

DIVERSITY COUNTS

Why States Should Measure the Diversity of Their Judges and How They Can Do It

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glossary

Asexual

Describes people who experience little or no sexual attraction.

Bisexual

A sexual orientation or identity describing one's sexual, romantic and/or affectional attraction to two or more sexes or genders.

Cisgender

Refers to people whose gender identity is the same as their assigned or presumed sex at birth.

Gay

A term that can be used to describe either a male whose primary sexual and romantic attraction is to other males or to reference anyone whose primary sexual and romantic attraction is to a person who is the same sex as themselves.

Gender identity

An individual's inner sense of being male, female or another gender. Gender identity is not necessarily the same as sex assigned or presumed at birth.

Heterosexual

As a noun, a person who is attracted to members of a different sex. As an adjective, of or relating to sexual and affectional attraction to a member of a different sex.

HIV or Human Immunodeficiency Virus

A retrovirus that targets the human immune system. Progression of HIV infection can lead to serious compromise of immune system function, leaving the body susceptible to opportunistic infections against which it normally could defend itself. HIV is not synonymous with AIDS, which is the most severe stage of HIV infection.

Lesbian

Refers to a woman who is primarily romantically and/or sexually attracted to and/or sexually active with other women. Lesbian refers exclusively to women, while gay can refer to either women or men.

LGBT

Initials that refer to lesbian, gay, bisexual or transgender.

Non-binary

Refers to a spectrum of gender and sexuality rather than binary categories of gender and sexuality.

Person or people living with HIV

Includes all people who have the human immunodeficiency virus (HIV) in their bodies. This term is inclusive of people with an AIDS diagnosis.

Person or people of color

Refers to individuals whose ethnic or racial origins are partly or wholly considered to be or are constructed as non-white.

Sexual orientation

Refers to sense of attraction to, or sexual desire for, individuals of the same sex, another sex, both or neither.

Straight

Heterosexual; a person whose sexual and affectional attraction is to someone of a different sex. Transgender people may be straight or LGB-identified.

Transgender; Trans

Refers to people whose gender identity or one's inner sense of being male, female or another gender, differs from their assigned or presumed sex at birth.



FOREWORD BY THE HONORABLE VIRGINIA L. LINDER 99TH ASSOCIATE JUSTICE OF THE OREGON SUPREME COURT¹

During my more than 18 years as a judge in Oregon, I have experienced first-hand the value of diversity on the bench—how decisions are aided by the shared insights and perspectives of judges with a broad cross-section of life experiences and how a diverse bench legitimizes the courts in the eyes of those our courts serve. Those benefits were brought home to me anew a few years ago when my close friend, Judge Beth Allen, told me about the tangible difference having openly gay and lesbian judges on Oregon’s bench had made to her practice as a lawyer.

A few years after Beth became a lawyer in the late 1990s, a woman she knew approached her for advice. Beth was openly lesbian, and the woman was coming out as a lesbian to friends and family. The woman expected to divorce her estranged husband, but she worried that, if she were open about her sexual orientation, she would lose custody of their son even though she was the primary parent. Beth assured the woman that sexual orientation could not be considered in resolving custody issues under settled Oregon law. Beth also explained that there were gay and lesbian judges on the trial courts in her county, and she was able

to point to me as an openly lesbian judge on (at the time) the Oregon Court of Appeals. The woman was astonished. She had no idea that there were openly gay and lesbian judges serving on Oregon’s courts. Knowing that, however, gave her the courage to come out to her husband and to fight for custody of her son. She won.

That is not a “one off” anecdote. Beth eventually opened her own highly successful law firm to serve the LGBT community and other historically marginalized groups. Her practice specialized in areas such as family law, estate law, business law and employment discrimination. She often found herself needing to tell her clients, by way of reassurance, that there were openly lesbian and gay judges on our trial court and appellate court benches, including (by then) the Oregon Supreme Court. That meant, she would explain, that lesbian and gay judges worked alongside other judges at all court levels. As a result, other judges “got it”—they saw LGBT persons as individuals, not as stereotypes, and decided cases involving LGBT parties on the same factors as any other case. Time and again, that knowledge made all the difference to Beth’s clients and their willingness to stand up for themselves and their rights, if necessary, by going to court.

The point is simple, but also profound: Diversity on the bench matters. It matters to real people,

“Lesbian and gay judges worked alongside other judges at all court levels. As a result, other judges ‘got it’—they saw LGBT persons as individuals, not as stereotypes, and decided cases involving LGBT parties on the same factors as any other case.”

1. Justice Linder served on the Oregon Court of Appeals from 1997 until she was elected to the Oregon Supreme Court in 2007. She retired at the end of 2015. She was the first openly lesbian judge on any state’s highest court and she remains (as of the date of this publication) the only openly LGBT judge in the nation to have achieved a seat on a state’s highest court through election.

with real disputes, who need our court system to resolve those disputes. A diverse bench matters not because it guarantees any particular outcome in any particular dispute, but because it helps ensure that—win, lose or draw—all who walk through the courthouse doors will be treated with dignity and will be fully and fairly heard.

Diversity on the bench, in short, is fundamental to the promise of equal justice for all.

This report, *Diversity Counts*, has important advice for all who care about that promise. It shows states why they should measure the diversity of their bench and how they can. Although practical and political realities vary from state to state, every state can benefit from the insights contained in this report. States that don't yet collect judicial diversity data can begin. States that already collect data can gather it more comprehensively and share it more effectively. This report offers a compelling argument for the value of that information and a pragmatic guide for gathering it.

I commend Lambda Legal and the American Constitution Society for Law and Policy on this path-breaking publication, which will be a valuable resource to state courts, state officials and bar leadership in the months and years to come.



INTRODUCTION

DIVERSITY COUNTS

State courts handle the vast majority of the country's cases, yet little is known about the backgrounds of judges who sit on them. Much of the information about who seeks and gets judicial seats is not publically available and, in many states, is not even collected in a systematic way.

This report by Lambda Legal and the American Constitution Society for Law and Policy maps out how states can collect and release “judicial diversity data”—data about the demographic and professional backgrounds of state judges and judicial candidates. The report:

1. Makes the case that judicial diversity data is important.

Part I explains why judicial diversity matters, what we know about diversity on state courts and why states should prioritize collecting judicial diversity data and making it available to the public, policymakers and journalists. States should improve collection and release of judicial diversity data for reasons of:

■ **Transparency.** There is a strong public interest in ensuring that the judiciary is composed of judges who truly understand the issues faced by all who are subject to its rulings. Without reliable judicial diversity data, no one can know if this is the case.

■ **Diversity.** Judicial diversity data is itself a crucial part of achieving diversity on the bench. States cannot improve diversity on the bench if they do not know the ways in which diversity is lacking.

■ **Ease.** Collecting and releasing judicial diversity data is not just important; as a practical matter, it is cheap and easy and well worth the future gains in diversity.

2. Reports state practice regarding judicial diversity data.

Part II reports the findings of a new study conducted by Liz Seaton, Esq., that examined whether and how 12 states collect and disclose judicial diversity data. To make sense of the range of approaches, we divided these 12 states into three tiers:

■ **Tier One** includes states that systematically collect and publicly disclose judicial diversity data: California, Georgia, New Jersey and Texas.

■ **Tier Two** includes states that systematically collect judicial diversity data and disclose it upon request: Arizona, Maryland, New York, Oregon and Wisconsin.

■ **Tier Three** includes states that either do not systematically collect judicial diversity data or do not disclose it: Kansas, Ohio and Tennessee.

Even data collected in Tier One and Tier Two states is very limited, typically covering only race/ethnicity and gender. California is the only state in the study that requires collection of data on the gender identity and sexual orientation of judges and judicial candidates (though relevant data is also found in New York).

3. Identifies best practices for collecting and releasing judicial diversity data.

Part III looks to the experiences of nine states featured in this report that do collect judicial diversity data in order to chart a path to improved data collection and release. We propose that judicial diversity data should be:

- **Collected.** States should systematically collect judicial diversity data.
- **Communicated.** States should voluntarily publish data.
- **Comprehensive.** Data should cover a range of diversity categories, including gender identity and sexual orientation.
- **Clear.** Data should be easy to find and use and presented in a manner easily accessible to the public, policymakers and journalists.

