

**A RISING PRIDE LIFTS ALL BOATS: CANADA SHOULD
ACCEPT U.S. TRANSGENDER ASYLUM-SEEKERS
AND CODIFY GENDER IDENTITY AS
A PROTECTED GROUND FOR ASYLUM**

BENJAMIN DECARLO

TABLE OF CONTENTS

INTRODUCTION	180
I. BACKGROUND	183
<i>A. Canadian Immigration</i>	184
<i>B. Canadian Asylum</i>	186
<i>C. Current Canadian Sentiment Towards Newcomers</i>	189
<i>D. 2SLGBTQI+ Asylum-Seekers in Canada</i>	195
<i>E. U.S. Asylum-Seekers in Canada</i>	199
<i>F. Anti-2SLGBTQI+ Rhetoric in the United States</i>	201
II. PROPOSAL AND ANALYSIS	204
<i>A. Facts</i>	205
<i>B. Exhausting State Protection</i>	206
<i>C. Internal Flight Alternatives</i>	208
<i>D. Other Factors Related to X's Claim</i>	209
1. <i>Advantages and Disadvantages</i>	210
2. <i>Alternatives to Asylum</i>	211
3. <i>Counterarguments</i>	213
CONCLUSION	214

INTRODUCTION

Canada has long been held as a premier destination for asylum-seekers worldwide.¹ The nation's identity as a stalwart of universal rights and humanitarianism has resulted in the country gaining international acclaim as a "safe haven" for refugees, especially those claiming persecution on account of sexual orientation or gender identity.² Despite an increase in xenophobia³ and anti-2SLGBTQI+ sentiment⁴ in the U.S. since 2021⁵, Canada has remained resilient against such forces due to three primary factors. First, Canada has maintained a national identity of multiculturalism which is inherently accepting of diverse newcomers.⁶ Second, Canada's five major political parties share a common

1. Vanessa Balintec, *More and more asylum seekers are coming to Canada. Is it enough to stem a global tide of refugees?*, CBC NEWS (July 26, 2023, 1:00 AM), <https://www.cbc.ca/news/canada/canada-asylum-seeker-increase-1.6916053>.

2. David A.B. Murray, *Real Queer: "Authentic" LGBT Refugee Claimants and Homonationalism in the Canadian Refugee System*, 56 CAN. ANTHROPOLOGY SOC'Y 21, 23 (2014).

3. ELIZABETH YATES, ET AL., HUMAN RIGHTS FIRST, XENOPHOBIA & ANTI-IMMIGRANT EXTREMISM: FROM FRINGE TO MAINSTREAM 3 (2023).

4. The Human Rights Campaign reported that the number of anti-2SLGBTQI+ bills introduced in U.S. state legislatures increased from 130 in 2021, to 550 in 2024. *See An Epidemic of Violence 2021*, HUM. RTS. CAMPAIGN [hereinafter HRC Report 2021], <https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021#table-of-contents> (last visited Sept. 30, 2024); *The Epidemic of Violence Against the Transgender and Gender Non-Conforming Community in the United States*, HUM. RTS. CAMPAIGN (Nov. 2023) [hereinafter HRC Report 2023], <https://reports.hrc.org/an-epidemic-of-violence-2023>.

5. *See generally* Sharita Gruberg, *LGBT Undocumented Immigrants Face an Increased Risk of Hate Violence*, CTR. FOR AM. PROGRESS (June 10, 2014), <https://www.americanprogress.org/article/lgbt-undocumented-immigrants-face-an-increased-risk-of-hate-violence/>; Geoff Bennett et al., *How the rise of anti-LGBTQ+ hate and violence is impacting the community*, PBS (Aug. 31, 2023, 6:35 PM), <https://www.pbs.org/newshour/show/how-the-rise-of-anti-lgbtq-hate-and-violence-is-impacting-the-community>.

6. Daniel Hiebert, *What's So Special About Canada? Understanding The Resilience of Immigration and Multiculturalism*, MIGRATION POL'Y INST. 1–2 (2016), <https://www.migrationpolicy.org/sites/default/files/publications/TCM-Trust-Canada-FINAL.pdf>.

understanding of key immigration issues.⁷ Finally, Canada's decentralized immigration system allows for more responsive government action while remaining insulated from political forces.⁸

In the United States, the Trump administration's immigration policies and rhetoric toward the 2SLGBTQI+ community caused many U.S. citizens to fear staying in the country.⁹ The transgender community in the U.S. has endured legislative attacks that limit their rights in public spaces, from being able to access public restrooms to participating in public school athletics.¹⁰ Fear, anxiety, and misinformation have warped humanitarian issues like transgender rights, immigration, and asylum into contentious political battles where compromise seems nearly impossible and the highest levels of government refuse to take action.¹¹ As a result, Canada received over 3,000 U.S. asylum-seekers¹² between 2017 and 2019, the largest spike since the Iraq War.¹³

This Article analyzes how Canada's asylum law would apply to a transgender U.S. citizen who is seeking asylum based on fear of

7. The five major Canadian political parties include the Liberal Party, Conservative Party, New Democratic Party, Green Party, and the Bloc Québécois. *See generally What do Canada's major political parties have to say about citizenship, immigration, and inclusion?*, INST. FOR CANADIAN CITIZENSHIP (Dec. 10, 2019) [hereinafter Canada's Political Parties], <https://inclusion.ca/article/what-do-canadas-major-political-parties-have-to-say-about-citizenship-immigration-and-inclusion/>.

