. v. Washington (filed Jan. 1, 2021).

8. Urs, *supra* note 2.

9. See Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in the Foster Care System*, THE WILLIAMS INSTITUTE AT UCLA SCHOOL OF LAW, 2014 <https://williamsinstitute.law.ucla.edu/publications/sgm-youth-la-foster-care> at 6, 8 (finding in a study of foster youth in Los Angeles that 19.1% of foster youth identify as LGBTQ and within that 54.6% as Latino, 28.5% as Black, and 3% as American Indian).

identity. A focus on QTFYOC does not suggest cisgender heterosexual (cis het) foster youth will not benefit from the critiques and suggestions which follow, but rather that by centering the most marginalized, advocates may see the true limitations of the current child welfare system and imagine something better for all youth.¹⁰

Section II exposes the overrepresentation of queer and trans youth in the foster care system and explores potential explanations. This analysis uncovers the history of the foster care system and its violent role in policing communities of color. Section II also discusses the pressing needs among QTFYOC that are often marginalized by the current state welfare system.

Section III explores existing federal and state protections for QTFYOC and ultimately argues that such protections provide only a patchwork of relief given their extreme variance among the states. As most state provisions lack substantive case law, this section then uses California as a case study to hypothesize potential applications of antidiscrimination protections and limitations of relief for QTFYOC.

Section IV outlines current methods for QTFYOC to enforce their rights through administrative claims and class actions. Section V proposes a range of potential policy solutions, including expansion of affirming placements and abolition.

II. QUEER AND TRANS YOUTH OF COLOR IN THE FOSTER CARE SYSTEM

QTFYOC are significantly overrepresented in the foster care system. This section outlines a brief history of the system and potential explanations for the overrepresentation of QTFYOC within it. This section also posits the specific needs of QTFYOC that the state fails to address despite their overrepresentation in the foster care system.

A. *A Brief History of the Foster Care System*

The Federal Department of Health and Human Services defines foster care as “24-hour substitute care for children placed away from their parents

10. In centering QTFYOC, this paper embraces Mari Matsuda’s method “looking to the bottom.” Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L.L. REV. 323 (1987). Matsuda argues that marginalized social groups are uniquely situated to understand subordinating systems and that legal advocates can learn from these groups when envisioning liberation. *Id.* at 63 (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice”). Centering QTFYOC is also in line with Professor Kimberlé Crenshaw’s theory of centering those at the intersections of marginalized identities to enact lasting social change. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139, 167 (1989) (“If [advocates’] efforts instead began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit . . . The goal of this activity should be to facilitate the inclusion of marginalized groups for whom it can be said: ‘When they enter, we all enter’”).

or guardians.¹¹ The foster care system can be traced back to the formidable English Poor Laws of the 1500s which essentially authorized the forced entry of impoverished children into the workforce.¹² In the U.S., private charitable institutions occupied the role of child “welfare”¹³ prior to official state involvement.¹⁴ Judges also played a role in removing children from seemingly unfit parents as early as 1642.¹⁵ The federal government officially entered the child welfare arena with the passage of the Social Security Act in 1935 that authorized federal grants for state child welfare services.¹⁶ In 1974, the Child Abuse Prevention and Treatment Act (CAPTA) “authorized [additional] federal funds to improve the state response to physical abuse, neglect, and sexual abuse.”¹⁷

Professor Dorothy Roberts complicates the narrative of a historically absent federal state by arguing violent state intervention in child “welfare” can be traced as far back as chattel slavery.¹⁸ She notes that enslaved parents had no custody rights over their children and “families could be separated at the whim of the enslaver for their economic convenience.”¹⁹ Roberts discusses the apprenticeship system, instituted after the civil war, “where judges would order Black children to be returned to their former enslavers, on grounds that their parents were neglecting them.”²⁰ Roberts argues that this history of the child welfare system as a violent seizure of Black children from their families and a gross dehumanization of Black parents remains traceable in the overrepresentation of Black children in the system today.²¹

11. 45 CFR § 1355.20 (2012) (“[foster care] includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes”).

12. VOICES FOR CHILDREN, *History of Foster Care* (May 25, 2020), <https://www.speakupnow.org/history-of-foster-care/#:~:text=1935%20%E2%80%93%20The%20federal%20government%20takes,foster%20homes%20take%20place%20prior> (the laws “allowed [children] in poverty, without a home, or orphaned youth to be placed in indentured service until adulthood”).

13. This paper occasionally refers to child “welfare” in quotes to complicate whether such institutions truly serve the welfare of children.

14. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAMILY L. QUARTERLY 449, 452 (2008) (noting in 1875 the New York Society for the Prevention of Cruelty to Children was the first charitable society established for child welfare).

15. *Id.* at 450 (“[a]s early as 1642, Massachusetts had a law that gave magistrates the authority to remove children from parents who did not “train up” their children properly”).

16. VOICES, *supra* note 12.

17. *See* Myers, *supra* note 14, at 457.

18. Janell Ross, *One in Ten Black Children in America Are Separated From Their Parents by the Child-Welfare System. A New Book Argues That’s No Accident*, TIME, Apr. 20, 2022, <https://time.com/6168354/child-welfare-system-dorothy-roberts>.

19. *Id.*

20. *Id.*

21. *Id.* (Roberts argues the seizure of Black children from enslaved parents created a “sense that children are better off away from their families, and that there isn’t a tight loving bond between Black children and parents”).

Similarly, federal involvement with Indigenous families in the United States can be traced back to the violent seizure of children and forced entry into Indian boarding schools.²² The Bureau of Indian Affairs (BIA) sent social workers to reservations to convince parents to waive their parental rights.²³ By 1926, it is estimated that over 83% of school-aged Indian children attended boarding schools.²⁴ National Native American Boarding School Healing Coalition Board President and boarding school survivor Sandy White Hawk (Lakota) argues the initiative was undeniably a white supremacist project:

This idea did not come from grace (a basic Christian concept), but rather cruel assumption that Indian families did not have a religion and a spiritual belief system or a family system . . . All they saw was poverty and alcoholism—circumstances we came upon due to colonization—and they compared it to their life and concluded that they and their way of life were superior.²⁵

White Hawk argues that the boarding school initiative was a violent process of “cultural genocide” and “identity shaming” in which the government hoped to assimilate Indigenous children by removing them from their families, communities, languages, and cultures.²⁶

Congress has since tried to restrict the rising number of children in long-term foster care. In 1978, Congress passed the Indian Child Welfare Act (ICWA) to end the boarding school initiative and forced adoption process.²⁷ And in 1980, Congress created the Adoption Assistance and Child Welfare Act (AACWA) which required states to “make ‘reasonable efforts’ to avoid removing children” and to reunite families where removal became necessary.²⁸ AACWA also required states to create a “permanency plan” for each foster child, outlining goals for family reunification or termination of parental rights.²⁹ In 2018, Congress passed the Family Prevention Services Act which limited the amount of federal welfare funds that can be used for children in congregate care and

22. THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION (NABS), *Indian Boarding Schools: The First Indian Child Welfare Policy in the U.S.*, Oct. 30, 2020, <https://boardingschoolhealing.org/indian-boarding-schools-the-first-indian-child-welfare-policy-in-the-u-s>. These schools also had incredibly high rates of abuse, torture, and death. Mark Walker, *Report Catalogs Abuse of Native American Children at Former Government Schools*, N.Y. TIMES, May 11, 2022, https://www.nytimes.com/2022/05/11/us/politics/native-american-children-schools-abuse.html?campaign_id=60&emc=edit_na_20220511&instance_id=0&nl=breaking-news&ref=cta®i_id=93636076&segment_id=91929&user_id=606e6fc986d66b2553f0a5365bc6c71a.

23. THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION (NABS), *Indian Boarding Schools: The First Indian Child Welfare Policy in the U.S.*, Oct. 30, 2020, <https://boardingschoolhealing.org/indian-boarding-schools-the-first-indian-child-welfare-policy-in-the-u-s>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See Myers, *supra* note 14, at 459.

29. *Id.*

allowed states to use the funds for prevention programs.³⁰ Despite these reforms, Black and Indigenous children remain significantly overrepresented in the foster care system.³¹ The federal government continues to enact policies which disproportionately separate children of color from their families.³²

B. *Overrepresentation of QTFYOC in the Foster Care System*

A 2014 Williams Institute study on Sexual and Gender Minority Youth was one of the most substantial efforts to date to track the prevalence of Queer and Trans youth in the foster care system. Researchers found 19.1% of foster youth in Los Angeles identify as LGBTQ, with 13.6% identifying as LGBQ and 5.6% as transgender.³³ This is a stark overrepresentation within the system given that estimates for LGBTQ individuals in the general U.S. population range from 3.4%-7.75%.³⁴

Additionally, most LGBTQ youth are youth of color. The same study estimated that of LGBTQ foster youth in the study, 54.6% identified as Latino, 28.5% as Black, and 3% as American Indian. In contrast, only 6.4% of LGBTQ foster youth identified as white.³⁵

TABLE 1. DEMOGRAPHICS OF LGBTQ YOUTH IN FOSTER CARE.

DEMOGRAPHICS OF YOUTH IN FOSTER CARE	LGBTQ
Latino	54.6%
American Indian	3.0%
Asian/Pacific Islander	2.9%
Black	28.5%
White	6.4%
Bi/multi-racial or ethnic	4.7%
Born out of U.S.	9.7%
One or both bio parents born out of U.S.	32.4%
Assigned Female at birth	61.4%
Assigned Male at birth	38.6%
Age in years	16.2 (1.7)

30. NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL), *Disproportionality and Race Equity in Child Welfare*, Jan. 26, 2021, <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx>.