4. Provides guidance on gender identity and sexual orientation data.

Part IV takes a closer look at two states (California and New York) where judicial diversity data on gender identity and sexual orientation is available, and offers detailed guidance on how states can gather and disseminate data on these overlooked categories. We focus on two issues:

- **Dealing with gender identity and sexual orientation.** States should treat gender identity and sexual orientation as distinct categories, not conflate them. And these categories should cover all judges and judicial candidates, not just those who are lesbian, gay, bisexual or transgender (LGBT). We provide model questions on these categories that states should include in surveys to judges and judicial candidates.

- **Understanding and addressing non-disclosure.** States should seek to understand and address reasons why some judges and judicial candidates may be unwilling to disclose information about their gender identity or sexual orientation, and in particular LGBT status. We identify potential barriers to disclosing this kind of information and some ways to overcome them.

5. Makes recommendations to key actors.

Part V sets out specific recommendations directed at those who can play a role in collecting and releasing judicial diversity data, in particular governors, designated agencies responsible for evaluation of judicial candidates, administrative offices of the courts and state bar associations.

Lambda Legal's Fair Courts Project works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and everyone living with HIV. For more information about Lambda Legal and the Fair Court Project, please visit www.lambdalegal.org/issues/fair-courts-project.

The American Constitution Society for Law and Policy, founded in 2001 and one of the nation's leading progressive legal organizations, is a rapidly growing network of lawyers, law students, scholars, judges, policymakers and other concerned individuals. For more information about the ACS or to locate one of the more than 200 lawyer and law student chapters in 48 states, please visit www.acslaw.org.

This report by Lambda Legal and the American Constitution Society for Law and Policy maps out how states can collect and release "judicial diversity data"—data about the demographic and professional backgrounds of state judges and judicial candidates.

BACKGROUND

STATE COURTS, JUDICIAL DIVERSITY AND THE IMPORTANCE OF DATA



“The bench needs to reflect the population of California so that Californians can continue to trust and understand that people in the position of power in the terms of the law, are just like them. We understand the issues because we have similar experiences, backgrounds, cultures, and heritage.”

—The Honorable Tani Gorre Cantil-Sakauye, 28th Chief Justice of California⁴

A. STATE COURTS

State courts handle more than 90 percent of the United States’ judicial business. Although the U.S. Supreme Court attracts significantly more attention, it decides fewer than 100 cases each year, compared with over 100 million cases arising annually in the state courts. State courts handle the cases that are most likely to directly touch people’s lives, including child custody, divorce, consumer disputes and criminal prosecutions.

Just as the U.S. Supreme Court decides cases that have important and wide-ranging public policy implications, so too do the state supreme courts, deciding cases arising from state laws and constitutional provisions involving civil and human rights, environmental protections and the criminal legal system. For instance, state supreme courts decide who can vote, who can drink clean water and breathe clean air, whom the police can detain, search and arrest and who goes to jail and for how long.²

B. JUDICIAL DIVERSITY

1. Why diversity on courts matters

Our courts are a vital path to equality for historically marginalized groups, including women, people of color, LGBT people and everyone living with HIV. They should be staffed with qualified and diverse judges who understand that the rights and liberties guaranteed by our Constitution apply equally to all people.

Public confidence. The legitimacy of our courts depends on the belief that judges will rule fairly and impartially. Public confidence may be diminished when the public perceives a lack of diversity on the bench. The lack of diverse judges may be particularly concerning for historically marginalized populations that depend on fair and impartial courts in their pursuit of justice and equality.

Research bears out these concerns. Lambda Legal’s 2014 survey of the experiences of LGBT people and people living with HIV in court found that only 27% of the transgender respondents and 33% of the LGBT people of color respondents said they “trust the courts.”³

2. See American Constitution Society for Law and Policy, *State Courts Matter*, available at www.acslaw.org/statecourtsmatter.
3. See Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living With HIV in the United States* (2014), available at <http://www.lambdalegal.org/protected-and-served>.
4. See Odette Keeley, “Bench Must Reflect State’s Diversity,” *Inquirer.net* (May 3, 2011), available at <http://globalnation.inquirer.net/755/bench-must-reflect-state%E2%80%99s-diversity>.



Similarly, the National Center for State Courts' 2015 survey of registered voters found that only 42% of African-Americans described state courts as "fair and impartial," in contrast to 60% of the overall sample.⁵

Structural impartiality. While impartiality in individual judges is crucial, so is a "structural impartiality" of the bench as a whole.⁶ Sherrilyn Ifill explains that "structural impartiality exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints" and "fosters impartiality by diminishing the possibility that one perspective dominates adjudication."⁷

A judiciary that is largely homogenous as an institution may insulate its individual members from grappling with different perspectives and experiences shared by more diverse peers and litigants alike.⁸ Structural impartiality can be achieved only when diverse viewpoints are reflected on the bench, so that no one perspective is taken for granted in judicial decision-making.⁹

Enriched decision-making. The role that judges play in our constitutional democracy requires them to be alert to the experiences of the population they are asked to judge. Judges with diverse perspectives and experiences may have different understandings of what burdens are borne and by whom and may weigh those concerns differently.

Judges who are attuned to the experiences of marginalized populations are likely to bring a vital perspective to judicial deliberations.

For these and other reasons, judicial diversity is a judicial virtue. Empathy for the experiences of diverse communities is part of what makes for a good judge. A judiciary that includes a diverse range of perspectives and experiences—including those that have been historically excluded and remain lacking—will improve the quality of justice and build public confidence.



“ At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”

—Justice Sandra Day O'Connor, the first woman on the U.S. Supreme Court, remembering Justice Thurgood Marshall, the first African-American to serve on the Court¹⁰

5. See National Center for State Courts, *The State of State Courts: A 2015 NCSC Public Opinion Survey* (2015), available at <http://www.ncsc.org/2015survey>.
6. See Sherrilyn A. Ifill, "Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts," 39 B.C.L. REV. 95 (1997) – *Boston College Law Review*, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2086&context=bclr>
7. *Id.*
8. See Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence," in *Judicial Independence in Context* (2010).
9. See Ifill, *supra* note 6.
10. See Sandra Day O'Connor, "Thurgood Marshall: The Influence of A Raconteur," 44 Stan. L. Rev. 1217 (1992) – *Stanford Law Review*, https://www.jstor.org/stable/1229051?seq=1#page_scan_tab_contents.



“ I was a law school teacher. And that’s how I regard my role here with my colleagues who haven’t had the experience of growing up female and don’t fully appreciate the arbitrary barriers that have been put in women’s way.”

—Justice Ruth Bader Ginsburg, describing her role on the U.S. Supreme Court¹¹

2. What we know about diversity on state courts

The most current and comprehensive study of the gender and race/ethnicity of state judges is 2016’s *The Gavel Gap: Who Sits in Judgment on State Courts*.¹²

The Gavel Gap presented ACS research by two law professors who found significant differences between the race and gender composition of the courts and the communities they serve. The two key findings were:

- “Women have entered law schools and the legal profession in large numbers for the last forty years, but are underrepresented on state courts.”¹³
- “People of color make up roughly four in ten people in the country but fewer than two in ten judges; and in sixteen states, judges of color account for fewer than one in ten state judges.”¹⁴

While state demographics vary,¹⁵ in no state does the bench mirror the population.¹⁶ Women and people of color remain severely underrepresented on most state courts at most levels. As the report summarizes: “In a near majority of states

(24), minority judges fell below 50% of proportional representation of the general population.”¹⁷ And, “[n]ot a single state has women on the bench in numbers commensurate with their representation in the general population.”¹⁸

C. JUDICIAL DIVERSITY DATA

1. Judicial diversity data is lacking

Reliable data about the demographic and professional backgrounds of state judges and judicial candidates is seriously lacking. Much of the relevant information is non-public and, in many states, it is not collected in a systematic way. There is such a shortage of data on the gender identity and sexual orientation of judges that little is known about LGBT state judges.

