



## AVOIDING ANTI-TRANSGENDER BIAS IN JURY SELECTION A Voir Dire Guide for Lawyers

Bias and discrimination against people who are transgender, non-binary, or gender diverse is common and can extend into the legal system, including within juries and at jury selection. Bias can show up in two forms:

1. transgender, non-binary, and gender diverse (“TNGD” or “transgender”) people are excluded from juries or
2. jurors may harbor bias against TNGD people. But lawyers can conduct effective questioning of prospective jurors to ferret out bias and be mindful of attempts to improperly exclude TNGD people from juries.

This guide is intended to assist practitioners with jury trials where a party or witness is TNGD by providing information and sample jury questions to allow practitioners to undercover biases of prospective jurors. It also provides guidance on challenging potentially discriminatory peremptory strikes against TNGD prospective jurors.

### Experiences of Transgender, Nonbinary, and Gender Diverse People in Court

In 2022, Lambda Legal released *Protected and Served?*, a community survey of LGBTQ+ people and people living with HIV’s experiences with the criminal legal system. It showed significant discrimination and bias within the courts and legal system, particularly against transgender people. Over half of TNGD survey respondents who had been in court over the previous five years experienced misgendering or the inappropriate use of a former name (deadname) in court.<sup>1</sup> For transgender women, that number is over 75%.<sup>2</sup> And over 30% of transgender respondents had their transgender status revealed in court when it wasn’t relevant to their case.<sup>3</sup> Past studies have also shown discrimination against TNGD court users. In 2015, the largest national survey of transgender and non-binary people, with over 27,000 respondents, conducted by the National Center for Transgender Equality (now Advocates for Trans Equality), found that 13% of respondents who visited courthouses over the previous year experienced discrimination or harassment by court staff based on knowledge or belief that they were transgender.<sup>4</sup> In addition, studies have shown that bias and prejudice can influence jurors’ decisions in all types of cases involving LGBTQ+ people.<sup>5</sup>

**Misgendering** (verb): the act of using the wrong gender signifiers, such as pronouns, honorifics, or other gendered language, when talking to or about someone.

**Deadname** (noun): A term used by some people who have changed their name to reference the name given at birth.

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### Ensuring Jury is Questioned About Anti-Transgender Bias

*Voir dire* (questioning of prospective jurors) is a crucial process used to guarantee the right to a fair and impartial trial.<sup>6</sup> Trial judges have wide discretion on whether to allow or disallow lines of questioning of prospective jurors.<sup>7</sup> However, there are limitations to that discretion. *Voir dire* must at least provide reasonable assurance that prejudice will be discovered if present.<sup>8</sup> Specific questioning of the jury about bias based on sexual orientation or gender identity must be allowed if LGBTQ+ issues are “inextricably bound up with issues to be resolved at trial” such that there is a need to specifically inquire into potential bias based on sexual orientation (or gender identity) to assure an impartial jury.<sup>9</sup> In *Berthiaume v. Smith*, a civil case alleging police misconduct, the plaintiff was an openly gay man, as were all his witnesses, and the police misconduct at issue in the case arose out of an alleged domestic battery incident between the plaintiff and his former male partner. The Eleventh Circuit found that these facts rise to the level required for specific questioning of the jury on sexual orientation bias.<sup>10</sup>

Due to the widespread bias and discrimination against TNGD people,<sup>11</sup> it is necessary to question prospective jurors about these potential biases if your case involves a transgender party or potentially a transgender witness. It may be enough that a party is transgender to be able to inquire about gender identity bias during jury selection. But a judge may also require that this fact is tied to what is at issue in the case. Be sure to think about all the ways that gender identity is tied to the issues being covered at trial.

### Voir Dire - Questioning Prospective Jurors for Anti-Transgender Bias

Recent studies show that a minority of people in the U.S. know an openly transgender person.<sup>12</sup>

*A short explanation of what transgender means can be useful for prospective jurors before they are asked about their associations, experiences, and beliefs about transgender people. You may also consider asking the jury to define “transgender” and add in anything they miss.*

**Transgender person:** A person who is transgender has a deeply felt, inherent, sense of their gender that does not align with their sex assigned at birth. Recent estimates suggest that approximately 2.8 million people ages 13 and over in the U.S. are transgender.<sup>13</sup> Approximately 0.8% of the U.S. adult population and 3.3% of the U.S. youth population 13-17 identify as transgender.<sup>14</sup>

Other definitions that could be useful to share with jurors depending on your case include:

**Gender identity:** a person’s inner and deeply held understanding of their own gender, which may or may not be the same as the sex they were assigned at birth. Everyone has a gender identity.