31. NABS, *supra* note 22 (“Native children are still placed in foster care at higher rates per capita than any other ethnic group”); Ross, *supra* note 18.

32. See Richard Gonzales, *Trump’s Executive Order On Family Separation: What It Does And Doesn’t Do*, NPR, Jun. 20, 2018, <https://www.npr.org/2018/06/20/622095441/trump-executive-order-on-family-separation-what-it-does-and-doesnt-do> (discussing Trump’s 2018 Executive Order allowing for the separation of children from their families during immigration detention).

33. See WILSON, *supra* note 9, at 6.

34. *Id.* at 39.

35. *Id.* at 8.

Another study estimated almost 57% “of all children in out-of-home care who identify as LGBTQ are youth of color.”³⁶ Thus, a discussion about LGBTQ foster youth is implicitly a discussion about youth of color. Acknowledging the prevalence of QTFYOC within the system is necessary to appropriately address their overlapping needs and heightened risks of discrimination.

C. Possible Explanations for increased exposure

The disproportionate representation QTFYOC is directly related to the general overrepresentation of youth of color in the foster care system.³⁷ Professor Roberts argues that the foundations of the child welfare system in chattel slavery remain everlasting. Roberts reasons that Black youth are overrepresented in the foster care system because the child welfare system addresses hardships of children “by accusing their parents and separating their families.”³⁸ Roberts argues stereotypes about Black parents as unloving or incapable fuel a narrative that “Black children are better off in the care of other[s].”³⁹ The foster care system’s “family policing” removes children from their “unworthy” parents rather than addressing the underlying inequalities which lead to the child’s hardship like lack of financial resources or health care.⁴⁰

QTFYOC and youth of color generally may also be overrepresented in the foster care system due to the incapacitation of potential parents or guardians. State regimes such as the carceral system and immigration detention and deportation render otherwise capable parents unable to care for their children. These regimes disproportionately target people of color.⁴¹ Additionally, due to systemic inequities and higher rates of stress, adults of color face higher rates of mental illness, potentially limiting their ability to serve as guardians.⁴²

QTFYOC may face an additional entry point into the foster care system through familial rejection due to their queer identities. QTFYOC whose parents are unaccepting of their identities may also have less community or

36. More than 80% of the foster youth from the general population identified as either Latino or Black. *Id.* at 22. See Megan Martin et al., *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration*, CENTER FOR THE STUDY OF SOCIAL POLICY (2016) (citing Dettlaff & Washburn, 2016).

37. Ross, *supra* note 18 (discussing a study finding while 37.4% of children experience a child protective services investigation, 53% of Black children experience an investigation).

38. *Id.* She supports her argument with the reality that the most common reason for children to be removed from their home and placed in child welfare is due to allegations of parental neglect as opposed to abuse. *Id.*

39. *Id.* (Roberts discussing the harmful stereotypes of “welfare queens” and absent Black fathers both of whom are assumed to be callous and inadequate parents).

40. *Id.* (“By blaming the parents you’re diverting attention away from the structural reasons for these unmet needs”).

41. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT, Oct. 13, 2021, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

42. Thomas A. Vance, *Addressing Mental Health in the Black Community*, COLUM. UNIV. DEP’T OF PSYCHIATRY, Feb. 8, 2019, <https://www.columbiapsychiatry.org/news/addressing-mental-health-black-community#:~:text=Research%20suggests%20that%20the%20adult,Disorder%20or%20Generalized%20Anxiety%20Disorder>.

extended family supports than white queer or trans youth because of the disproportionate inequity of financial resources and incapacitation of potential parents. Thus, while a white trans youth may be able to go live with her financially stable uncle if she is kicked out of her home, a Black trans youth may not have the same opportunity. Perhaps her uncle is incarcerated, mentally ill, or financially unable to support her. Then, the Black trans youth will be placed in the foster care system or face homelessness while her white peer may avoid the child welfare system altogether.

When QTFYOC do have viable support networks, the child welfare system often fails to acknowledge or leverage such resources. The child welfare system operates under a cultural knowledge base primarily crafted from a traditional white family structure.⁴³ However, youth of color may have a host of caring adults in their lives including godparents, neighbors, and nonbiological aunts, uncles, and cousins.⁴⁴ The child welfare system generally fails to consider this “complex network of informal supports” when determining placement.⁴⁵ Thus, QTFYOC may end up in the foster care system at disproportionate rates due to the state’s failure to recognize culturally distinct forms of kinship and support.

Finally, the child welfare system itself functions as a regime to police non-normative familial structures. The recent proliferation of state laws directly targeting trans youth and their caregivers threaten to punish affirming parents and funnel trans kids away from loving homes and into the child welfare system.⁴⁶ Roberts argues that the targeting of trans youth and their parents who provide affirming care, like the family policing of Black parents facing poverty, is yet another way the state weaponizes the child welfare system to “attac[k] families who aren’t seen to conform to certain norms.”⁴⁷ Similarly, the separation of children from their families at the border and the Indian boarding school initiative are instances in which the state violently intervenes supposedly on behalf of welfare but disproportionately against non-normative and non-white families. As inherently non-normative and subversive in their

43. This may generally include biological relatives like a father, mother, grandparents, and a limited number of biological aunts and uncles.

44. Martha L. Raimon, et al., *Better Outcomes for Older Youth of Color in Foster Care*, AMERICAN BAR ASSOCIATION, Mar. 25, 2015, <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2015/better-outcomes-older-youth-color-foster-care>. See Tat Bellamy-Walker, *How the Black queer community is re-imagining the family tree*, NBC NEWS, Feb. 16, 2022, <https://www.nbcnews.com/news/nbcblk/black-queer-community-re-imagining-family-tree-rcna16134> (discussing the importance of chosen family within the Black queer community).

45. Raimon, *supra* note 44.

46. For example Florida recently passed SB 254, which allows a Florida court to “enter, modify or stay a child custody determination to a child” in Florida “to the extent necessary to protect the child from being subjected to sex-reassignment prescriptions or procedures in another state.

47. Ross, *supra* note 19. Roberts also critiques the lack of public outcry for the separation of Black families as opposed to immigrants at the border. *Id.*

very existence, it is no surprise that queer and trans youth of color and their families would find themselves targets of the same family policing regime.

D. *State Marginalization of QTFYOC's Specific Needs*

No matter how QTFYOC end up in the child welfare system, once there, states often marginalize or ignore their differing needs and vulnerabilities by implementing a single-axis approach to discrimination. Since the majority of LGBTQ youth in the foster care system are youth of color, an analysis of the needs for foster youth requires consideration of race as well as sexuality and gender. As critical race theorist Kimberlé Crenshaw asserts, an intersectional identity is not merely an aggregate of each individual axis.⁴⁸ QTFYOC have needs distinct from merely the sum of cishet youth of color and LGBTQ white youth⁴⁹.

1. Compounded Risk of Discrimination

“You will always have to choose between being a man or a woman, so you have to choose now”

*—Eli’s case worker in response to their request their foster parent use they/them pronouns to refer to them.*⁵⁰

“I would always have a butcher knife inside under my pillow because I didn’t trust people. I always felt that someone was going to try to attack me, so the only way I felt safe was with weapons”

*—a youth whose foster family told him they would kill him if he were gay.*⁵¹

QTFYOC face an increased risk of discrimination distinct from their white cishet peers. Unfortunately, current data collection does not usually reflect this nuance.⁵² There is also a general lack of information or data regarding the rates of discrimination for youth of color within the foster system.⁵³ However,

48. Crenshaw, *supra* note 11, at 140 (“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated”).

49. This section does not suggest that these comparisons will always hold true on an individualized level (i.e. a specific white straight foster youth may need more mental health support than a specific Black trans foster youth). Instead, by generalizing the needs of QTFYOC, this section aims to highlight points of need that are often missed when advocacy centers white cishet youth in the foster system.

50. Roxana Asgarian, *America’s Foster Care System Is a Dangerous Place for Trans Teens. Now They’re Fighting for Change*, TIME, Dec. 7, 2021, <https://time.com/6124930/oregon-foster-care-trans-youth-lawsuit>.

51. Martin, *supra* note 76, at 11.

52. For instance, the Williams Institute notes in its study only that “[t]he majority of youth within the LGBTQ foster youth population were youth of color, indicating that many of them likely face both racial and anti-LGBTQ discrimination.” WILSON, *supra* note 9, at 40. The study does not analyze whether or what impact race had on QTFYOC who answered the survey. It is not the project of this paper to gather such data though it will hopefully be available in future studies.

53. Most studies on youth of color track their overrepresentation within the

based on existing data it is evident that LGBTQ foster youth face heightened risks of discrimination. In the Williams Institute study of Los Angeles foster youth, 12.9% of LGBTQ youth reported being treated poorly by the foster care system as compared to 5.8% of non-LGBTQ youth.⁵⁴ Additionally, “LGBTQ respondents were more than twice as likely to report that the foster system treated them ‘not very well.’”⁵⁵ A survey of LGBTQ youth in foster care in New York City found 100% of LGBTQ youth in group homes reported verbal harassment and 70% reported physical violence in group homes.⁵⁶ LGBTQ foster youth may have religious conflicts with caregivers who tell youth their identities are “sinful” or subject them to conversion therapy.⁵⁷ LGBTQ foster youth also report unequal restrictions “in age-appropriate activities, such as dating or attending LGBTQ youth groups” and social activities like hand holding or dating.⁵⁸ Caregivers may deny LGBTQ youth the right to dress in accordance with their gender or sexual identity or access appropriate medical or mental health care.⁵⁹

QTFYOC are LGBTQ foster youth and thus face similar forms of discrimination. In addition to common forms of discrimination for LGBTQ foster youth, QTFYOC face an added and unique vulnerability as youth of color. These forms of discrimination are compounding and thus render QTFYOC specifically vulnerable.