8. Hiebert, *supra* note 6, at 13.

9. Jayesh Rathod, *Fleeing the Land of the Free*, 123 COLUM. L. REV. 183, 194–95 (2023).

10. Ian Millhiser, *The Supreme Court is running away from transgender rights cases*, VOX (Jan. 17, 2024, 7:00 AM), <https://www.vox.com/scotus/2024/1/17/24040460/supreme-court-transgender-sports-bathrooms-metropolitan-school-ac>.

11. *Id.*

12. The confidential protocols that apply under asylum laws make it difficult to ascertain how many of these claims were 2SLGBTQI+ related. *See, e.g.*, 8 C.F.R. § 208.6 (2020) (protecting the confidentiality of asylum-related information); U.N. High Comm'r for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* 20-31 (2020), <https://www.unhcr.org/4317223c9.pdf> [hereinafter UNHCR] (detailing UNHCR's confidentiality and data-protection protocols for refugee status determinations); Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, art. 48, 2013 O.J. (L 180) 60 (requiring national authorities to follow the principle of confidentiality when considering requests for international protection).

13. Rathod, *supra* note 9, at 190.

transphobic persecution. These two countries were selected because they share similar settler-state histories in addition to international and economic power.¹⁴ Yet, they differ in social policies and attitudes toward sexual identity, gender identity, and newcomers.¹⁵ While the U.S. overshadows Canada in terms of its population, economy, and military power, the U.S. has historically trailed Canada in terms of civil rights legislation.¹⁶ The U.S. government has adopted Canadian guidelines on handling gender-based persecution claims,¹⁷ and was persuaded by Canadian case law when decriminalizing same-sex activity and the legalization of same-sex marriage.¹⁸

Some nations may hesitate to accept an asylum-seeker from the U.S., for fear that it could be interpreted as disrespect or criticism.¹⁹ But Canada traditionally disregards such hesitation when it openly disagrees with U.S. policy, like Canada's acceptance of U.S. asylum-seekers during the Vietnam War.²⁰ Over the past two decades, U.S. immigration law and foreign policy have drastically changed with each administration,²¹ and will likely change again in 2025.²² However, this situation presents

14. Murray, *supra* note 2, at 24.

15. *Id.*

16. *Id.*

17. Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa*, 15 MICH. J. GENDER & L. 291, 304–05 (2009).

18. Sasha Issenberg, *How Canada brought same-sex marriage to the United States*, GLOBE & MAIL (July 23, 2021), <https://www.theglobeandmail.com/opinion/article-how-canada-brought-same-sex-marriage-to-the-united-states/>.

19. Rathod, *supra* note 9, at 227.

20. *Id.* at 196–97, 207.

21. See generally Jessica Bolter, Emma Israel & Sarah Pierce, *Four Years of Profound Change: Immigration Policy during the Trump Presidency*, MIGRATION POL'Y INST. (Feb. 2022), <https://www.migrationpolicy.org/sites/default/files/publications/mpi-trump-at-4-report-final.pdf> (discussing the widespread changes to immigration law and procedures by the Trump Administration); see also Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key facts about U.S. immigration policies and Biden's proposed changes*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/short-reads/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/> (discussing the Biden Administration's proposed changes to Trump-era policies).

22. See Int'l Servs., *Guidance: Possible Immigration Changes in 2025*, CORNELL U. (Nov. 26, 2024), <https://international.globallearning.cornell.edu/alerts/guidance-possible-immigration-changes-2025>; Brandon Wolf, *Reports: Trump Poised To Reinstate & Expand Ban on Transgender Military Service Members*,

an opportunity for Canada to distinguish itself, yet again, from its neighboring superpower and reify its commitment to universal rights and humanitarianism on the world stage.