In the absence of state-released judicial diversity data, it has fallen upon non-state actors to fill the gap. Responding to this shortage, legal professional associations have published data and conducted research on women and people of color on the bench.

11. See Greg Stohr, “Ruth Bader Ginsburg Isn’t Giving Up Her Fight for Women’s Rights,” Bloomberg (Feb. 12, 2015), available at <https://www.bloomberg.com/news/features/2015-02-12/ruth-bader-ginsburg-isn-t-giving-up-her-fight-for-women-s-rights>.

12. Tracey George and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?* (2016), available at gavelgap.org.

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.* at 10.

16. Unlike many elected and appointed officials, state appellate judges are required to meet professional requirements such as being a member of the state bar or a licensed attorney.

17. *Id.* at 9.

18. *Id.*

THE GAVEL GAP: DOCUMENTING A “SERIOUS SHORTCOMING IN OUR UNDERSTANDING OF AMERICA’S COURTS”

To produce *The Gavel Gap: Who Sits in Judgment on State Courts?* in 2016, Professors Tracey George and Albert Yoon and nine student researchers at Vanderbilt University and the University of Toronto spent more than a year in 2015-16 completing a nationwide data quest. They started with data made public in a handful of states and went further by examining media sources, reaching out to states that release data only upon specific request and methodically gathering the remainder of the hard-to-find facts for three demographic categories. In the end, they created a new database revealing the gender, racial and ethnic backgrounds of more than 10,000 state judges serving on state courts of general jurisdiction as of December 2014.

The Gavel Gap is an important resource. Indeed, one

Supreme Court of Ohio staff member referred one of our researchers to *The Gavel Gap* after noting that her own state does not systematically collect judicial diversity data.²²

Yet *The Gavel Gap* also illustrates the “serious shortcoming in our understanding of America’s courts” that arises from the lack of judicial diversity data. It took a Herculean effort by a group of independent researchers to collect and release basic demographic data about state judges—data which states should release voluntarily in the first place. And given the lack of discoverable information on LGBT judges, even *The Gavel Gap* authors were not able to compile data based on gender identity and sexual orientation, and so very little is known about LGBT judges in state courts.

■ The National Association of Women Judges’ website publishes some statistics on the gender composition of each state’s bench.¹⁹ These limited statistics are compiled by Forster-Long, Inc. for their annual publication, *The American Bench*, to which a year of single-user online access costs \$625.²⁰

■ The National Center for State Courts’ website publishes some statistics on state judges’ race and ethnicity.²¹ However, states are supposed to self-report this race and ethnicity data, and some states have made little or no data publicly available.

■ Neither association releases data on the gender identity and sexual orientation of judges.

2. Why states should prioritize judicial diversity data

States should improve collection and release of judicial diversity data for several reasons:

Transparency. Transparency refers to government’s obligation to provide certain relevant information to the public so that people can hold officials accountable. This includes information

19. National Association of Women Judges, *2016 US State Court Women Judges*, available at <https://www.nawj.org/statistics/2016-us-state-court-women-judges>.

20. Forster-Long, Inc., *The American Bench*, available at <http://www.forster-long.com/americanbench>.

21. National Center for State Courts, *State Court Organization*, available at <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM140>.

22. Lambda Legal email correspondence with the Supreme Court of Ohio, August 19, 2016.

about the demographic and professional backgrounds of judges and judicial candidates in state courts. There is a strong public interest in ensuring that the judiciary is composed of judges who truly understand the issues faced by all who are subject to its rulings. Without reliable judicial diversity data, no one can know if that is the case.

Diversity. Gathering and disseminating judicial diversity data is itself a crucial step toward achieving judicial diversity. States cannot improve diversity on the bench if they do not know the ways in which diversity is lacking. With reliable data in hand, state and other actors can assess:

- The backgrounds of candidates who make it to the bench;
- Where a state stands on representativeness on its bench; and
- What specific forms of diversity are present and lacking on the bench.

Insights from judicial diversity data can in turn guide the judicial selection process and its reform. For instance, in states with merit selection of judges, collecting data can allow commissioners to discover whether they are successfully recruiting diverse applicants and putting diverse candidates before the appointing authority.²³

Ease. Collecting and releasing judicial diversity data is not just important—as a practical matter, it is cheap and easy to do and well worth the future gains in diversity.

- One easy way to begin collecting data is to ask for basic information about demographic and professional backgrounds:
 - in the case of judicial candidates in non-elective states, in their judicial appointment applications; and
 - in the case of elected/appointed judges, through human resources/ judicial data forms and anonymous surveys.
- For those states that already collect data, making their surveys more comprehensive should be straightforward. In most cases, it simply involves adding categories such as gender identity and sexual orientation to existing judicial data or application forms and aggregating the information received.
- Once the data has already been collected, the administrative and financial burden of publishing it online is likely to be minimal.

23. See Kate Berry, *Building a Diverse Bench: A Guide for Judicial Nominating Commissioners*, available at <https://www.brennancenter.org/publication/building-diverse-bench-guide-judicial-nominating-commissioners>.



STUDY

HOW 12 STATES DEAL WITH JUDICIAL DIVERSITY DATA

This report releases a new study that examined whether and how 12 states collect and disclose judicial diversity data about the demographic and professional backgrounds of state judges and judicial candidates. Lambda Legal commissioned Liz Seaton, Esq., as the primary researcher of the study.

The 12 states in this study were selected in part for their geographic diversity and variations in judicial selection methods for high court judges. With guidance from *The Gavel Gap* report, the primary researcher prioritized identifying states with useful practices in collecting and releasing judicial diversity data, so that other states do not have to start from scratch when considering such a project themselves. Instead, they can look to sister states that already follow useful practices on this issue.

The research team compiled information on state practices through email and telephone interviews with state court officials. The interviews took place between May and September 2016. Additional information was gathered from published sources, including laws, state court and professional association websites, academic journals, fair courts publications and newspapers.

The study found a range of approaches to collecting and disclosing judicial diversity data. To make sense of these findings, the report adopts a three-tier analytic framework:

- **Tier One** includes states that systematically collect and publicly disclose judicial diversity data: California, Georgia, New Jersey and Texas.
- **Tier Two** includes states that systematically collect judicial diversity data and disclose it upon request: Arizona, Maryland, New York, Oregon and Wisconsin.
- **Tier Three** includes states that either do not systematically collect judicial diversity data or do not disclose it: Kansas, Ohio and Tennessee.

For best practices, guidance and recommendations about how states should collect and release judicial diversity data, please turn to:

- **Part III:** Best Practices: Collecting and Releasing Judicial Diversity Data
- **Part IV:** Guidance: Collecting Gender Identity and Sexual Orientation Data
- **Part V:** Recommendations: Next Steps for Key Actors

The following pages present a detailed analysis of how the 12 states deal with judicial diversity.

OVERVIEW OF FINDINGS

	STATE	COLLECTED?	DISCLOSED?
TIER 1	California	Yes. Required by law. Collected by three separate actors. Includes data on gender identity and sexual orientation.	Yes. Published. Published annually by three separate actors. Includes data on gender identity and sexual orientation.
	Georgia	Yes. Required by law. Collected by the Judicial Council.	Yes. Published. Published annually by the Judicial Council.
	New Jersey	Yes. Collected by the Equal Employment Opportunity/Affirmative Action Unit.	Yes. Published. Published biennially by the Supreme Court Committee on Minority Concerns.
	Texas	Yes. Collected by the Office of Court Administration.	Yes. Published. Published annually by the Office of Court Administration and the Judicial Branch.
TIER 2	Arizona	Yes. Collected for merit selected judicial vacancies.	Yes. Disclosed Upon Request.
	Maryland	Yes. Collected by the Administrative Office of the Courts.	Yes. Disclosed Upon Request.
	New York	Yes. Collected by the Office of Court Administration.	Yes. Disclosed Upon Request.
	Oregon	Yes. Collected by the Human Resource Services Division.	Yes. Disclosed Upon Request.
	Wisconsin	Yes. Collected by the State Courts Office.	Yes. Disclosed Upon Request.
TIER 3	Kansas	Yes. Collected by the Office of Judicial Administration.	No. Data is not published, and request for collected data was denied by the Office of Judicial Administration.
	Ohio	No. Data is not collected.	No. No collected data to be disclosed.
	Tennessee	No. Data is collected in an ad hoc, unsystematic manner.	No. Data was disclosed upon request, with an explanation that there is no systematic collection or disclosure of data.