2. Increased Mental Health Needs

Most foster youth are in need of mental health support as separation from family, even if temporary, is often traumatic. QTFYOC face additional sources of trauma and stress that require tailored mental health support. In addition to the general trauma of being placed in the foster system, QTFYOC may be forcibly removed from their homes due to forms of state violence like mass incarceration, immigration detention, forced assimilation and ethnic cleansing, etc. QTFYOC may run away from home or be kicked out due to their sexual

foster system and disproportionately low adoption rates but do not discuss instances of discrimination within their placements or system interactions.

54. WILSON, *supra* note 9, at 5. While the study did not separate QTFYOC from white LGBTQ respondents, the vast majority of LGBTQ foster youth surveyed were youth of color. Thus, the LGBTQ responses are also reflective, at least to some extent, of the QTFYOC experience in particular.

55. *Id.* at 40.

56. HRC, *supra* note 36 (citing FEINSTEIN, RANDI ET AL., *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System*, 2001).

57. TAMAR-MATTIS, *infra* note 87, at 157.

58. TAMAR-MATTIS, *infra* note 87, at 157, 165 (“For example, a group home that permits heterosexual, nontransgendered boys to visit with girls and make age-appropriate gestures of affection (such as hand-holding) might prohibit a gay youth from engaging in the same activity with another boy. A foster care provider might allow foster youth to attend extracurricular school activities such as clubs or the prom, but forbid a lesbian foster child from attending Gay/Straight Alliance (GSA) meetings or the gay prom”).

59. *Id.* at 157.

or gender identity and face the added stress of social and familial rejection. If QTFYOC are not “out” in their placements, they likely face the stress of hiding their identities.

Youth stress manifests in dangerous ways including self-harm, detachment, increased risky behavior, and increased risk of suicide. The general LGBTQ youth population is at least two times as likely to attempt suicide than non-LGBTQ youth.⁶⁰ This risk is intensified among LGBTQ youth of color.⁶¹ Trans and nonbinary youth may experience gender dysphoria which can worsen mental health outcomes.⁶² Thus, QTFYOC need affirmative mental health support within the foster care system by qualified professionals who are trained in issues like gender dysphoria, racial sensitivity, harassment, state violence, abandonment, and suicidality.⁶³

3. Gender Affirming Care

Trans and nonbinary foster youth need access to gender affirming placements and affirming physical and mental healthcare. Trans and nonbinary foster youth face additional barriers when navigating a society built for the comfort of cisgender individuals. Non-affirmative placements may restrict whether a trans or nonbinary foster youth can “dress or live as their identified gender,” use proper bathrooms, be placed with peers of the same gender where placements are segregated by sex, and access appropriate mental and physical health care including puberty blocking medications.⁶⁴

Unfortunately, recent state laws threaten the right to gender affirming care not just for foster youth, but for all minors. Arkansas passed the first legislation to ban gender affirming medical treatments for minors in April 2021.⁶⁵ The Arkansas Bill will also require minor youth already receiving gender affirming care like puberty blockers to cease their treatment rather than grandfathering them in.⁶⁶ Thus, youth already given some semblance of gender affirming care will be forced to undergo puberty and irreversibly damaging physical changes. Eighteen other states currently have similar bills on their

60. Martin, *supra* note 76, at 8 (citing Laver 2013).

61. TREVOR, *supra* note 43 (“12% of white youth attempted suicide compared to 31% of Native/Indigenous youth, 21% of Black youth, 21% of multiracial youth, 18% of Latinx youth, and 12% of Asian/Pacific Islander youth”).

62. *Id.* (More than half of transgender and nonbinary youth seriously considered attempting suicide in the last year).

63. See also WILSON, *supra* note 9, at 11 (asserting “it is critical that policymakers and caregivers have an understanding of the lives and unique challenges of the LGBTQ youth they serve, such as family rejection, abuse (physical, sexual and emotional), exploitation, harassment, and elevated suicide risk in response to their sexual and gender minority statuses”).

64. TAMAR-MATTIS, *infra* note 87, at 151.

65. Samantha Schmidt, *Arkansas legislators pass ban on transgender medical treatments for youths, overriding governor’s veto*, THE WASHINGTON POST, Apr. 6, 2021, <https://www.washingtonpost.com/dc-md-va/2021/04/06/arkansas-transgender-ban-override-veto/>.

66. *Id.*

docket.⁶⁷ After several similar bills to ban affirming medical care failed outright in the state, Texas found a new way to target the practice by interpreting the definition of “child abuse” to include providing gender affirming medical treatment. Governor Gregg Abbott ordered “Texas’s child welfare agencies to investigate parents whose children receive gender-affirming health care, and threatened them and professionals who fail to report it with criminal prosecution.”⁶⁸ These mandated reporters include doctors, nurses and teachers.⁶⁹

Under the guise of protection, Texas will actually remove trans and nonbinary youth from their affirming homes (where parents or caregivers are providing gender affirming health care) and place them in the child welfare system. Among the first to be targeted was an employee of the state protective services agency in Texas.⁷⁰ The state is now seeking the medical records of her 16-year-old trans daughter and has told the family that the “only allegation against them was that [her child] might have been provided with gender-affirming health care and was ‘currently transitioning from male to female.’”⁷¹ Texas thus continues the history of state weaponization of child protective services to implement white, Christian, and now transphobic ideals of what constitutes “good parenting” under the guise of child safety concerns.⁷²

For youth already in the foster system, Abbott’s order provides even further disincentive for foster caregivers to provide affirming medical care to trans and nonbinary youth. While youth like Mary have parents willing and able to fight for their rights, foster youth often go without such dedicated advocates. In response to the order, some health clinics have suspended refills and prescriptions for transgender minors receiving affirmative care.⁷³ With the threat of investigation or loss of state funding, caregivers and group providers are unlikely to risk their licensing to provide affirming care to foster youth against these added barriers.

67. *Id.*

68. Dorothy Roberts, Opinion, *The child welfare system already hurts trans kids. Texas made it a nightmare.* THE WASHINGTON POST, Mar. 3, 2022, <https://www.washingtonpost.com/outlook/2022/03/03/texas-trans-youth-welfare>.

69. Julian Mark, *Texas governor directs state agencies to investigate gender-affirming care for trans youths as ‘child abuse.’* THE WASHINGTON POST, Feb. 23, 2022, <https://www.washingtonpost.com/nation/2022/02/23/greg-abbott-gender-affirming-care-child-abuse-directive>.

70. J. David Goodman & Amanda Morris, *Texas Investigates Parents Over Care for Transgender Youth, Suit Says*, N.Y. TIMES, Mar. 1, 2022, https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html?campaign_id=60&emc=edit_na_20220301&instance_id=0&nl=breaking-news&ref=cta®i_id=93636076&segment_id=84297&user_id=606e6fc986d66b2553f0a5365bc6c71a.

71. *Id.*

72. Though certainly distinct circumstances, these actions are in line with prior and other current weaponizations of the child welfare system against Black, Indigenous, and Latinx families.

73. *Id.*

4. Permanency

“I had to be placed in a residential facility under emergency shelter because there weren’t any affirming placements available that would want to take a gay Black teenager”

*—Weston Charles-Gallo, testifying before the U.S. House Ways and Means Committee in 2021.*⁷⁴

While many children who enter the foster care system eventually return to their original guardians, QTFYOC foster youth are more likely to be in need of permanent placements.⁷⁵ However, excessive relocation and the lack of affirming or even accepting caregivers within the child welfare system disproportionately prevents QTFYOC youth from finding permanent or stable placements.⁷⁶ QTFYOC who do not find permanent placements are at greater risk than their white cisnet peers of facing homelessness, contact with the criminal legal system, and sexual violence or abuse.

QTFYOC foster youth spend more time in the foster care system than their white cisnet peers and have greater rates of placement turnover, causing greater instability.⁷⁷ QTFYOC are also disproportionately placed in group homes which subject them to violent and unstable living situations.⁷⁸ The overwhelming amount of non-affirming placements is a significant source of such instability. A survey of LGBTQ youth in foster care in New York City found 78% “of LGBTQ youth were removed or ran away from their foster placements as a result of hostility toward their sexual orientation or gender identity.”⁷⁹ Caregivers disproportionately request removal of LGBTQ youth from their care.⁸⁰

74. Roberts, *supra* note 107.

75. Urs, *supra* note 2.

76. WILSON, *supra* note 9, at 41 (“LGBTQ youth in this sample significantly differed from their non-LGBTQ counterparts with regard to the number of placements, rates of homelessness, hospitalization for emotional reasons, and likelihood of living in group settings. All of these suggest that LGBTQ youth face unique barriers to—and may require different strategies to achieve—permanency”).

77. See Raimon, *supra* note 44 (noting “national data show that African American children spend an average of 29 months in out-of-home placement, Latino children an average of 23 months, and white children an average of 18 months”). See also HRC, *supra* note 36, at 2 (noting a “2002 study of 45 LGBTQ foster youth found the average number of placements for those youth to be 6.35 . . . Compare this to the current average number of placements for a youth in foster care, which is around three”).

78. WILSON, *supra* note 9, at 38 (finding while 10.1% of non-LGBTQ youth reported ever living in a group home, 25.7% of LGBTQ foster youth had lived in a group home).