Section I of this Article explores the background of Canada's immigration and refugee law, as well as instances of 2SLGBTQI+ refugees and U.S. citizens claiming asylum in Canada. Section II of this Article proposes and analyzes a hypothetical situation where a transgender U.S. citizen applies for asylum in Canada. The hypothetical asylum-seeker, "X", is a 21-year-old university student. X identifies as a black female, with she/they pronouns, whose assigned sex at birth was male. They reside in Florida, where they were banned from participating in sports at their university because of their gender identity. As a result, they were outed²³ and subsequently received death threats from their roommates. X will face immense difficulty in proving their asylum claim, because she will need to demonstrate she has exhausted all options of receiving state protection within Florida and she cannot relocate elsewhere in the United States.

I. BACKGROUND

This section examines Canadian immigration and the status of 2SLGBTQI+ rights in the U.S. and Canada. Parts A and B discuss the history of Canada's unique immigration and asylum systems. Part C focuses on modern Canadian sentiment towards newcomers and the challenges faced by the Canadian government. Part D explores the reality of 2SLGBTQI+ asylum-seekers in Canada and the influence of Canadian policies worldwide. Part E discusses claims by U.S. citizens seeking asylum in Canada. Finally, Part F examines the rising anti-2SLGBTQI+ sentiment in the U.S. which motivates transgender individuals to flee and seek asylum in Canada.

HUM. RTS. CAMPAIGN (Nov. 25, 2024), <https://www.hrc.org/press-releases/reports-trump-poised-to-reinstate-expand-ban-on-transgender-military-service-members>.

23. Outed is "to make known the fact that someone is not heterosexual or cis-gender, especially when that person does not want other people to know." *Outed*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/outed> (last visited Sep. 30, 2024).

A. Canadian Immigration

Since the end of the second world war, Canada has consistently maintained positive public sentiment towards immigration and refugees, even amid periods of political and economic unrest.²⁴ A combination of social policies, institutions, and practices have promoted multiculturalism and insulated Canada's immigration policy from populist pressures.²⁵ Canada's immigration system is decentralized, meaning each province may recruit immigrants directly through its own provincial visa system.²⁶ A decentralized system reduces the befallen blame of the federal government whenever anxiety surrounding immigration arises.²⁷ Accordingly, no single province or political actor can point to the federal government as a scapegoat for immigration failures.²⁸

Canada's immigration policy is historically motivated by national security and economic interests.²⁹ Initially, national security was used as a pretext to exclude non-white individuals, primarily Chinese persons, from obtaining citizenship.³⁰ Canada accepted numerous Chinese laborers to develop its railroad system in the late 19th century.³¹ However in 1923, people of Chinese descent were prohibited from immigrating to Canada under the Chinese Immigration Act.³² The Chinese-Canadian community successfully organized in opposition and the act was repealed in 1947.³³

Following the repeal, Canada's immigration goals became primarily economically motivated and adopted a points-based immigration system favoring individuals "with high levels of human and financial

24. Hiebert, *supra* note 6, at 1.

25. *Id.* at 17–18.

26. *Id.* at 13.

27. *Id.*

28. *Id.*

29. Hiebert, *supra* note 6, at 3.

30. *Exclusion of Chinese Immigrants (1923-1947) National Historic Event*, GOV'T OF CAN. (Aug. 2, 2023) [hereinafter *Exclusion of Chinese Immigrants*], <https://parks.canada.ca/culture/designation/evenement-event/exclusion-chinois-chinese>.

31. *Significant events in the history of Asian communities in Canada*, GOV'T OF CAN. (May 1, 2024), <https://www.canada.ca/en/canadian-heritage/campaigns/asian-heritage-month/important-events.html>.

32. *Id.*

33. *Id.*

capital.”³⁴ Along with this change, Canada shifted its view of immigration from building a white society to addressing declining fertility and a stagnant economy.³⁵ Canada’s practice of framing immigration in economic terms and as a solution to the country’s demographic and economic problems has fostered lasting public trust and support for immigration.³⁶

In 2015, Canada implemented its Express Entry program, which expedites permanent residency applications for certain classes of immigrants.³⁷ The three categories for Express Entry are Canadian Experience Class, Federal Skilled Worker Program, and Federal Skilled Trades Program.³⁸ Each requires the applicant to be skilled with prior work experience or a valid job offer in Canada.³⁹ International students studying in Canada may apply for Express Entry if they meet one of three categorical requirements and demonstrate that they have at least \$20,635 in funds to support themselves.⁴⁰

Transgender U.S. citizens who obtain a job offer from a Canadian company or reside in Canada, through a temporary work visa or student visa, may be eligible to immigrate to Canada.⁴¹ Yet the reality for many transgender U.S. citizens makes it unlikely for anyone in the

34. Hiebert, *supra* note 6, at 3.

35. This shift in immigration policy viewed immigrants from Asia as essential. *Id.*

36. *Id.* at 5.

37. *Express Entry Year-End Report 2015*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/express-entry-year-end-report-2015.html> (last modified Mar. 15, 2017).

38. *How Express Entry Works*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/works.html> (last modified July 18, 2024).