A. TIER ONE: STATES THAT SYSTEMATICALLY COLLECT AND PUBLICLY DISCLOSE DATA



CALIFORNIA

REGION: WEST

HIGH COURT JUDICIAL SELECTION METHOD: GUBERNATORIAL APPOINTMENT WITH JUDICIAL COMMISSION CONFIRMATION

California has the distinction of being the only state in this study to collect and release demographic data about its LGBT judges and judicial candidates, although how this data is presented raises concerns. In 2016, four appointees (8.9%) and 14 applicants (6.4%) self-identified as LGBT.²⁴

California law mandates the collection and release of state judicial demographic data. The relevant law—California Government Code section 12011.5(n)—requires annual collection and release of judicial demographic data with respect to ethnicity, race, disability, veteran status, gender, gender identity and sexual orientation.²⁵ The requirement concerning gender identity and sexual orientation was added in 2011 with Senate Bill 182, which Lambda Legal supported.

Responsibility for collection and release of data lies with three separate state actors: (1) the Governor, (2) the Commission on Judicial Nominees Evaluations of the State Bar, and (3) the Judicial Council of California. All three publish judicial diversity data, albeit in slightly differently ways.

24. Office of Governor Edmund G. Brown, Jr., “Governor Brown Releases 2016 Judicial Appointment Data” (Feb. 28, 2017), available at <https://www.gov.ca.gov/news.php?id=19698>.

25. See California Government Code Section 12011.5(n) states:

- (A) The Governor shall collect and release, on an aggregate statewide basis, all of the following:
 - (i) Demographic data provided by all judicial applicants relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation.
 - (ii) Demographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation as provided by all judicial applicants, both as to those judicial applicants who have been and those who have not been submitted to the State Bar for evaluation.
 - (iii) Demographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all judicial appointments or nominations as provided by the judicial appointee or nominee.
- (B) The designated agency of the State Bar responsible for evaluation of judicial candidates shall collect and release both of the following on an aggregate statewide basis:
 - (i) Statewide demographic data provided by all judicial applicants reviewed relative to ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation, and areas of legal practice and employment.
 - (ii) The statewide summary of the recommendations of the designated agency of the State Bar by ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation, and areas of legal practice and employment.
- (C) The Administrative Office of the Courts shall collect and release the demographic data provided by justices and judges described in Article VI of the California Constitution relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation by specific jurisdiction.

Section 12011.5(n)(C)(4) states: “The State Bar and the Administrative Office of the Courts shall use the following ethnic and racial categories: American Indian or Alaska Native, Asian, Black or African-American, Hispanic or Latino, Native Hawaiian or other Pacific Islander, White, some other race, and more than one race, as those categories are defined by the United State Census Bureau for the 2010 Census for reporting purposes.”

(California continued)

- *The Governor* releases aggregate statewide demographic data provided by all judicial applicants, appointees and sitting judges and justices. The 2017 release includes applicant and appointee data for 2016 as well as cumulative data from 2011 through 2016.

The Governor's data tallies the number of LGBT judges under the heading of Sexual Orientation, without indicating the numbers of heterosexual and cisgender respondents or even mentioning gender identity. This appears to conflate sexual orientation and gender identity and leaves unclear whether any of the judges are transgender. The release notes that data concerning sexual orientation is incomplete "[b]ecause a response to this question is voluntary and because all applications received prior to January 1, 2012 did not include this question..."²⁶

- *The Commission on Judicial Nominees Evaluation* releases a "Statewide Demographics Report" covering demographic and professional background information provided by judicial applicants and, in most cases, aggregate ratings according to demographic groups.²⁷

In the 2016 report, the section on sexual orientation and gender identity notes that 11% of the 63 female candidates and 20% of the 82 male candidates declined to

reveal sexual orientation. The data appears to conflate sexual orientation and gender identity: Both are included in the same table, and the only categories included are Heterosexual, Gay, Bisexual, Transgender and Decline to Respond, with no cisgender option. Furthermore, no aggregate ratings for sexual orientation and gender identity are provided.

- *The Judicial Council of California* publicly releases the most detailed data of the three, including the overall gender, race, ethnicity, sexual orientation and gender identity of responding justices and judges in the Supreme Court, Courts of Appeal and trial courts and the sexual orientation and gender identity of responding justices and judges by jurisdiction. Here again, sexual orientation and gender identity are grouped together and without a cisgender option. The 2017 report includes data current as of December 31, 2016.²⁸



GEORGIA

REGION: SOUTHEAST

HIGH COURT JUDICIAL SELECTION METHOD:
NONPARTISAN ELECTIONS OR MERIT
SELECTION, DEPENDING ON TIMING OF
VACANCY

Georgia law mandates collection of
judicial statistics.²⁹ Accordingly, the Judicial

26. Office of Governor Edmund G. Brown, Jr., *Governor Brown Releases 2016 Judicial Appointment Data* (Feb. 28, 2017), available at <https://www.gov.ca.gov/news.php?id=19698>.

27. State Bar of California, *Commission on Judicial Nominees Evaluation 2015 Statewide Demographic Report*, available at <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=k-hgLYZdb9Y%3d&tabid=224&mid=1534>.

28. Judicial Council of California, *Demographic Data Provided by Justices and Judges Relative to Gender, Race/ Ethnicity, and Gender Identity/Sexual Orientation* (Gov. Code, § 12011.5(n)) As of December 31, 2016, available at <http://www.courts.ca.gov/documents/2017-Demographic-Report.pdf>.

(Georgia continued)

Council of Georgia publishes “Judicial Demographics” data in its annual report. The data addresses gender and race, including multiracial, other and unknown options. The findings presented are intersectional (e.g., Black Male, Asian Female, etc.). Data collection includes self-reporting by judges at the year’s close, referenced on the final page of the Annual Report, FY2015.³⁰



NEW JERSEY

REGION: NORTHEAST

HIGH COURT JUDICIAL SELECTION METHOD: GUBERNATORIAL APPOINTMENT WITH SENATE CONFIRMATION

New Jersey Courts’ Equal Employment Opportunity/Affirmative Action Unit collects and compiles judicial demographic data. The “Equal Employment Opportunity/Affirmative Action Master Plan” describes the data collection process:

“The Judiciary will provide the Applicant Disposition Data form by email to be completed on a voluntary basis by all applicants for a particular job vacancy. Data collected on the form includes

information on the position applied for; the race/ethnicity, gender, and age of the applicant; veteran’s status; disability status; the educational attainment level of the applicant; and the recruitment source used in attracting the candidate. The completed forms and related reports are to be handled only by the local EEO/AA staff and kept separate from Human Resources or anyone else involved in the recruitment/hiring process.”³¹

The Supreme Court Committee on Minority Concerns—an advisory committee tasked with implementing recommendations designed to “rid the court of all vestiges of bias and discrimination”—publishes the data biennially, specifically every odd year. The data appears in the form of a chart revealing statistics on the ethnicity, gender and race of judges on the Supreme Court, Superior Court (Appellate and Trial levels) and Tax Court.

In addition to disclosing demographic data, the report analyzes trends. For instance, the 2017 report observes that “representation of females has steadily increased from 16.4 % (65) in 1995 to 35.0% (153) in 2017;

29. The Georgia State Code requires the Administrative Office of the Courts, under the supervision and direction of the Judicial Council, to “compile statistical and financial data and other information on the judicial work of the courts” and to “prepare and publish in print or electronically an annual report on the work of the courts and on the activities of the Administrative Office of the Courts.” See GA Code § 15-5-24 (2015), available at <http://law.justia.com/codes/georgia/2015/title-15/chapter-5/article-2/section-15-5-24/>.