79. See HRC, *supra* note 36, citing FEINSTEIN, RANDI ET AL. *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* (2001).

80. Martin, *supra* note 76, at 8 (“Based on NSCAW-II data, 19.6 percent of youth in out-of-home care identifying as LGB were moved from their first placement at the request of their caregiver or foster family, compared with only 8.6 percent of heterosexual youth being moved for this reason”).

While nonacceptance of identity is certainly a cause for removal requests, “[u]nmet mental health needs may also be an additional barrier to permanency for LGBTQ youth if caregivers are less likely to be accepting of youth in emotional distress.”⁸¹ Youth of color are also likely to have trauma which goes unaddressed by the foster care system and complicates finding permanent placements.⁸² Thus, QTFYOC are in need of proper mental health care and affirming placement options to achieve permanent placements.

Failure of the foster care system to place QTFYOC disproportionately renders them susceptible to violence, abuse, and criminalization. Black, Latino, and Indigenous youth are already disproportionately targeted and abused by the criminal legal system and policing practices. LGBTQ foster youth report significantly higher rates of homelessness than their cisnet peers.⁸³ Unhoused LGBTQ youth are 7.4 times as likely to experience sexual violence than unhoused heterosexual youth.⁸⁴ Unstable placements may also lead QTFYOC to turn to sex work as a means of survival which may lead to greater contact with the criminal legal system.⁸⁵ Thus, QTFYOC with unstable placements are more likely to experience homelessness or rely on sex work which may subject them to abuse and greater contact with police and the criminal legal system (which already disproportionately target and abuse youth of color).

III. FOSTER CARE PROTECTIONS IN THE UNITED STATES

Despite the distinct and pressing needs of QTFYOC, little legal protection exists to ensure proper care, seek remedies, or curb future harm. This section outlines what federal and state legal protections do exist and theorizes as to how such protections may apply in California.

81. WILSON, *supra* note 9, at 40. The study also found QTFYOC report almost three times (13.47%) as many hospitalizations for emotional reasons than their cisnet peers (4.25%). *Id.* at 38.

82. See Raimon, *supra* note 44 (noting the Center for the Study of Social Policy (CSSP) “found that child welfare systems often pay insufficient attention to the trauma, grief, and loss experienced by youth and their families, a trauma that is often exacerbated for youth of color due to historical patterns of differential treatment and racism. Rather than acknowledging the trauma and loss many youth have suffered, older youth are instead often described in case files as hostile, aggressive, and pathological”).

83. WILSON, *supra* note 9, at 38, 12 (finding 21.1% of LGBTQ and 13.9% of non-LGBTQ foster youth had ever been homeless).

84. *LGBT Homeless*, NAT’L COAL. FOR THE HOMELESS, Jun. 2009, <http://www.nationalhomeless.org/factsheets/lgbtq.html>.

85. HRC, *supra* note 36, at 3 (“These experiences of hostility within systems of care force many LGBTQ youth to make difficult decisions in order to meet their most basic needs, including engaging in “survival sex” or “couch surfing” that involves sexual exchange rather than subjecting themselves to abuse within foster care. These activities often lead to involvement with the juvenile justice system, a system in which LGBTQ youth are also over-represented and often face further abuse”).

A. Existing Federal Protections

Though the foster care system is generally a domain of state law, certain federal protections apply to children in the foster care system. Constitutional guarantees such as the 14th Amendment's equal protection clause and the right to due process apply to foster youth. The federal government also imposes standards a state must meet to receive Title IV-E funds for their child welfare programs.⁸⁶ The Multiethnic Placement Act (MEPA) requires states receiving federal foster care funds to avoid discrimination in adoption placements based on race.⁸⁷

B. Existing State Protections

In addition to the aforementioned federal protections, some states offer protection for QTFYOC in the form of nondiscrimination laws, regulations, and policies, including protections in state constitutions and laws banning specifically harmful practices like conversion therapy. This section outlines existing state protections and the key inconsistencies across states which may leave QTFYOC in certain regions more vulnerable. Even in states with the most protections for QTFYOC, there is little-to-no case law litigating and enforcing such safeguards. Using California as a case sample, this section then explores how advocates might apply state laws, regulations, and policies to protect QTFYOC, as well as the potential limits of these protections.

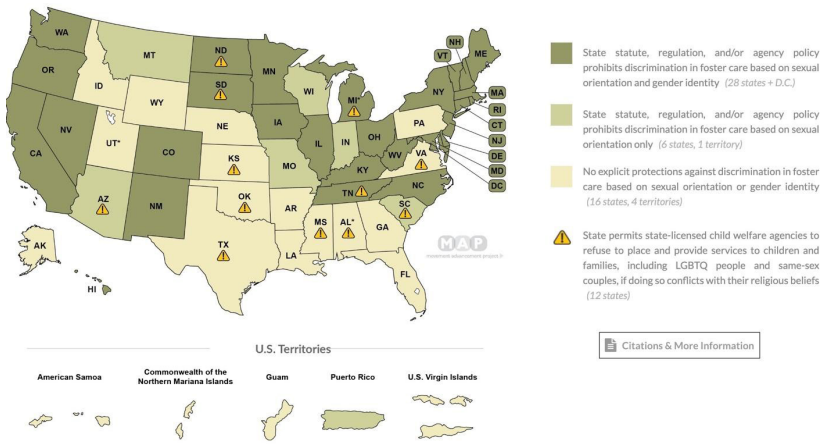
1. Variance Among States

State regulations, laws, and policies vary significantly in the protection they offer QTFYOC. The Movement Advancement Project map below tracks the prevalence of nondiscrimination laws or policies by state.⁸⁸

86. *Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance under Title IV-E of the Social Security Act*, Oct. 26, 2012, https://www.everycrsreport.com/reports/R42792.html#_Toc339461867. For instance, states receiving federal funding are required to provide trauma-informed programs and services in their welfare system. 42 U.S.C. § 671 (e)(4)(B) (2018).

87. ANNE TAMAR-MATTIS, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, in *LAW AND SEXUALITY: A REVIEW OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER LEGAL ISSUES* 150, 152–53 (2005).

88. MOVEMENT ADVANCEMENT PROJECT (MAP), *Foster and Adoption Laws* (data is current as of 03/15/2023), https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.



As noted on the map, 28 states and the District of Columbia have non-discrimination laws or policies that specifically protect foster youth from discrimination on the basis of sexual orientation *and* gender identity.⁸⁹ Six additional states protect foster youth from discrimination only based on sexual orientation and not gender identity, leaving no protections for foster youth who are discriminated against for being trans or gender-nonconforming.⁹⁰ Finally, twelve states actually permit state-licensed agencies to refuse placement or services for LGBTQ children and families where doing so would conflict with their religious beliefs.⁹¹

Among the states that do have nondiscrimination protections, there is significant variance in the applicability and reach of the protections. Evidence of such variability is evident when comparing the scope of protections that California and Washington’s nondiscrimination provisions provide. California’s nondiscrimination provision, Assembly Bill (AB) 458 as codified in the Welfare and Institutions Code, includes enumerated rights granted to all foster youth in any social service rendered regardless of the actor.⁹² In contrast, Washington’s antidiscrimination provision is within the Licensing Requirements for Child Foster Homes.⁹³ Since it is a licensing code, not a

89. *Id.*

90. *Id.*

91. *Id.*

92. CAL. WELF. & INST. § 16001.9 (2020) (https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040.AB458).

93. WASH. ADMIN. CODE § 388–147–1595 (2015) (“You must follow all state and federal laws regarding nondiscrimination while providing services to children in your care. You must treat foster children in your care with dignity and respect regardless of race, ethnicity, culture, sexual orientation and gender identity. You must connect a child with resources that meets a child’s needs regarding race, religion, culture, sexual orientation and gender identity”). See also WASH. ADMIN. CODE § 110–145–1710 (2015) (licensing for group care facilities) and WASH. ADMIN. CODE 110–147–1595 (licensing requirements for child placing agency and adoption services).

right granted directly to foster youth, a violation of the Washington provision may impact the licensing status of a caregiver but does not inherently provide a mode of enforcement or remedy for foster youth against their caregivers.⁹⁴ When foster youth in Washington face discrimination from non-caregivers (i.e. social workers, case workers), they must rely on a DCYF regulation which only applies to Washington DCYF staff, leaving it unclear what protections, if any, QTFYOC have against discrimination from other foster youth and peers.⁹⁵ Washington's gap in protection is especially disconcerting given QTFYOC across the country are disproportionately placed in group care facilities or temporary stays with other foster youth and are particularly vulnerable to harassment and bullying by peers.

There are some states which go beyond merely an antidiscrimination provision and incorporate tangible policies to prevent harm to QTFYOC. Tennessee's Department of Children's Services, for example, outlines one such policy in their Administrative Policy. The policy provides that trans and intersex youth "will not be searched or physically examined for the sole purpose of determining genital status," thus mitigating trauma and abuse for non-cisgender youth.⁹⁶ Additionally, the policy puts the power back in the hands of youth as the best assessors of their own needs, stating "[w]ith respect to his or her own safety, a LGBTI child/youth's own views will be given serious consideration."⁹⁷ It also outlines that youth will not be automatically placed in housing based on their assigned sex, will not be denied roommates because of their sexuality, and trans youth will be given privacy when showering and dressing.⁹⁸ Finally,, the comprehensive policy also includes a ban on conversion therapy and an assurance that trans youth must continue to receive their medical care, including hormone therapy and mental health counseling, when in foster care.⁹⁹ Tennessee's policy is particularly strong as the provision itself

94. WASH. ADMIN. CODE § 110-147-1410 (2015) ("We may modify, deny, suspend or revoke your license when you, your employees or volunteers . . . [d]o not meet the licensing regulations in this chapter").