**Gender Dysphoria:** A diagnosis in the DSM-5-TR defined as clinically significant distress or impairment due to gender incongruence, which may include a desire to change primary and/or secondary sex characteristics. Not all transgender or gender diverse people experience gender dysphoria.

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### *Associations and experiences with transgender, nonbinary, and gender non-conforming people*

Studies indicate that contact with transgender people reduces prejudice.<sup>15</sup> Questions about prospective jurors' contacts with transgender people can help bring to light whether they hold prejudices that may impact their decision-making. Remind the jury that there are no right or wrong answers, not everyone is right for every case, and being honest is the most important aspect of *voir dire*.

1. Do you know whether any of your friends or family members are transgender?
2. Have you ever met a transgender person?
3. If you've not yet met a transgender person, how would you feel if you did?
4. How would you feel if you learned that a transgender person moved in next door to you?
5. Are you or a close friend or family member part of an organization that has taken a public position on the rights of transgender people?

### *Personal Beliefs*

1. Do you have any personal beliefs which would make it impossible for you to fairly and impartially consider a case involving a transgender person?
2. If a transgender person testifies, would you view their testimony differently? Give it more weight? Less weight?
3. Do you think a transgender person should have the same rights as a non-transgender person?
  - a. Regarding access to health care?
  - b. Regarding access to public restrooms matching their gender identity? (Ask this question only if it has to do with the case.)
  - c. Regarding playing sports consistent with their gender identity? (Ask this question only if it has to do with the case.)
4. Should a private employer be able to refuse to hire someone because they are transgender?
  - a. What about a government employer?
5. Do you oppose or support laws that protect transgender people from discrimination?
6. Do you attend religious services on weekly or more frequent basis?

### *Related to Your Specific Case*

1. Example - HEALTH CARE Cases: Some transgender people experience gender dysphoria, which is a medical condition. A person experiencing gender dysphoria feels distress caused by a discrepancy between their gender identity and their sex assigned at birth. Treatment for gender dysphoria can include gender-affirming hormone therapy and, in some cases, gender-affirming surgery.
  - a. Do you have any strong feelings about the use of hormone therapy for gender transition?
  - b. Do you have any strong feelings about the use of surgery for gender transition?

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### *Ability to be Fair and Impartial*

1. If you are selected as a juror in this case, is there any reason that you would not be able to render a verdict solely on the evidence presented at trial?
2. If you are selected as a juror in this case, is there any reason that you would not be able to follow the instructions on the law that applies in this case, even if you disagree with it?
3. Is there any other reason that I have not asked about that would prevent you from serving as a juror on this case in a fair and impartial manner?

### Challenges for Cause

Challenges for cause are codified in federal and state statutes and rules. But the right to challenge a juror for cause is an important aspect of ensuring one's Constitutional rights to due process and the right to a fair trial before an impartial jury, under the Fourteenth and Sixth Amendments, respectively. Some people are open about their biases against transgender, non-binary, and gender diverse people. Counsel should challenge for cause any potential juror who expresses anti-trans viewpoints. Other people may be less willing to share anti-trans beliefs, but there may be other signs that point to those beliefs existing. It may be necessary to remind judges that they should consider not only what the juror says but also "the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty."<sup>16</sup> If there is not enough information to raise a challenge for cause, first seek to obtain that information through additional questioning. If you are unable to get further information from the juror but still believe that they are harboring bias against a TNGD party or witness, you can use a peremptory challenge to remove them from the venire.

### Peremptory Challenges to Address Anti-Trans Bans

Peremptory challenges to prospective jurors are available in almost every state and the federal system.<sup>17</sup> Usually, each attorney receives 3-6 peremptory challenges, depending on the jurisdiction and type of case, that can be used to strike prospective jurors from the venire, if they cannot be stricken for cause. Eliminating a juror for cause can be difficult. Many prospective jurors are "rehabilitated" by the judge or opposing counsel after they express potential bias. Generally, when a prospective juror says they can still be fair and impartial and render an impartial verdict a judge may choose to seat them, despite the potential biases revealed. So, peremptory challenges can be very important in ensuring an impartial jury. Peremptory challenges can be used for any reason and attorneys generally do not need to inform the court as to the reason they choose to use one. However, peremptory challenges are "subject to the commands of the Equal Protection Clause."<sup>18</sup> *Meaning peremptory challenges cannot be used in a discriminatory manner. The Constitution bars "striking even a single prospective juror for a discriminatory purpose."*<sup>19</sup>