30. Judicial Council of Georgia Administrative Office of the Courts, Annual Report, FY2015, available at http://georgiacourts.gov/sites/default/files/FY15AR_wdemo.pdf. Reports from previous years are available at <http://www.georgiacourts.org/content/annual-reports>.

31. Judiciary of the State of New Jersey, “Equal Employment Opportunity/Affirmative Action and Anti-Discrimination Master Plan,” (June 30, 2014), available at <https://www.judiciary.state.nj.us/policies/eeomastr.pdf>.

(New Jersey continued)

a similar positive increase is also noted for the representation of jurists of color from 7.1% (28) in 1995 to 17.8% (78) as of January 3, 2017.”³²

The report also observes that “knowledge and information about sexual orientation and gender identity (SOGI) generally and LGBTQI issues is not sufficiently provided across stakeholder groups within the Judiciary and yet, given the significant LGBTQI population in New Jersey, it is necessary.”³³ Collecting and releasing data about the gender identity and sexual orientation of judges and judicial candidates is an important step toward having broader conversations about these diverse identities and experiences.



TEXAS

REGION: SOUTH CENTRAL

**HIGH COURT JUDICIAL SELECTION METHOD:
PARTISAN ELECTIONS**

The Texas Office of Court Administration collects and releases judicial demographic data. It publishes an “Annual Statistical Report” that includes a section on demographics called “Profile of Appellate and Trial Court Judges.”³⁴

The section comprises two parts:

- Part One includes eight categories of court-level aggregate information about Texas judges, from the state Supreme Court to Municipal Courts: number of judges; age of judges (mean, oldest, youngest and range); gender; ethnicity; length of service (average and longest); range of service on the particular court (in years); when judges first assumed office; and method of selection (appointment or election).
- Part Two includes four categories, again of aggregate data by court level: education (how many completed high school, college and law school); bar licensure (how many were licensed to practice and for how long); path to the court (attorney private practice, judge of lower court, legislative service, or other governmental service); and previous experience (prosecutor, attorney private practice, judge of lower court or county commissioner).

The Texas Judicial Branch publishes the same data as a single page called “Profile of Appellate and Trial Court Judges.”³⁵

32. New Jersey Supreme Court Committee on Minority Concerns, 2015-2017 Report (January 2017), available at <https://www.judiciary.state.nj.us/reports2017/minority.pdf>.

33. *Id.*

34. Texas Office of Court Administration, “Annual Statistical Report for the Texas Judiciary: Fiscal Year 2015,” available at <http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf>.

35. Texas Judicial Branch, “Profile of Appellate and Trial Court Judges As of September 1, 2015,” available at <http://www.txcourts.gov/media/1332556/Judge-Profile-Sept-15.pdf>.

B. TIER TWO: STATES THAT SYSTEMATICALLY COLLECT DATA AND DISCLOSE IT UPON REQUEST



ARIZONA

REGION: SOUTHWEST

HIGH COURT JUDICIAL SELECTION METHOD: MERIT SELECTION

Arizona collects judicial diversity data related to race, ethnicity, gender and professional background as part of the application process for all merit-selected judicial vacancies, a staff member of the Arizona Judicial Council reported.³⁶ Merit selection judicial offices include the Supreme Court, the Court of Appeal and the Superior Court in the three largest counties, Maricopa, Pima and Pinal. This data is not published, but it is made available upon written request.

Attorneys applying for a merit selection judicial position answer a question on the judicial application about gender (which an applicant writes in) and race/ethnicity (which an applicant selects from given options), a staff member of the Arizona Supreme Court reported.³⁷ The question comes with a note about the role of diversity in merit selection:

“The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state’s or county’s population in making its nominations. However, the primary consideration shall be merit.”

In addition to short sections requesting “Personal Information” and “Educational Background,” the application contains a more detailed section on “Professional Background and Experience.” This latter section covers a wide array of information, including present and past areas of law practiced, typical clients and “any additional professional experience [an applicant] would like to bring to the Commission’s attention.”

Arizona does not routinely collect judicial diversity data for judicial officers who are selected by popular election or appointed by city councils. However, the Commission on Minorities in the Judiciary—a standing committee of the Arizona Judicial Council responsible in part for “enrich[ing] the diversity of the judiciary to reflect the communities it serves”—conducted a diversity survey of all judicial officers in 2015. The resulting judicial diversity data is also provided upon written request.

36. Lambda Legal email correspondence with the Arizona Judicial Council, November 28, 2016.

37. Lambda Legal email correspondence with the Arizona Supreme Court, November 29, 2016.



MARYLAND

REGION: MID-ATLANTIC

HIGH COURT JUDICIAL SELECTION METHOD: MERIT SELECTION

Maryland's Administrative Office of the Courts collects judicial demographic data for all court levels and releases it upon request. The report is organized by race/ethnicity, with gender (male or female) breakdowns for each of the following categories: African-American, American-Indian/Alaska Native, Asian/Pacific Islander, Hispanic, White and Multi-Racial.

An appellate court judicial application on the Maryland courts website sets out two categories of qualifications of a Maryland judge: (1) legal and (2) professional and personal. It states that the Maryland Constitution “speaks generally of the second category of qualifications, by providing that those selected for judgeships shall be lawyers ‘most distinguished for integrity, wisdom and sound legal knowledge.’”³⁸

The application solicits demographic information from judicial candidates concerning race and sex. It further notes

that “[t]he submission of this information is voluntary and will be kept confidential and used only for statistical reports.”³⁹

Applicants may choose to share a copy of the questionnaire with professional associations, including the Lesbian, Gay, Bisexual, and Transgender Bar Association of Maryland.



NEW YORK

REGION: NORTHEAST

HIGH COURT JUDICIAL SELECTION METHOD: GUBERNATORIAL APPOINTMENT WITH SENATE CONFIRMATION

New York's Office of Court Administration (OCA) collects judicial demographic data through payroll processes but does not publish it. However, the OCA releases this data upon request, including to the New York State Bar Association (NYSBA).

In 2014, the NYSBA requested and published this data in a report entitled *Judicial Diversity: A Work in Progress*. The report is an extensive treatment of judicial diversity in New York. It explains the importance of judicial diversity, explores diversity across multiple categories, breaks the data down by judicial district and compares it to the diversity of the population served.

38. Maryland Judicial Center, “Qualifications of a Maryland Judge” (Aug. 24, 2016), available at <http://www.courts.state.md.us/judgeselect/pdfs/judapplication.pdf>.

39. *Id.*

(New York continued)

The NYSBA report includes an article called “Lesbians, Gay Men, Bisexuals and Transgender People” on pages 35-37 written by the Honorable Michael Sonberg, an acting justice for the New York County Supreme Court, in which he “encourage[s] OCA to include an optional question regarding sexual orientation on attorney registration forms, as the New York State Bar Association and other bar associations do on their membership forms.”⁴⁰



OREGON

REGION: PACIFIC NORTHWEST

HIGH COURT JUDICIAL SELECTION METHOD: NONPARTISAN ELECTIONS

The Oregon Judicial Department’s Human Resource Services Division collects judicial demographic data with respect to race, ethnicity and gender and discloses it upon request. The data sheet provided to us describes the data collection process:

“Judges upon election or appointment are provided a Judge Data Sheet - EEO Census Form as a part of the New Judge Packet. The initial paragraph on the form notes participation is voluntary, ‘very much encouraged and appreciated’ and includes the Chief Justice’s request that each member of the judiciary complete the survey and return it to HRSD.”

The data is organized by race/ethnicity, with gender breakdowns for each of the following categories: Asian, American Indian or Alaskan Native, Black/African-American, Hispanic, Native Hawaiian or Other Pacific Islander, Two or More Races, White and Declined to Answer.