95. Washington DCYF policy 6900 ("A child or youth who identifies as LGBTQ+ will not be subjected to discrimination or harassment on the basis of actual or perceived sex, sexual orientation, gender identity or gender expression."). In the course of writing and editing this note, a district court enjoined Washington DCYF from enforcing policy 6900 when plaintiffs filed a 1983 action challenging the policy as precluding them from qualifying for a foster care license due to their sincerely held religious beliefs. *See* *Blais v. Hunter*, 493 F.Supp.3d 984, 996. *Blais* severely limits the already sparse protections available to queer youth in the state of Washington's care and holds policy 6900 does not at all apply to foster care license applicants. *See* *Blais v. Hunter*, 493 F.Supp.3d 984, 996 (holding that the protection of Washington DCYF policy 6900 "applies only to Department staff and protects only foster children who have already identified as LGBTQ+ . . . [t]he policy's plain language does not apply to foster care license applicants or children who might in the future identify as LGBTQ+").

96. <https://files.dcs.tn.gov/policies/chap20/20.20.pdf> at 1.

97. *Id.* at 2.

98. *Id.*

99. *Id.* at 3.

outlines a tangible enforcement mechanism for foster youth. The policy allows for foster youth to report a violation themselves and provides reports will be kept confidential to the extent possible.¹⁰⁰

2. Application of State Protections: Case Study of California

California has multiple protections for QTFYOC, including a conversion therapy ban for minors, a bill of rights that contains a nondiscrimination statute, the right for foster youth to access gender affirming care, and training requirements. This section analyzes the potential application and limits of these protections to common concerns QTFYOC face.

California AB 458, passed in 2003, was the first bill of its kind to specifically protect LGBTQ youth in the foster care system.¹⁰¹ The bill amended the enumerated rights of foster youth to include the right “[t]o 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 and expression, mental or physical disability, or HIV status.”¹⁰² AB 458 also added the right to have caregivers and other personnel trained in cultural competency, sensitivity, “and best practices for providing adequate care to lesbian, gay, bisexual, and transgender children in out-of-home care.”¹⁰³

Though AB 458 has been in effect since 2004, to date, no judicial decision cites the codified provision.¹⁰⁴ Professor Anne Tamar-Mattis critiques the Act as it has no method of enforcement and there is “no definition of what constitutes discrimination on the basis of sexual orientation or gender identity in the bill.”¹⁰⁵ Tamar-Mattis argues, it thus “falls onto LGBTQ foster youth and their advocates to define and defend the youth rights addressed in AB 458.”¹⁰⁶

100. *Id.* at 4.

101. TAMAR-MATTIS, *supra* note 87, at 150.

102. CAL. WELF. & INST. § 16001.9, *supra* note 39. This code also protects Indigenous Youth from discrimination based on their tribe affiliation (“To have recognition of the child’s political affiliation with an Indian tribe or Alaskan village, including a determination of the child’s membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child’s political affiliation with an Indian tribe or Alaskan village.”). *Id.*

103. *Id.*

104. Nine cases cite CAL. WELF. & INST. § 16001.9 but none reference the antidiscrimination statute in (a)(17) added by AB 458 as of May 2022. Westlaw search performed by Taylor Roberts-Sampson. It should be noted that there is a general lack of case law for foster youth bringing claims against the state. Some cases may also be sealed as the plaintiffs are almost always minors when bringing an action. Regardless of the rationale, the lack of case law on CAL. WELF. & INST. § 16001.9 leaves unanswered how the statute will be interpreted by the California courts.

105. TAMAR-MATTIS, *supra* note 87, at 167.

106. *Id.* at 151.

Despite the lack of case law, definitions, and enforcement mechanisms, advocates may still successfully apply AB 458 to key issues LGBTQ foster youth face. Tamar-Mattis argues that AB 458 is a major shift for LGBTQ foster youth as it provides “an explicit statutory basis for rights that previously could have been established only implicitly and by extension.”¹⁰⁷ She theorizes that AB 458 may provide expansive protection for issues such as instability, restrictive and isolating placements, unequal access to afterschool programming, and conversion therapy.

When caregivers are unaccepting, QTFYOC are often forced to switch placements.¹⁰⁸ QTFYOC are also placed in unstable or temporary housing at rates disproportionate to their white and straight peers. The federal Multiethnic Placement Act (MEPA) finds racial discrimination where “a policy causes children of one race to experience more instability of placement than children of another race.”¹⁰⁹ While QTFYOC and their advocates may rely on MEPA to make racial discrimination claims, it is unclear whether the Act remains effective when both race and sexual orientation are implicated. Also, where QTFYOC face discrimination that cisgender youth of the same race do not face, MEPA would be ineffective. Finally, MEPA only applies where a *policy* causes disparate treatment and thus may exclude individual private actors. Given much of the discrimination QTFYOC face is from foster parents and caseworkers, proving a policy *causes* such discrimination is a high, perhaps unreachable burden.

There is no corollary to MEPA that explicitly addresses sexual orientation and gender identity discrimination when LGBTQ foster youth experience greater instability in placements over non-LGBTQ youth. Tamar-Mattis theorizes that advocates may use AB 458 to fill this gap for LGBTQ youth through analogy to MEPA:

A policy of routinely shifting placements for LGBTQ youth when their caregivers are unsupportive of their sexual orientation or gender identity may have the effect of increasing the level of instability of placement for LGBTQ youth above the level experienced by the general population of foster care youth. Because instability of placement has a harmful effect on youth in foster care, such an effect would be discriminatory . . . A policy of changing the placements of victims of sexual orientation discrimination, instead of changing the behavior of perpetrators, has the effect of increasing overall instability of placement for LGBTQ youth.¹¹⁰

Tamar-Mattis’ approach would also require proof that a *policy* actually *causes* the disparate impact, which is likely a high burden. Additionally, stability in such placements may be an elusive solution for QTFYOC. Effectively forcing QTFYOC to stay in discriminatory placements to avoid the disparate

107. *Id.* at 167.

108. *Id.* at 159.

109. *Id.*

110. *Id.*

impact of unstable housing caused by a policy of switching placements would merely recharacterize the harm QTFYOC face. Being subjected to discrimination in a placement is damaging and disparately harmful to QTFYOC who are more susceptible to sexual orientation, gender identity, and racial discrimination than their white cisnet peers. Many QTFYOC also run away from discriminatory placements and find themselves homeless, subject to disproportionate police targeting, and sex trafficking.¹¹¹ Furthermore,, caregivers still retain the right to have a child removed from a placement without giving a reason. Thus, caregivers can continue to disproportionately target and remove QTFYOC from their homes without giving sexual orientation or gender identity as the official reason. Therefore, although AB 458 does provide a useful basis to make more discrimination claims, increasing affirming housing options is a more direct method of remedying unstable housing for QTFYOC.

In addition to her suggestion that advocates could use AB 458 to address placement instability, Tamar-Mattis also argues AB 458 could be used to combat inequitable restrictions placed on QTFYOC as impermissible differential treatment.¹¹² QTFYOC are disproportionately sent to restrictive placements where their actions are heavily regulated, including by strict dress codes, curfews, and limits on age-appropriate extracurricular and social activities that their cisnet peers can attend.¹¹³ In *Massey*, the Ninth Circuit case held that “isolating a young lesbian by removing her from class once a day, ostensibly in order to protect her from potential harassment, was a violation of her right to equal protection.”¹¹⁴ Tamar-Mattis argues advocates can apply AB 458 through analogy to *Massey* and assert moving foster youth to a more restrictive placement for their safety is likewise discriminatory and impermissible.¹¹⁵ Similarly, specific restrictions on afterschool activities are likely impermissible where an advocate can show a “double standard” for treatment of QTFYOC versus their straight peers.¹¹⁶ However, it may be incredibly difficult to prove differential treatment *per se* where there is only one youth in the home.¹¹⁷

Advocates might also use AB 458 to strengthen California’s already existent conversion therapy ban for minors. In 2012, California was the first state to ban conversion therapy for minors.¹¹⁸ However, by restricting the ban’s application to cover only “mental health providers,” California left room for other adults to subject minors to conversion therapy without consequence

111. WILSON, *supra* note 9, at 12 (citing a 2001 study by Feinstein finding 56% of LGBTQ foster youth “spent time on the streets because they felt safer there than in their group or foster home”).

112. TAMAR-MATTIS, *supra* note 87, at 160–61; 165–66.

113. *Id.* at 160.

114. *Id.* at 165–66.

115. *Id.* at 160–61.

116. *Id.* at 165–66.

117. *Id.* at 166. However, This could be less of an issue for QTFYOC who the state disproportionately places in group settings.

118. CAL. BUS. & PROF. § 865.1 (2012) (“ Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age”).

under the law.¹¹⁹ Advocates may be able to argue that subjecting foster youth to conversion therapy by a non-mental health provider is in violation of AB 458 because it creates a double standard of care and subjects foster youth to harassment and discrimination. Tamar-Mattis notes:

There are no cases specifically on point in California recognizing such treatment as discriminatory in or out of the foster care setting. However, the fact that there is no recognized therapeutic value from such an approach, combined with the fact that cisgender youth in foster care are not forced to try to change their sexual orientation or gender identity, might be enough to demonstrate inappropriately differential treatment.¹²⁰

Given the legislature did not define discrimination or harassment in the Bill, it is unclear whether a court would adopt this broad conception.