In the 1986 case of *Batson v. Kentucky*, the Supreme Court held that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race.<sup>20</sup> Since then, the Court has prohibited the use of peremptory challenges on account of a jurors' sex in *J.E.B v. Alabama*,<sup>21</sup> or any other classification subject to heightened judicial scrutiny.<sup>22</sup> *Batson* has been extended to apply to criminal defense attorneys as well as prosecutors<sup>23</sup> and private civil litigants.<sup>24</sup>

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In *Smithkline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit Court of Appeals held that *Batson* applies to sexual orientation discrimination in the use of peremptory challenges.<sup>25</sup> SmithKline Beecham Corp. sued Abbott Laboratories in a case related to the increased pricing of Abbott Laboratories' HIV medication. During jury selection, when it was time for Abbott Laboratories turn for peremptory challenges, they used their first peremptory challenge to strike the only self-identified gay man in the jury pool. The Ninth Circuit held that heightened scrutiny applies to classifications based on sexual orientation and that equal protection forbids striking a juror on the basis of their sexual orientation.<sup>26</sup>

It is clearly established that equal protection is violated when a peremptory challenge is used to strike a juror based on sex. "All gender-based classifications today" "warrant heightened scrutiny."<sup>27</sup> Failing to apply *Batson* to prohibit discriminatory peremptory challenges based on gender identity violates core equal protection principles. In the context of Title VII, the U.S. Supreme Court held that "on the basis of sex" includes sexual orientation and gender identity.<sup>28</sup> In this context the Court explained, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>29</sup> However, there are no specific cases about gender identity-based peremptory challenges.

### States that bar the discriminatory use of peremptory challenges based on gender identity

In 2018, the American Bar Association formally urged governments to explicitly prohibit discrimination in jury selection based on sexual orientation and gender identity.<sup>30</sup> Currently 10 states bar discrimination in jury selection on the basis of sexual orientation and gender identity; California, Colorado, Hawaii, Illinois, Maine, Maryland, Minnesota, New York, Oregon, and Washington.<sup>31</sup> Additionally, New Hampshire bars discrimination on the basis of gender identity, but not explicitly based on sexual orientation.<sup>32</sup> There are seven states and two territories that bar jury discrimination based on sexual orientation, but not explicitly gender identity: Alaska, Arizona,<sup>33</sup> Idaho, Massachusetts, Montana, Nevada, Wisconsin, Guam, and Northern Mariana Islands.<sup>34</sup> Counsel should also consider state constitutional guarantees of equal protection and guarantees related to trial by jury when making out a *Batson* challenge. Objections to the discriminatory use of peremptory strikes based on sex and gender identity should be made even if the jurisdiction hasn't explicitly determined that strikes based on gender identity are barred.

### Making a *Batson* Challenge

If faced with a discriminatory use of a peremptory challenge to remove a juror based on gender identity, counsel should object to this challenge and follow the three-step approach outlined in *Batson*, unless the jurisdiction has taken efforts to reform *Batson* challenges, which will be discussed more below. To ensure you have a complete record, be sure to:

- Maintain full and accurate notes on each juror;
- Make the challenge right away;
- Request a judge to hear and rule on the challenge if one is not present during voir dire, to ensure the decision is subject to appellate review;
- Request a court reporter and state for the record all facts supporting the challenge;
- If the challenge is denied, be sure to object again on the record before the jury is sworn in (doing so outside the presence of the jury).

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### Step One

“First, the party challenging [a] peremptory strike must establish a prima facie case of intentional discrimination’... ‘by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.’ At this first stage, the challenging party has the burden of production not persuasion, and the burden on the challenging party is ‘not an onerous one.’”<sup>35</sup> Purposeful discrimination does not need to be the most likely explanation, or even more likely than not; rather it must be supported by sufficient evidence to allow a judge to draw an inference that discrimination has occurred.<sup>36</sup> There are no bright-line tests for determining what evidence will suffice.<sup>37</sup> States have been afforded some discretion in determining how to make this showing, and counsel should become familiar with jurisdiction-specific requirements.<sup>38</sup> Counsel should make a record based on all relevant circumstances, including:

1. Evidence that the jurors in question are all members of a particular group but are different in other aspects.
2. A pattern of strikes based on a protected classification on the particular venire at issue, e.g., more than one strike used against transgender, non-binary, or gender diverse people.
3. The past conduct of an attorney that resulted in striking all jurors of a protected class.
4. The type and manner of an attorney’s questions and statements during *voir dire*, including nothing more than a “desultory” questioning, e.g., rushing through questions for certain jurors or asking jurors different questions.
5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions.
6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner.
7. Disparate examination of members of the venire; e.g., questions designed to provoke a certain response that is likely to disqualify jurors of a certain race or gender (or gender identity).
8. Circumstantial evidence of intent may be proven by disparate impact, where all or most of the challenges were used to strike jurors of a certain race or gender (or gender identity).<sup>39</sup>

### Step Two

Once the court determines that the party challenging the peremptory strike has made out its prima facie case, the burden shifts to the striking party to present a neutral explanation for the challenge. Some possible neutral reasons might include the prospective juror’s occupation, education, family connections to a party, attitudes, personal beliefs, and prior litigation experience. However, even if the striking party produces only a “frivolous or utterly nonsensical” justification for its strike, the case does not end—it merely proceeds to step three.<sup>40</sup>

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### Step Three

Lastly, the party challenging the strike must convince the court that the explanation given by the striking party is a pretext for “purposeful discrimination.”<sup>41</sup> If a violation is found, the trial judge will decide whether the juror will be returned to the pool or if a new jury pool or panel may be needed. Counsel should make sure to elicit the factual record necessary to preserve the issue for appeal if a violation is not found.

### *Batson* Reform

Five states have taken action to reform the *Batson* framework for criminal and/or civil cases. Arizona, California, Connecticut, New Jersey, and Washington have all taken steps to reduce discrimination in jury selection by changing the way peremptory strikes are challenged or abolishing them all together.<sup>42</sup> Arizona is the only state to have completely removed peremptory challenges in jury trials.<sup>43</sup> Washington was the first state to adopt reforms with the Washington Supreme Court adopting General Rule 37 (GR 37) in 2018.<sup>44</sup> California passed legislation in 2020 that was modeled after Washington’s GR 37.<sup>45</sup> And in 2022, Connecticut and New Jersey made reforms through new court rules, like Washington.<sup>46</sup> Though they differ somewhat, in general, these new rules have abolished *Batson’s* step 1 and have also set out presumptively invalid reasons for using a peremptory strike that may have been considered facially neutral reasons in the past. If counsel practices in one of these jurisdictions it is important to be familiar with the new rules/statutes.

### Conclusion

Counsel can effectively use *voir dire* to eliminate biased jurors from the venire and be prepared to defend against discriminatory uses of peremptory challenges. While this resource is intended to help attorneys and courts navigate *voir dire* and other jury matters, it is important to remember that best practices will require a contextualized and localized approach.

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### References

- <sup>1</sup> Somjen Frazer et al., *Protected and Served? 2022 Community Survey of LGBTQ+ People and People Living with HIV's Experiences with the Criminal Legal System* 37 Fig. 41 (Lambda Legal and Black and Pink National 2023), <https://www.protectedandserved.org/2022-report-full-report> [<https://perma.cc/9L9Z-N3KP>].
- <sup>2</sup> *Id.* at 38, figure 43.
- <sup>3</sup> Frazer, *supra* note 1.
- <sup>4</sup> Sandy James et al., *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.
- <sup>5</sup> Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. of Homosexuality 93-111 (2000), [https://doi.org/10.1300/J082v39n02\\_05](https://doi.org/10.1300/J082v39n02_05); Bradley H. White & Sharon E. Robinson Kurpius, *Effects of victim sex and sexual orientation on perceptions of rape*. 46 Sex Roles 191 (2002), <https://psycnet.apa.org/doi/10.1023/A:1019617920155>; Shane W. Kraus & Laurie Ragatz, *Gender, jury instructions, and homophobia: What influence do these factors have on legal decision making in a homicide case where the defendant utilized the homosexual panic defense?*, 47 Crim. Law Bull. 237 (2011).
- <sup>6</sup> *Warger v. Shauers*, 574 U.S. 40, 50 (2014) (internal citations omitted).
- <sup>7</sup> *Ristaino v. Ross*, 424 U.S. 589 (1976) (internal citations omitted).
- <sup>8</sup> *Berthiaume v. Smith*, 875 F.3d 1354, 1358 (11th Cir. 2017).
- <sup>9</sup> *Id.* (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981)).
- <sup>10</sup> *Id.*
- <sup>11</sup> See e.g., Sandy James, et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*. (Nat'l Ctr for Transgender Equality 2024), [https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report\\_FINAL.pdf](https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf) [<https://perma.cc/A48J-5HTS>].
- <sup>12</sup> GLAAD Media Institute, *Accelerating Acceptance 2025 Report*, GLAAD, <https://glaad.org/accelerating-acceptance-2025/#non-lgbtq-adults> [<https://perma.cc/9MYH-36B9>] (last visited Feb. 26, 2026) (only 22% of non-LGBTQ adults said they knew a transgender person).
- <sup>13</sup> Jody L. Herman and Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?* 2 (Williams Institute Aug. 2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug2025.pdf> [<https://perma.cc/2J3Z-EJPJ>].
- <sup>14</sup> *Id.*