WISCONSIN

REGION: NORTH CENTRAL

HIGH COURT JUDICIAL SELECTION METHOD: NONPARTISAN ELECTIONS

Wisconsin collects judicial demographic data and releases it upon request, its State Courts Office confirmed. New judges are asked for the information at the time they are added to payroll, and the Director of the State Courts Office compiles the information voluntarily provided by the judges.

Reports received show that the categories tallied for their three court levels (Supreme Court, Court of Appeals, Circuit Court) are gender and race/ethnicity (American Indian/Alaskan Native, Asian or Pacific Islander, Black, Hispanic or White).

40. Hon. Michael R. Sonberg, “Lesbians, Gay Men, Bisexuals and Transgender People,” in *Judicial Diversity: A Work in Progress* (Sept. 17, 2014), available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html.

C. TIER THREE: STATES THAT EITHER DO NOT SYSTEMATICALLY COLLECT DATA OR DO NOT DISCLOSE IT



KANSAS

REGION: MIDWEST

HIGH COURT JUDICIAL SELECTION METHOD:
MERIT SELECTION

Kansas collects judicial demographic data but does not publish it, its Office of Judicial Administration confirmed.⁴¹ In response to our request for judicial diversity data, a public information director stated:

“Our personnel office collects data, some of which is provided voluntarily, but we do not compile and publish it. Under the Kansas Open Records Act (K.S.A. 45-215, et seq.) and Kansas Supreme Court rule, we are not required to produce a record that doesn’t already exist in order to answer your question.”⁴²



OHIO

REGION: MIDWEST

HIGH COURT JUDICIAL SELECTION METHOD:
NONPARTISAN ELECTIONS

Ohio does not collect or disclose judicial diversity data, according to a staff member at the Supreme Court of Ohio.⁴³



TENNESSEE

REGION: SOUTHEAST

HIGH COURT JUDICIAL SELECTION METHOD:
MERIT SELECTION

Tennessee does not collect judicial diversity data, according to a staff member of its Courts Public Information Office. In response to our request for such data, the staff member supplied a tally of the numbers of judges in three categories (Male, Female and Minority) and explained:

“This is not an official data collection in any way. A staff member is making [a] judgment call as to the various data we collect. The applicants may not even be aware that we are collecting the data—she is doing it based on her observations.”⁴⁴

41. Lambda Legal email correspondence with the Kansas Supreme Court Official of Judicial Administration, September 1, 2016.

42. Lambda Legal email correspondence with the Kansas Supreme Court, September 1, 2016.

43. Lambda Legal email correspondence with the Supreme Court of Ohio, August 19, 2016.

44. Lambda Legal email correspondence with the Tennessee Administrative Office of the Courts, September 9, 2016.

(Tennessee continued)

This suggests that although demographic data is compiled in the course of the nomination and appointments process for Tennessee judges, the data is not based on a systematic survey of judicial candidates. Instead, the data provided reflects an individual's impressions of candidates' gender, racial and ethnic identities.

Overall, reliable judicial diversity data is lacking. A number of states do not collect basic demographic information about their judiciary. No state collects and reports information across all basic diversity categories, including race, ethnicity, gender, gender identity, sexual orientation and disability status, as well as professional background.





BEST PRACTICES

COLLECTING AND RELEASING JUDICIAL DIVERSITY DATA

This report has found an overall lack of judicial diversity data. However, it has also found that data collection and sharing can be improved. By taking simple steps, states can begin to overcome the problem. To find best practices, we look to the experiences of nine states featured in this report that do collect such data.

We propose that judicial diversity data should be:

- **Collected:** States should systematically collect judicial diversity data.
- **Communicated:** States should voluntarily publish data.
- **Comprehensive:** Data should cover a range of diversity categories, including gender identity and sexual orientation.
- **Clear:** Data should be easy to find and use and presented in a manner easily accessible to the public, policymakers and journalists.

A. COLLECTED

States should collect judicial diversity data in a systematic way—meaning through a formal step-by-step process that solicits demographic and professional information from all judges and judicial candidates in the state.

States may choose among a range of approaches to data collection, depending on practical and political concerns. Some may introduce a law requiring judicial diversity data collection (e.g., California). Others

may invoke an existing law authorizing collection of judicial statistics (e.g., Georgia) or even the state constitution (e.g., Maryland). Others still may compile judicial diversity data as a routine aspect of judicial administration.

Whatever approach is adopted, data collection should be:

- **Voluntary.** Participation by judges and judicial candidates should be voluntary. They should be informed of the ways in which their demographic information will be used, and they should make their own decision about whether they want to disclose their information. Of course, since completeness of data is an obvious goal of data collection, respondents may be encouraged to voluntarily disclose their demographic information.

For instance:

Oregon's judge data sheet reportedly states that participation is voluntary and "very much encouraged and appreciated."

- **Confidential.** Data should be collected and stored in such a way that protects confidentiality—meaning individual data should be kept confidential and only released in the statistical aggregate. Judges and judicial candidates should be assured that disclosed information will remain confidential and that disclosure will not prejudice their tenure or candidacy.

For instance:

Maryland's judicial application form states: "The submission of this information is voluntary and will be kept confidential and used only for statistical reports."

- **Reliable.** Data should be collected using clear and accepted methods and reliable practices. The data and methods should be sufficiently detailed so that other researchers are able to replicate the findings.

For instance:

New Jersey's "Equal Employment Opportunity/Affirmative Action Master Plan" describes the data collection process, and the Supreme Court Committee on Minority Concerns publishes the data and trends in considerable detail.

- **Ethical.** Ethical data collection requires treating judges and judicial candidates with respect from the time they are approached for participation, even if they decline to participate, through to when their participation ends. This includes respecting their right to decide that the research does not match their interests and to decline or withdraw participation, respecting their privacy and keeping their private information confidential.

In particular, compiling judicial diversity data based on people's impressions of judges and judicial

candidates' identities may be unreliable and unethical:

Unreliable because:

- it lacks clear and accepted research methods;
- judges and judicial candidates may not identify with the perceived racial, ethnic, gender or other identities ascribed to them; and
- the categories used to describe them may be reductive and yield unhelpful data; and

Unethical because:

- judges and judicial candidates may not be aware of or may not have consented to the use of their demographic and professional information in particular ways;
- they may be denied the opportunity to self-identify; and
- the assignment of identity by others may be based on stereotypes (for instance, about how men and women are supposed to look and act) that are themselves problematic.

For instance:

Tennessee's classification of judges as Male, Female and Minority based on their appearance is not only unreliable; it also offers less nuanced findings than states with systematic collection of judicial diversity data (such as Georgia's data on judges who are Black Male, Asian Female, etc.).

B. COMMUNICATED

States should voluntarily publish the judicial diversity data they collect. The data released should be aggregated on a statewide and court-level basis, subject to ensuring that there is not an unwanted and unexpected disclosure about any individual judge or judicial candidate.

Publication may take a number of different forms (both print and online), ranging from a full report on diversity on the bench (e.g., California, New Jersey) to a section on judicial demographics within another publication, such as an annual report (e.g., Georgia, Texas).

Releasing data on judicial diversity serves an important public interest. And where the data has already been collected, the administrative and financial burden of publishing it online is likely to be minimal.

Where states have not yet published the judicial diversity data they gathered in the past, they should, at a minimum, disclose the historic data upon request. Furthermore, they should do so for each request and not selectively at their discretion. It would indeed be troubling if state court officials could decide what data to disclose and to whom without any principled justification for withholding data, as appears to be the case in Kansas.

C. COMPREHENSIVE

Data collected should cover a range of diversity categories, including gender identity and sexual orientation. Among the nine states surveyed that collect judicial diversity data:

- Each collects and releases data in different ways.
- All collect data on gender and race and/or ethnicity.
- One (California) requires data on gender identity and sexual orientation.
- Some collect other valuable data, such as data on professional background.
- No state collects and reports information across all these various categories.

A best practice methodology would, at a minimum, ask judges and judicial candidates to provide basic information about their demographic backgrounds, including race, ethnicity, gender, gender identity, sexual orientation and disability status, as well as their professional backgrounds. We offer additional guidance on collecting data on gender identity and sexual orientation in the next section.