California also guarantees foster youth the right to gender affirming care and to be involved in developing a case plan.¹²¹ Additionally, SB 731, passed in 2015, “require[s] children and nonminor dependents in an out-of-home placement to be placed according to their gender identity, regardless of the gender or sex listed in their court or child welfare records.”¹²² These protections are crucial because pervasive misgendering, deadnaming¹²³, and denial of gender affirming care for trans and nonbinary youth can lead to serious mental health issues and even increase the risk of suicide.¹²⁴ However, because of the lack of

119. Mental health provider is defined as “a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.” CAL. BUS. & PROF. § 865.2 (2013).

120. TAMAR-MATTIS, *supra* note 87, at 164–65.

121. AB 2119, passed in 2018, is the first of its kind. CAL. WELF. & INST. § 16010.2(a)(3) (A), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2119. The Bill defines gender affirming care as “medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include, but is not limited to, the following: (i) Interventions to suppress the development of endogenous secondary sex characteristics; (ii) Interventions to align the patient’s appearance or physical body with the patient’s gender identity; (iii) Interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria, as defined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.” *Id.*

122. S.B. 731, codified as CAL. WELF. & INST. § 16006, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB731.

123. Deadnaming refers to the practice of calling a trans or nonbinary individual by their birth name or a previous name with which they do not identify. *Deadname*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/deadname> (last visited May 11, 2022). Where an individual’s “dead name” is traditionally associated with the sex they were assigned at birth but at odds with their gender identity, deadnaming can trigger a strong negative emotion or physiological response.

124. A 2021 National Survey by the Trevor Project found “Transgender and nonbinary youth who were able to change their name and/or gender marker on legal documents, such as driver’s licenses and birth certificates, reported lower rates of attempting suicide. TREVOR,

case law exploring these rights, it is questionable to what extent these guaranteed rights are actually enforceable for QTFYOC.

IV. CURRENT METHODS TO ENFORCE STANDARDS OF CARE FOR QTFYOC

Where QTFYOC experience discrimination or violation of their granted rights, youth or their advocates may enforce their rights either through making an administrative claim or filing legal action. This section analyzes these options in turn, arguing that both administrative claims and class actions currently fail to account for the specific needs of QTFYOC even where legal protections exist.

A. *Making Administrative Claims*

Where a state does provide rights for foster youth in their policies, youth or their advocates may report a specific abuse by making an administrative claim. The Federal Government lacks authority to intervene in individual child welfare cases.¹²⁵ As all administrative claims are governed by State-specific statutes and policies, youth must rely on the patchwork of protections available where they live.¹²⁶ QTFYOC in states lacking antidiscrimination provisions may be left with little legal protection or grounds for filing a claim. In general, an investigation into a complaint “must occur at the local/county level before the State agency becomes involved.”¹²⁷

Many states have an ombudsman¹²⁸ Office or Office of the Child Advocate to collect reports from foster youth and their advocates.¹²⁹ The role of an ombudsman office varies by state but generally involves investigating complaints by children and families regarding child welfare services like foster care, “provid[ing] a system accountability mechanism by recommending system-wide improvements to benefit children and families - often in the form of annual reports,” protecting “the interests and rights of children and families - both individually and system-wide,” and monitoring and inspecting “programs, placements and departments responsible for providing children’s services.”¹³⁰

supra note 43.

125. *Id.*

126. *Child Welfare State Complaint Offices*, U.S. DEP’T OF HEALTH & HUM. SERVS.https://www.childwelfare.gov/organizations/?CWIGFunctionsaction=rols.main.dspList&rolType=Custom&RS_ID=31 (last visited May 11, 2022).

127. *Id.*

128. The word “Ombudsman” is derived from the Swedish word meaning “agent” or “representative.” *Children’s Ombudsman Offices: Office of the Child Advocate*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx#ok> (last visited May 11, 2022).

129. *Id.* (“Currently, approximately twenty-three states have established a Children’s Ombudsman/ Office of the Child Advocate with duties and purposes specifically related to children’s services. Another five states have a statewide Ombudsman program that addresses the concerns of all governmental agencies, including children’s services. Nine states have related Ombudsman services, program-specific services, or county-run programs.”).

130. *Id.*

Once contacted by a youth or advocate, the state ombudsman will either provide resources and referrals or initiate a case.¹³¹ If a case is initiated, the process continues as follows:

Once a case is open, the Ombudsman gives notice of the complaint to the agency and begins to investigate or review the complaint and the agency is requested to respond. If necessary, the Ombudsman may intervene by facilitating communication, holding a meeting, or pursuing legal action. Once the Ombudsman has concluded its investigation, the office will develop a report while giving the agency the opportunity to respond. On an annual basis, the Ombudsman will summarize citizen complaints and identify system trends in an annual report.¹³²

The purpose of an ombudsman is to provide a “workable solution” to a given conflict involving foster youth and their caregivers or the state.¹³³

While the existence of a formal complaint process is certainly a step in the right direction, there are significant limitations on the accessibility and effectiveness of administrative claims for foster youth. Initiating a case with an ombudsman is often an inaccessible process for QTFYOC. Avenues of relief may be limited by conflicts of interest or restrictions on systemic investigations. Finally, QTFYOC face additional barriers due to the discretionary nature of the complaint process and lack of retaliation and confidentiality protections.

First, initiating a case with an ombudsman is a convoluted process for which many QTFYOC likely lack the adult support necessary. Foster youth are often left to navigate the complaint process by themselves. Additionally, QTFYOC are likely filing a claim against their own caregivers and thus cannot rely on them for assistance in completing the proper reporting. Each state has its own entirely different website and format for contacting an ombudsman. Some states do not have an ombudsman and instead ask youth to report their complaints directly to the state child welfare agency. Assuming youth even have internet and computer access to reach the websites, these sites are often convoluted and require extensive knowledge to properly navigate.¹³⁴ Unfortunately, “[w]ithout adequate guidance, foster youth can get caught between agencies

131. *Id.*

132. *Id.*

133. TAMAR-MATTIS, *supra* note 87, at 157.

134. For instance, the California Ombudsman page asks youth to differentiate their claim as a complaint against a foster parent, foster home, or State licensed community care facility, complaint against a social worker, complaint against a law enforcement officer, complaint against a judge, complaint against a lawyer, violation of civil rights, reporting child abuse and neglect, etc. California Foster Care Ombudsman, <https://fosteryouthhelp.ca.gov/> (last visited May 11, 2022). Each category has its own reporting agency and reporting process for users to follow. *Id.* There is also a more simplistic report form though it is unclear whether youth complete only that form or then also report their complaint to a specific agency. California Foster Care Ombudsman, *Complaint Form*, <https://fosteryouthhelp.ca.gov/youth-complaint-form> (last visited May 11, 2022).

that seem to be denying or diverting responsibility.”¹³⁵ Many ombudsmen also have restricted hours, making it nearly impossible for youth in school and after school programming to place a call.¹³⁶ The confusing complaint process leaves QTFYOC particularly vulnerable as they may lack the support networks or financial resources of their white cishet peers.

Second, many states do not have ombudsmen at all or have ombudsmen that are not independent from the child welfare agency, creating conflicts of interest and impeding actual protection for foster youth in need.¹³⁷ Only 14 states have ombudsmen that are entirely independent, autonomous, and specifically handle issues of child welfare.¹³⁸ Other states have non-independent offices within the child welfare agencies or offices that operate within, but are autonomous from, the state agency providing welfare services. Even though the latter are technically independent, “[t]his structure creates direct conflicts of interest—or, at the very least, the appearance of conflicts—because the department director controls all aspects of the program’s operation and allocation of resources. This means the ombudsman has no independent authority to recommend policy or program improvements.”¹³⁹ In order for an ombudsman to be effective, the office must be independent and should not be the subject of control by another appointed authority.¹⁴⁰ Autonomous ombudsmen are crucial to ensuring QTFYOC’s claims are fairly investigated, especially when making allegations of discrimination at the hands of the state. Third, cases initiated with ombudsmen are often restricted in remedy to the specific complainant and do not necessarily lead to structural change: “While the ombudsman office might be capable of resolving the complaints of individual foster children, it is not permitted to investigate larger structural problems and issues within the foster care system, nor recommend changes.”¹⁴¹ California restricts the right of the ombudsman to investigate systemic issues even where there is a pattern of individual complaints pointing to a systemic cause.¹⁴² This disproportionately impacts QTFYOC as discrimination frequently requires systematic, rather than individualistic, remedies. For instance, if a Black Queer foster youth files a report alleging discrimination by their caseworker for use of improper pronouns and racial slurs, an individualistic solution of assigning the youth to a new caseworker fails to remedy the underlying issue. There is no guarantee that this new caseworker will be any better. Instead, solutions like mandatory sensitivity training, pronoun training and resources, and programs to hire

135. NATIONAL CENTER FOR YOUTH LAW, <https://youthlaw.org/publication/ca-foster-care-ombudsman-needs-more-authority-independence> (last visited Apr. 2022).

136. *Id.*

137. *Children’s Ombudsman*, *supra* note 128.

138. *Id.*

139. NATIONAL, *supra* note 135.

140. *Id.*

141. *Id.* referring specifically to the California state Ombudsman for child welfare services. Where ombudsmen are restricted from systemic action, class action litigation, discussed in detail below, may be the most viable option to enact institutional change.

142. *Id.*

affirming and diverse caseworkers would more greatly impact this youth and similarly situated QTFYOC.