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<sup>15</sup> Hailey A. Hatch, et al., *Effectiveness of Interventions for Transgender Prejudice Reduction: A Meta Analysis*, 91 Sex Roles (2025), <https://doi.org/10.1007/s11199-025-01558-6>.

<sup>16</sup> *Skilling v. U.S.*, 561 U.S. 358, 386 (2010) (internal citations omitted).

<sup>17</sup> Arizona no longer allows for peremptory challenges, after the Arizona Supreme Court changed several rules effective January 1, 2022. Arizona Rules of Criminal Procedure 18.4, 18.5. Arizona Rules of Civil Procedure 47 (e).

<sup>18</sup> *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), *holding modified by Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>19</sup> *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

<sup>20</sup> *Id.*

<sup>21</sup> *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>22</sup> *Id.* at 128-129.

<sup>23</sup> *Georgia v. McCollum*, 505 U.S. 42 (1992).

<sup>25</sup> *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. 614 (1991).

<sup>25</sup> *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014).

<sup>26</sup> *Id.*

<sup>27</sup> *J.E.B.*, 511 U.S. at 136.

<sup>28</sup> *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020).

<sup>29</sup> *Id.* at 660.

<sup>30</sup> American Bar Association, Resolution 108D, Report to the House of Delegates (2018), [https://www.abajournal.com/files/2018\\_hod\\_midyear\\_108D.pdf](https://www.abajournal.com/files/2018_hod_midyear_108D.pdf) [<https://perma.cc/D3CN-WLXT>].

<sup>31</sup> Movement Advancement Project, Equality Maps: Jury Service Nondiscrimination, MAP, [https://www.lgbtmap.org/equality\\_maps/jury\\_nondiscrimination](https://www.lgbtmap.org/equality_maps/jury_nondiscrimination) [<https://perma.cc/CY56-98MH>] (last visited Feb. 10, 2026).

<sup>32</sup> *Id.*

<sup>33</sup> Arizona is in the 9 Circuit and thus must follow *SmithKline*. However, Arizona now bars the use of peremptory challenges. See note 18.

<sup>34</sup> Movement Advancement Project, *Supra* note 31.

<sup>35</sup> Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. Ill. U. L. Rev. 1(2019), <https://huskiecommons.lib.niu.edu/cgi/viewcontent.cgi?article=1016&context=niulr> (footnotes omitted); see also *SmithKline Beecham Corp.*, 740 F.3d at 476.

<sup>36</sup> *Johnson v. California*, 545 U.S. 162, 170 (2005).

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<sup>37</sup> *Batson*, 476 U.S. at 96-97 (declining to specify what type of evidence the challenging party must offer to establish a prima facie case.)

<sup>38</sup> *Johnson*, 545 U.S. at 168.

<sup>39</sup> L. Peyton Chapman, III, *Batson Challenges: A Practical Update*, *International Association of Defense Counsel Newsletter, Trial Techniques and Tactics*, Dec. 2019, at 4-5, [https://www.iadclaw.org/assets/1/19/TrialTechniquesTactics\\_December\\_2019.pdf](https://www.iadclaw.org/assets/1/19/TrialTechniquesTactics_December_2019.pdf) [<https://perma.cc/5J4F-AN9R>] (citing *Ex Parte Branch*, 526 So.2d 609 (Ala. 1987) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986) and various other cases)).

<sup>40</sup> *Johnson*, 545 U.S. at 171.

<sup>41</sup> *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008).

<sup>42</sup> Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 Colum. L. Rev. 1 (2024), [https://columbialawreview.org/wpcontent/uploads/2024/01/FramptonOsowski-The\\_end\\_of\\_Batson.pdf](https://columbialawreview.org/wpcontent/uploads/2024/01/FramptonOsowski-The_end_of_Batson.pdf) [<https://perma.cc/9UD2-M4DQ>].

<sup>43</sup> *Id.* at 1, 35-49.

<sup>44</sup> *Id.* at 25.

<sup>45</sup> *Id.* at 26-27.

<sup>46</sup> *Id.* at 28-29.