For those states that already collect data, making their surveys more comprehensive should be straight-forward. In most cases, it simply involves adding additional categories (such as gender identity and sexual orientation) to existing judicial data or application forms, and aggregating the information received.



D. CLEAR

Where judicial diversity data is released, and how, is important. Data should be easy to find and use and presented in a manner easily accessible to the public, policymakers and journalists. It should be published within a reasonable time in an electronically accessible form.

For those states that publicly release data—California, Georgia, New Jersey and Texas—we located the information on websites open to the public. California’s data is released by three separate state actors, and Texas makes its data available in two locations. Multiple locations make data easier to find.

The demographic data on New Jersey judges appears on page 151 of a 212-page annual report. Similarly, the data on Georgia judges appears on the final page of an annual report. The data would be easier to find if these states also supplied it as a stand-alone webpage.

New York’s data was published by the NYSBA, an independent professional association, and so a state court website search did not reveal it. It is, however, findable through a broader internet search. The NYSBA provides population demographic data alongside judge demographic data, which is helpful for drawing comparisons.





GUIDANCE

COLLECTING GENDER IDENTITY AND SEXUAL ORIENTATION DATA

State courts have broad authority to uphold or restrict the rights of LGBT people. As lawyers, litigants, defendants and jurors, LGBT individuals can face overt discrimination from state judges as well as more subtle discriminatory practices that have become prevalent in the judicial system. All the more reason for states to introduce cultural competency and anti-bias education for all judges—and to find out whether any LGBT judges serve on the bench.

While this report has found an overall lack of judicial diversity data, data on the gender identity and sexual orientation of judges and judicial candidates is nearly non-existent. Indeed, even states that gather judicial diversity data tend not to collect data on these two categories—California being a recent and notable exception.

In some states, discrete pieces of information are available through media stories about LGBT judges who have been appointed or elected. Yet in the absence in state-issued data, even Lambda Legal—the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV—cannot say with confidence how many LGBT judges serve on state court benches.

There is a path forward. This section takes a closer look at the experience of two states where judicial diversity data including gender identity and sexual orientation is available, and offers guidance on how states can gather and disseminate data on these overlooked categories.

A. TALE OF TWO STATES

This report has identified two states where information about the gender identity and sexual orientation of judges is readily available: California and New York.

- Since 2012, the State of California has released data on how many LGBT judges serve on its state court benches.
- In 2014, the New York State Bar Association, a voluntary membership group rather than a state entity, published biographical information about the state’s openly LGBT judges.

California and New York are an encouraging start. They demonstrate how state and non-state actors can gather and disseminate judicial diversity data including gender identity and sexual orientation.

As importantly, these two states illustrate the benefits of more comprehensive judicial diversity data. In particular, California’s data on the gender identity and sexual orientation of judges has fostered a deeper understanding of diversity on the bench. It has enabled further analysis about the status of LGBT presence in the California judiciary, causes for the lack of LGBT diversity and remedies to improve diversity.⁴⁵

45. California LGBT Judicial Coalition, “The New Frontier of LGBT Equality: The California State and Federal Judiciary” (July 14, 2015), available at <http://voiceofoc.org/files/2015/07/CA-LGBTs-in-the-Court-Article.pdf>.

In the absence of state-issued data, even Lambda Legal—the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV—cannot say with confidence how many LGBT judges serve on state court benches.

More than simply offering data, these two states offer lessons in data collection. Along with best practices outlined earlier,⁴⁶ they shed light on some of the pitfalls that emerge when collecting data on gender identity and sexual orientation, as well as some of the ways that data collection can be improved. Recall that:

■ **In California:**

- Data released by three separate state actors appears to conflate gender identity and sexual orientation.
- The Governor's data tallies the number of LGBT judges under the heading of Sexual Orientation, without indicating the numbers of heterosexual and cisgender respondents or even mentioning gender identity.
- The Commission on Judicial Nominees Evaluation and the Judicial Council's data includes only Heterosexual, Gay, Bisexual, Transgender and Decline to Respond, with no cisgender option.

■ **In New York:**

- Although the New York Office of Court Administration collects judicial demographic data, that data does not include gender identity and sexual orientation.
- The information on LGBT judges published by the New York State Bar Association is not systematically collected by the state. Rather, it was made available for the NYSBA report by the Honorable

Michael R. Sonberg of the New York County Supreme Court.

- While a helpful start, this method may not yield comprehensive data about the gender identity and sexual orientation of New York judges. The knowledge of a single judge cannot be a substitute for systematically collected, state-issued data.

B. GUIDANCE ON GENDER IDENTITY AND SEXUAL ORIENTATION

It is critical that states gather and disseminate judicial diversity data *that includes* gender identity and sexual orientation. In order to introduce and improve such data collection, Lambda Legal offers the following guidance based on its experience working with LGBT people and everyone living with HIV.

1. Dealing with gender identity and sexual orientation

Survey design. Gender identity and sexual orientation are distinct categories with separate meanings and should be treated as such. The Glossary to this report defines these terms as follows:

- ***Gender identity*** refers to an individual's inner sense of being male, female or another gender.
- ***Cisgender*** refers to people whose gender identity is the same as their assigned or presumed sex at birth.
- ***Transgender*** refers to people whose gender identity differs from their assigned or presumed sex at birth.

California and New York demonstrate how state and non-state actors can gather and disseminate judicial diversity data including gender identity and sexual orientation.

46. See Part III (Best Practices: Collecting and Releasing Judicial Diversity Data).

States should collect and release data on both gender identity and sexual orientation and should treat them as distinct demographic categories instead of lumping them together.

- **Sexual orientation** refers to one's sense of attraction to, or sexual desire for, individuals of the same sex, another sex, both or neither.

As these definitions make clear, a judge has both a gender identity and a sexual orientation: a transgender man may be heterosexual, a cisgender woman may be a lesbian and so on. Accordingly, states should collect and release data on both gender identity and sexual orientation and should treat them as distinct demographic categories instead of lumping them together. Failing to inquire about both categories may overlook salient aspects of people's identities and yield imprecise or inaccurate data.

In collecting data on gender identity and sexual orientation, it is important not just to count those who are lesbian, gay, bisexual or transgender, but also to include categories for heterosexual and cisgender—so as to move away from the presumption that a person is both heterosexual and cisgender unless they disclose otherwise and a world view that promotes being heterosexual or cisgender as normal or preferred.

Model Questions. In order to gather complete and accurate data on gender identity and sexual orientation, we recommend including the following questions in surveys given to judges and judicial candidates:

GENDER

Gender identity refers to an individual's inner sense of being male, female or another gender. Gender identity is not necessarily the same as sex assigned or presumed at birth.

What is your gender identity?

- a. ☐ Female
- b. ☐ Male
- c. ☐ Non-binary/another gender
- d. ☐ Prefer to self-describe _____
- e. ☐ Decline to answer. Please explain your reason _____

Transgender is an umbrella term that refers to people whose gender identity is different from their sex assigned at birth. Cisgender refers to people whose gender identity is the same as their assigned or presumed sex at birth.

Do you identify as transgender or cisgender?

- a. ☐ Transgender
- b. ☐ Cisgender
- c. ☐ Prefer to self-describe _____
- d. ☐ Decline to answer. Please explain your reason _____

SEXUAL ORIENTATION

Sexual orientation refers to one's sense of attraction to individuals of the same sex, another sex, both or neither.

What is your sexual orientation?

- a. ☐ Lesbian
- b. ☐ Gay
- c. ☐ Bisexual
- d. ☐ Straight
- e. ☐ Prefer to self-describe _____
- f. ☐ Decline to answer. Please explain your reason _____

2. Understanding and addressing non-disclosure

Problem of non-disclosure. Some judges and judicial candidates may be unwilling to disclose information about their gender identity or sexual orientation, sometimes out of concern that self-identifying as LGBT could prejudice their tenure or candidacy.