Fourth, QTFYOC are particularly vulnerable to discriminatory ombudsman and retaliation. As noted, ombudsmen have discretion regarding whether to initiate a case or merely provide referrals. Thus, even QTFYOC who are able to contact an ombudsman are then subject to the discretionary beliefs of that individual. If a given ombudsmen does not take a complaint seriously or is not accepting of diverse needs, QTFYOC may be left without proper relief. Also, many states lack anti-retaliation or confidentiality policies, leaving QTFYOC at risk of targeting by caregivers, social workers, and other adults for reporting their abuse.¹⁴³

B. *Class Action Enforcement*

QTFYOC and their advocates may also bring class actions to enforce their federal and state rights in the face of discrimination. Class action lawsuits “against state and county child-welfare systems have been a common means of addressing harms to foster children since the 1970s” and may be a useful tool to “define the scope of protection” for QTFYOC.¹⁴⁴

However, class actions often fail to capture the specific needs of QTFYOC, even where they are named plaintiffs. Nonrecognition of QTFYOC or even merely LGBTQ foster youth as an independent certified class restricts the effectiveness of the remedies a court may provide.

This section explores two cases where QTFYOC are named plaintiffs. First in *D.S. v. Washington State* under a foster youth with disabilities class, and then in *Wyatt B.* as a subclass of sexual and gender minority (SGM) foster youth. This section will argue that the subclass approach in *Wyatt B.* allows for more recognition of QTFYOC’s intersectional experiences and will likely lead to greater recognition of their needs and protection of their rights.

1. Crenshaw’s Articulation of Intersectional Analysis

In her work *Demarginalizing the Intersection of Sex and Race*, critical race theorist Kimberlé Crenshaw analyzes the limits of class action litigation and exposes the legal treatment of Black women as improper subjects of discrimination claims.¹⁴⁵ Crenshaw posits that Black women’s intersectional identity as both Black and women complicates discrimination claims:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may

143. *Id.* (“The statute should include an anti-retaliation provision to ensure that children and other complainants do not suffer repercussions when they complain about injustices or inadequate services”).

144. Asgarian, *supra* note 90 (the first class action against a state welfare system being “when an attorney with the New York Civil Liberties Union, Marcia Lowry, pioneered this type of case against the New York City foster care system”); TAMAR-MATTIS, *supra* note 87, at 157.

145. Crenshaw, *supra* note 11.

flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination . . . And sometimes, they experience discrimination as Black women-not the sum of race and sex discrimination, but as Black women.¹⁴⁶

This intersectional identity often obscures Black women's avenues of relief when litigating discrimination claims. Crenshaw argues that the law fails to conceive of Black women as proper named class representatives for either Black workers or women due to their intersectional identity. Where Black women do serve as class representatives, their intersectional experiences may prevent a finding of discrimination from applying to other members of one, but not both, of their intersectional identities.¹⁴⁷

Like Crenshaw's articulation of the challenges faced by Black women, QTFYOC sit at the intersections of convening identities: LGBTQ, POC, foster youth, etc. However, most foster youth class actions are not brought under a class of youth of color or a class of queer and trans youth. Instead, QTFYOC are often forced to bring their claims under other certified classes to which they also may belong, like youth with disabilities. The court ignores intersectional concerns of QTFYOC in order to make them proper subjects when they are named plaintiffs under other classes.

2. Case Studies

In *D.S. v. Washington State*, a certified class of foster youth with behavioral and developmental disabilities brought suit against the state alleging a violation of rights regarding the state's misuse of "exceptional placements" or "one-night stays."¹⁴⁸ The complaint alleges that the Department of Children, Youth and their Families (DCYF) placed youth in consecutive temporary stays in office buildings and hotels, forcing them to leave each morning with all of

146. *Id.* at 149. Crenshaw notes courts have denied Black women ability to serve as a certified class representative, conceiving them unable to properly represent the named class of women. *Id.* at 144 (discussing *Moore v. Hughes Helicopter, Inc.*, where the court refused to certify a Black woman as a class representative for women, reasoning "Moore had never claimed before the EEOC that she was discriminated against as a female, but only as a Black female. [T]his raised serious doubts as to Moore's ability to adequately represent white female employees").

147. *Id.* at 148 ("[antidiscrimination doctrine] forces [Black women] to choose between specifically articulating the intersectional aspects of their subordination, thereby risking their ability to represent Black men, or ignoring intersectionality in order to state a claim that would not lead to the exclusion of Black men"). Crenshaw points to the case of *Payne v. Travenol*, where two Black female plaintiffs brought suit for racial discrimination on behalf of all Black employees. *Id.* at 147. While the court did find sufficient evidence of racial discrimination and awarded remedies to the class of Black female employees, the court refused "to extend the remedy to Black men." *Id.*

148. Complaint at 3, *D.S. v. Washington* (filed Jan. 1, 2021).

their belongings and relocate, “essentially rendering [the foster youth] homeless for extended periods of time.”¹⁴⁹

D.S., a named plaintiff in the suit, is a Native American Trans Woman diagnosed with Depression and Anxiety and classified by the state “as having a behavioral health disability.”¹⁵⁰ While in foster care, D.S. was subjected to many of the same forms of discrimination as other QTFYOC including placement instability,¹⁵¹ bullying and harassment,¹⁵² denial of mental health care,¹⁵³ and a lack of affirming placements.¹⁵⁴

Because D.S. was a named plaintiff under an ADA class, D.S.’ attorneys collapsed her intersectional experiences and emphasized only those that overlapped with other youth with disabilities. For instance, advocates in the complaint present systemic issues as relating primarily to children with behavioral and developmental disabilities.¹⁵⁵ This leaves similar systemic issues that also apply to QTFYOC unacknowledged by the court. Thus, future cases litigated on behalf of QTFYOC or even LGBTQ youth may be unable to rely on *D.S.* for relief.

D.S.’ advocates also chose to bring the action as an ADA class rather than a QTFYOC class, furthering the continued lack of case law litigating the bounds of antidiscrimination statutes. Many of D.S.’ allegations suggest a clear violation of Washington’s foster youth antidiscrimination statute. However, D.S.’ advocates did not rely on this statutory protection and instead opted to litigate under well-established ADA protections. Reliance on alternate protections creates a cycle in which QTFYOC who can be named under a more popular class are able to litigate their claims, but those who do not share such

149. *Id.*

150. Urs, *supra* note 2; Complaint at 20, *D.S. v. Washington* (filed Jan. 1, 2021).

151. Urs, *supra* note 2 (“DCYF tried to place D.S. in an all-boys facility and when she refused, the agency forced her to sleep in a social worker’s car for the night”).

152. A DCYF social worker told D.S. that “she would not be ‘passable’ as a trans person, [and] that she would never go anywhere in life.” Complaint at 21, *D.S. v. Washington* (filed Jan. 1, 2021). Despite that D.S. has legally changed her name, “the state refuses to change it in its files until they get an official document from the Department of Health.” Urs, *supra* note 2.

153. Complaint at 19, *D.S. v. Washington* (filed Jan. 1, 2021).

154. Washington, *supra* note 3 (“A child or youth who identifies as LGBTQ+ will not be subjected to discrimination or harassment on the basis of actual or perceived sex, sexual orientation, gender identity or gender expression.”); Urs, *supra* note 2; Complaint at 19–20, *D.S. v. Washington* (filed Jan. 1, 2021).

Complaint at 21, *D.S. v. Washington* (filed Jan. 1, 2021) (“[a]s a trans girl, D.S. requested an alternative placement due to the lack of gender-affirming care in the shelter and being bullied by other youth who made her feel scared and physically unsafe. She reported that in addition to not receiving any mental health care, a staff member had stated to her: “You’re always going to be a boy. Stop acting like a girl.” Although DCYF acknowledged that this placement was not its preference for D.S., the agency claimed that it had no other options at that time and required that she continue living in this setting”).

155. *Id.* (“Children with behavioral health and developmental disabilities are at heightened risk of experiencing placement exceptions, one-night stays, and congregate care placements.”)

intersection (in this case a diagnosed disability) are left without relief and without case law establishing the bounds of their rights.

Erasure as a named class also leads to remedies which fail to account for QTFYOC. In response to the D.S. Complaint, the federal court ordered DCYF to develop a formal plan.¹⁵⁶ However, in the plan and budget request DCYF subsequently released “no specific mention was made of the needs of LGBTQIA+ youth in its care.”¹⁵⁷ The DCYF plan actually further marginalizes QTFYOC by relying more heavily on homophobic and transphobic placement agencies to find permanent placements as opposed to temporary stays.¹⁵⁸ This remedy will not aid QTFYOC like D.S. who will still be left without affirming placement options or sensitive caseworkers. Even the remedies requested in the complaint demonstrate such erasure. For instance, advocates request DCYF “address the individualized needs of children with disabilities” and higher staff with “appropriate expertise” to better place youth with disabilities.¹⁵⁹ What D.S. needed was staff trained on trans and queer sensitivity and inclusivity and “expertise” on placing her in an affirming home. Yet her needs go unaddressed in the calls for relief in the complaint as she is reduced only to her identity as a youth with a disability.

Additionally, remedies that would be useful to QTFYOC like D.S. were ignored where they did not apply to the named ADA class. For instance, proposed solutions that DCYF waive “its onerous home study process that too often disqualifies relatives and family friends who want to provide a home to youth whom they know and love,” actively search for placements where caregivers and other youth in the home want LGBTQ youth, develop “hub homes” for LGBTQ youth, and giving youth agency to share information with prospective foster parents all went unaddressed in DCYF’s proposed plan.¹⁶⁰ Thus, the relief that QTFYOC may receive where they are not a named class is limited to whatever relief would also be useful to the named class.