Statistics bear out this concern. According to one analysis of California's judicial diversity data, "In 2014, over 35% of the judges chose not to respond to the question regarding LGBT status whereas only 2.8% of the judges chose not to respond to the race/nationality questions."⁴⁷

The more non-disclosure there is, the less we know about diversity on the bench. Thus, states collecting judicial diversity data should not bypass the issue of non-disclosure but rather seek to understand and address it directly.

Reasons for non-disclosure. There may be various reasons underlying judges' and judicial candidates' decision not to disclose their gender identity or sexual orientation.

■ **"This doesn't apply to me."** Gender identity and sexual orientation are terms frequently invoked in relation to LGBT


people, including in surveys on judicial diversity. As a result, some cisgender and heterosexual respondents may treat those terms as markers of *difference* rather than categories that may apply to everyone, including them. This may be particularly true when surveys solicit disclosure of LGBT status instead of offering a full range of options under gender identity and sexual orientation, including cisgender and heterosexual options.

■ **"This doesn't matter"/"This is a personal matter."** Other respondents may regard their gender identity or sexual orientation as a less salient or more personal aspect of their identity. As the Honorable Michael Sonberg observes in the New York context: "The 'openness' of lesbian and gay judges, both in New York City and in the rest of New York State, varies widely; while most LGBT members of the judiciary in New York City are indisputably open regarding their sexual orientation, a few are not, regarding it as a purely personal matter."⁴⁸

■ **"This makes me vulnerable."** Given the long history of political attacks against individual judges and courts that have ruled in favor of LGBT equality, some LGBT judges may worry that disclosing their identity could make them political targets for those who oppose LGBT people and equality. Also,

47. California LGBT Judicial Coalition, "The New Frontier of LGBT Equality: The California State and Federal Judiciary" (July 14, 2015), available at <http://voiceofoc.org/files/2015/07/CA-LGBTs-in-the-Court-Article.pdf>.

48. Hon. Michael R. Sonberg, "Lesbians, Gay Men, Bisexuals and Transgender People," in *Judicial Diversity: A Work in Progress* (Sept. 17, 2014), available at http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html.



Reasons for non-disclosure are likely to vary from person to person, depending on factors such as how they identify, the perceived likelihood of LGBT bias and what is at stake in disclosing their demographic information.

some LGBT judicial candidates may fear that disclosing their LGBT status in an application form could prejudice their candidacy. Political targeting of judges is not new, and the country has seen the political targeting of cisgender women judges and judges of color, too.

■ **“I am already vulnerable.”** Multiple intersecting factors—including race, ethnicity, class, gender, gender identity, sexual orientation, physical ability, HIV status, immigration status and age—subject many LGBT people and those living with HIV to even higher rates of discrimination. A judge’s compounding identities, especially identities marked for discrimination, can operate to create reasons for non-disclosure of LGBT status.

■ **LGBT stigma, discrimination and violence.** An overarching reason behind the reluctance to disclose may stem from the social stigma of LGBT status that continues to exist. Two demographers who collect data on LGBT populations have observed: “As a group still subject to social stigma, many of those who identify as lesbian, gay, bisexual or transgender may not be forthcoming about this identity when asked about it in a survey.”⁴⁹ Concerns may go beyond stigma for members of the LGBT community who face significant risk of targeted violence and discrimination in their daily lives.

This list is far from exhaustive. Some combination of these and other concerns may motivate judges and judicial candidates not to disclose their gender identity or sexual orientation. And the underlying reasons for non-disclosure are likely to vary from person to person, depending on factors such as how they identify, the perceived likelihood of LGBT bias and what is at stake in disclosing their demographic information.

Solutions to non-disclosure. Given these concerns, *anonymous* surveys may be employed as a means to supplement data collected through routine application and human resources processes.

In order to better understand the reasons for non-disclosure on various categories, surveys should allow space for respondents to indicate their reasons for declining to respond to specific questions.

Several best practices already identified in this report may also contribute to addressing non-disclosure. This includes collection and release of judicial diversity data that is:

■ **Comprehensive.** Soliciting data not only from those who are lesbian, gay, bisexual and transgender but also including categories for heterosexual or cisgender.

49. Gary J. Gates and Frank Newport, “Special Report: 3.4% of U.S. Adults Identify as LGBT,” Gallup (Oct. 18, 2012), available at <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>.

- **Consensual.** Seeking informed consent from judges and judicial candidates after explaining why judicial diversity data is important and how demographic data will be used for statistical purposes.
- **Confidential.** Collecting and storing data in such a way that protects confidentiality—meaning individual data is kept confidential and only released in the statistical aggregate.
- **Assuring.** Assuring judges and judicial candidates that disclosed information will remain confidential and that disclosure will not prejudice their tenure or candidacy.
- **Aggregated.** Releasing data on an aggregated statewide and court-level basis, subject to ensuring there is not an unwanted and unexpected disclosure about any individual judge or judicial candidate.



RECOMMENDATIONS

NEXT STEPS FOR KEY ACTORS

1. To governors:

Collect and release, on an aggregate statewide and court-level basis, the demographic data provided by:

- (a) all judicial appointees or nominees; and
- (b) all judicial applicants, both those judicial applicants who have been submitted to the state bar for evaluation and those who have not been submitted,

relative to ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation and areas of legal practice and employment.

2. To the designated agencies responsible for evaluation of judicial candidates:

Collect and release, on an aggregate statewide and court-level basis:

- (a) demographic data provided by all judicial applicants reviewed; and
- (b) the summary of the recommendations of the designated agency of the state bar,

relative to ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation and areas of legal practice and employment.

3. To the administrative offices of the courts:

Collect and release, on an aggregate statewide and court-level basis, the demographic data provided by justices and judges relative to ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation and areas of legal practice and employment.

4. To state bar associations:

Request and release, on an aggregate statewide and court-level basis, the demographic data provided by justices and judges relative to ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation and areas of legal practice and employment.

ACKNOWLEDGEMENTS

Yuvraj Joshi, Fair Courts Project Fellow at Lambda Legal, was the primary author and analyst of this report. Liz Seaton, Senior Advisor at Justice at Stake, was the primary researcher of the study examining how states collect and disclose judicial diversity data.

This report was edited by Eric Lesh, Director of the Fair Courts Project at Lambda Legal, and David Lyle, Director of the State Courts Project at the ACS. It was reviewed, in full or in part, by M. Dru Levasseur, Director of the Transgender Rights Project at Lambda Legal, and Susan Sommer, Associate Legal Director and Director of Constitutional Litigation for Lambda Legal.

Lambda Legal and the ACS are grateful to the Honorable Virginia L. Linder, the 99th Associate Justice of the Oregon Supreme Court, for authoring the foreword to this report.

We thank our expert team of external reviewers who provided comprehensive and constructive feedback on earlier drafts: Kate Berry, Counsel of the Democracy Program at the Brennan Center for Justice; Blake Points Kavanagh, KIS Analyst at the National Center for State Courts; and Malia Reddick, Manager of the Quality Judges Initiative at the Institute for the Advancement of the American Legal System.

We also thank those who provided assistance to Liz Seaton with the primary research for this report, including Malia Brink, Assistant Research Professor at the American University School of Public Affairs; student researchers Tiffany Cao, Hana Le, Nancy Martin and Sarah Wisniewski; Justice At Stake, a nonpartisan group that worked to keep courts fair and impartial; Janet Lee, an American University Washington College of Law student and 2016 Justice at Stake law clerk; and Professor Tracey George of Vanderbilt University Law School and her research assistants.

Production assistance for this report was provided by Lambda Legal's Angelo Ragaza, Content and Editorial Director; Alberto Galindo, Associate Editor; JJ Hartmann, Web Manager; Sally Chew, Consulting Editor; and Natalie Pryor, Consulting Designer.

Lambda Legal would like to thank the Open Society Foundations and the Rockefeller Brothers Fund for their generous support of the Fair Courts Project.

Lambda Legal and the ACS hope that this resource will guide decision makers and support additional research, advocacy, litigation and policy efforts to strengthen fair and impartial state courts and ensure equal access to justice for everyone.

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