While *D.S.* was litigated under an ADA class, *Wyatt B.* is the first class action in the United States “to litigate on behalf of a set of specific populations in foster care combined into a single class action lawsuit.”¹⁶¹ It is also the first class action to specifically address the needs of LGBTQ foster youth.¹⁶² The suit is brought by the certified “general class” of all children under Department of Human Services guardianship and three subclasses including children with disabilities (the ADA subclass), children “who are or will be 14 years old and

156. Urs, *supra* note 2.

157. Urs, *supra* note 2. D.S.’ advocated does note that one aspect of the plan may provide aid to LGBTQ foster youth by increasing independent living placements. *Id.*

158. Urs, *supra* note 2.

159. Complaint at 4, *D.S. v. Washington* (filed Jan. 1, 2021).

160. Urs, *supra* note 2.

161. Asgarian, *supra* note 90

162. *Id.* (“In the 1990s during a class-action settlement with New York City to make improvements to its child welfare system, a subclass of gay foster youth attempted to break off, arguing that their safety concerns weren’t adequately represented in the larger suit—but a judge ruled against their petition”).

older, who are eligible for transition services and lack an appropriate reunification or other permanency plan (the “aging out sub-class”),” and children “who identify as sexual or gender minorities, including lesbian, gay, bisexual, queer, transgender, intersex, gender nonconforming and non-binary children (the “SGM sub-class.”)”¹⁶³

Given that the court decision and subsequent remedies are still pending, more research is necessary to determine whether the creation of a SGM subclass in *Wyatt B.* substantively impacts the benefits for QTFYOC. However, divergences between the *D.S.* and *Wyatt B.* complaints do suggest a heightened priority for LGBTQ foster youth’s concerns where they are a named class. Unlike in *D.S.* where the complaint mainly addresses overlapping issues of the ADA class, the *Wyatt B.* complaint much more explicitly discusses the issues of LGBTQ youth. For instance, the complaint discusses the mental health concerns with denying the named plaintiff gender affirming care and the unique stress LGBTQ youth face in discriminatory placements.¹⁶⁴ In contrast to *D.S.* where the complaint focused primarily on family reunification, the *Wyatt B.* complaint also emphasizes LGBTQ foster youth’s more common need for other permanent placements aside from family reunification.¹⁶⁵ Thus, class actions may be a more viable form of protection for QTFYOC when the identities of youth of color and LGBTQ youth are part of the named classes rather than just having youth with those identities as part of other named classes.

V. POLICY RECOMMENDATIONS

QTFYOC have unique needs and vulnerabilities and are not adequately protected by the current legal landscape and available avenues of relief. Given the violent history of the child welfare system as a form of racial policing and the continued overrepresentation of youth of color within this traumatic system, some advocates argue for abolishing the current child welfare system and reimagining new methods of care and community support.¹⁶⁶ Actions like the

163. Complaint at 9, *Wyatt B. v. Brown* (filed Apr. 16, 2019) (No. 19–556).

164. Complaint at 5, *Wyatt B. v. Brown* (filed Apr. 16, 2019) (No. 19–556) (“Lesbian, gay, bisexual, transgender, queer and questioning (“LGBTQ”) children, particularly transgender children in transition and children who are in the process of coming out about their sexuality or gender identity, are often deprived of a safe and stable placement and face the dangerous choice of either staying in the closet or risking the termination of their placements”).

165. *Id.* at 3 (“[foster youth] either need places to live while they and their parents either receive necessary services so they can be reunited – as quickly as possible – or they need the state’s efforts to find them other permanent homes in which they can safely grow up”).

166. See Isabela Baghdady, *Professor Dorothy Roberts Talks Dismantling the Child Welfare System at Penn Event*, THE DAILY PENNSYLVANIAN, NOV. 16, 2021, <https://www.thedp.com/article/2021/11/dorothy-roberts-penn-law-child-welfare> (Professor Dorothy Roberts stated “I’m now convinced that we need to completely dismantle the child welfare system while we build a radically reimagined way of caring for families and keeping children safe”). See also Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, COLUM. J.-L. & RACE, forthcoming, <https://papers.ssrn.com/sol3/papers>.

Texas order to investigate parents providing gender affirming care reaffirm the role of the child welfare system in targeting nonnormative and marginalized communities and disprove the myth of foster care as a safe haven for rejected LGBTQ children. For many queer and trans youth of color, avoidance of out-of-home care altogether would be the best outcome. This section will posit a variety of policy recommendations to better the experiences and outcomes for QTFYOC including narrowing the foster care system's reach, reallocating resources to community aid, and providing proper legal protections for youth who do truly require out-of-home placements under the supervision of the state.

Support Families in Caring for Their Children: Many children funneled into the foster system do not actually need out-of-home care. Allocation of basic resources and financial support to families in need may make removal unnecessary in a significant number of cases. Expansion of welfare support for families through universal healthcare, subsidized or free child-care, and cash aid (without work requirements so parents can devote time to raising their children) could significantly shrink the need for out-of-home placements by meeting the needs of children *within* their loving homes. Additionally, halting racialized systems of policing like immigration detention and removal and mass incarceration will prevent the unnecessary incapacitation of otherwise capable parents. Finally, ensuring equitable access to unbiased medical care, especially for Black mothers during pregnancy and childbirth, would better ensure that parents can both physically and mentally support themselves, their children, and their communities.¹⁶⁷

Broaden Affirming Placement Options: In cases where children must be removed from their homes, exploration of non-biological and extended familial and communal support will allow more queer and trans youth of color to find care outside the formal foster system. The state should consider the role neighbors, aunts (biological and not), cousins, coworkers, church members, and family friends could (and do) serve in supporting children in need of care. Creative options like shared care across these support networks should also be leveraged wherever possible.

The duty to investigate viable support networks should be imposed at the federal level. This could be accomplished by amending the Adoption Assistance and Child Welfare Act (AACWA) to require not only the obligation to make "reasonable efforts" to prevent removal from a home and attempt reunification, but also the duty to make "reasonable efforts" to place a child

cfm?abstract_id=3815217 (arguing new forms of community support in New York during COVID-19 were a viable and safe alternative to the child welfare system especially for Black and Latinx families).

167. Black mothers are currently "three times more likely to die from pregnancy or childbirth than women of any other race." https://nationaldiaperbanknetwork.org/black-mothers-pregnant-women-are-struggling-in-the-us%ef%bf%bc/?gclid=Cj0KCQjwn9CgBhDjARIsAD15h0DwxKBMwJEHXWT24huFeyaK6s-2P2V4RWfu9iZBXhjt1OGsPtNT5caAqpSEALw_wcB

within a culturally informed support network prior to resorting to foster placement.¹⁶⁸ This effort should be made even on an emergency basis so children can avoid contact with the foster care system entirely where possible.

Expanding placement options beyond traditionally recognized avenues of care based on white Christian family structures will certainly require more personnel and resources at the onset of a case to make phone calls, research relatives, and conduct family interviews. However, the financial and social payoff of curbing system contact at the onset would be considerable.

Within the system, the federal government ought to ensure the existence of affirming homes through support and protection of marginalized adoptive and foster parents. State laws that allow for private agencies to claim religious exemptions and discriminate against LGBTQ couples and families seeking to become caregivers must be repealed. These laws protect the interests of private agencies over the insurmountable need of QTFYOC to access already sparse affirming placements.¹⁶⁹

Pass a Federal Bill of Rights for Foster Youth: Rather than a patchwork of inconsistent state laws, federal legislation that protects the rights of queer and trans youth of color from discrimination on multiple identity axis and guarantees their rights to affirming care would ensure youth in and out of the foster care system have stable grounds on which to rest their legal claims. This legislation could require as a condition for states to receive federal funding for child welfare under Title IV-E of the Social Security Act that the states pass antidiscrimination statutes for foster youth. The statute should clearly identify the rights of foster youth and outline an enforcement mechanism by which foster youth and their advocates can seek redress when their rights are violated. This statute could be modeled off of states like Tennessee that have already passed expansive and detailed antidiscrimination legislation.

Certify Classes or Subclasses Based on Race, Gender, and Sexuality: QTFYOC have unique experiences and needs within the foster care system. They also make up a significant percentage of the general foster youth population. As discussed, class actions brought under other identities may fail to provide appropriate relief where the named class is not based on race, gender, and/or sexuality. Allowing QTFYOC to advocate as a recognized class or a certified sub-class within a class action suit could lead to better-tailored recognition and relief for this overrepresented sector of foster youth.

168. This provision could look something like the model in the Indian Child Welfare Act (ICWA) requiring preferential placement of Indian children with “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” 25 U.S.C. § 1915 (a). A similar preference for placements could be created to require states to place children within their extended family, culture, or community though these concepts would then need to be more clearly defined.

169. *See* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (where the federal government failed to provide such protection and allowed a private agency to prevent same sex couples from certification as foster parents because it was in accordance with their religious freedom).

CONCLUSION

QTFYOC are starkly overrepresented within the foster care system, yet the current welfare system ignores and marginalizes their needs. Though federal and state legislative protections for QTFYOC exist, such protections often vary by state, operate on a single-axis identity, and do not have established case law to determine their force. Relief from administrative claims is often limited by state ombudsman's reliance on state welfare agencies and their disallowance of systematic investigations or changes. Class actions may help address more systemic issues, though QTFYOC's needs are often erased where the identities of sexual and gender minority or youth of color are not themselves named classes. Expanding welfare support for in-home care, broadening affirming placement options, requiring states who receive federal funding to pass antidiscrimination protections, and certifying class actions based on race, gender, and sexuality are all viable options to improve the experience of queer and trans youth of color both within and outside the foster care system.