39. *See id.*

40. Hon. Marc Miller, Can. Minister of Immigr., Refugees and Citizenship, Speaking Notes: Update on the International Students Program (Dec. 7, 2023), *in* GOV’T OF CAN., Apr. 2024, <https://www.canada.ca/en/immigration-refugees-citizenship/news/2024/04/speaking-notes-for-the-honourable-marc-miller-minister-of-immigration-refugees-and-citizenship-update-on-the-international-students-program.html>.

41. *See Eligibility for Express Entry programs: Who can apply for the Federal Skilled Trades Program*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/skilled-trades.html> (last modified June 13, 2024); *see also Eligibility for Express Entry programs: Who can apply as a Federal Skilled Worker*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers.html> (last modified June 13, 2024).

community to obtain the necessary work experience or student visa to immigrate to Canada.⁴² Immigrating to another country requires time, resources, and planning – all of which are luxuries to those facing persecution from their peers, the police, and elected representatives. Instead, seeking asylum is the most feasible form of relief for transgender individuals suffering persecution in the United States.

B. Canadian Asylum

In the wake of World War II, the United Nations (“UN”) codified the rights and status of refugees in two international instruments:⁴³ the 1951 Convention Relating to the Status of Refugees⁴⁴, and the 1967 Protocol Relating to the Status of Refugees.⁴⁵ These instruments prohibit nation-states from returning an individual to a territory where their life will be threatened and also define who qualifies as a refugee.⁴⁶ While both instruments cover the same subject matter, the 1967 Protocol removes the 1951 Convention’s temporal and geographic limitations that restricted refugee status to individuals affected by World War II.⁴⁷ Canada ratified the instruments in 1969 and enacted both as federal legislation.⁴⁸ In 2012, Canada’s parliament granted further protections to refugees with the Protecting Canada’s Immigration System Act⁴⁹ This act created the

42. See generally *Understanding Poverty in the LGBTQ+ Community*, HUM. RTS. CAMP., <https://www.hrc.org/resources/understanding-poverty-in-the-lgbtq-community> (last visited May 7, 2024) (transgender U.S. Citizens face poverty and economic insecurity).

43. Nicole Laviolette, *Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process*, 13 INT’L J. HUM. RTS. 437, 439 (2009) [hereinafter *Independent Human Rights*].

44. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] (entered into force Apr. 22, 1954).

45. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (entered into force Oct. 4, 1967).

46. *Independent Human Rights*, *supra* note 44, at 439.

47. See 1967 Protocol, *supra* note 46, 606 U.N.T.S. at 267.

48. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 2(1) (Can.) [hereinafter IRPA]; *Independent Human Rights*, *supra* note 44, at 439.

49. See generally Protecting Canada’s Immigration System Act, S.C. 2012, c 17.

Refugee Appeal Division, a procedural protection that Canada was long criticized for lacking.⁵⁰

Canada's definition of a refugee is derived from the definition provided within the 1951 Convention.⁵¹ Accordingly, a refugee is any individual outside of their home country who is forced to flee from persecution.⁵² Their persecution may be based on race, religion, nationality, membership of a particular social group, or political opinion.⁵³ An individual claiming asylum in Canada is considered a "Claimant" or "Asylum-Seeker" until their case is decided.⁵⁴ Essentially, a person seeking asylum in Canada must meet two legal criteria. First, they must demonstrate a well-founded fear of persecution, and second, they must prove their persecution is on account of a protected ground.⁵⁵ If both elements are satisfied, Canada is obligated under international law to not return the Asylum-Seeker to their country of origin.⁵⁶

The Canadian Government codified its commitment to multiculturalism and openness by enacting the Immigration Act of 1976.⁵⁷ The 1976 Immigration Act fostered greater diversity among accepted refugees and stronger protections for vulnerable refugees.⁵⁸ In 2002, the Immigration and Refugee Protection Act replaced the 1976 *Immigration Act* and

50. See *Refugee Appeal Division*, CAN. COUNCIL FOR REFUGEES, <https://ccrweb.ca/sites/ccrweb.ca/files/static-files/RADpage.htm> (last visited Apr. 4, 2024).

51. *Background Information About Refugees*, CAN. COUNCIL FOR REFUGEES, [hereinafter *Refugee Info.*], <https://ccrweb.ca/en/information-refugees> (last visited Apr. 4, 2024).

52. *Id.*; IRPA § 96.,

53. *Refugee Info*, *supra* note 52.

54. *Id.*

55. *Id.*

56. *Independent Human Rights*, *supra* note 44, at 439; IRPA § 115(1). This is a principle of international human rights and refugee law known as non-refoulement. *Rights and Duties of Refugees*, UNHCR, <https://help.unhcr.org/canada/rights-and-duties-3/rights-and-duties-of-refugees/> (last visited Apr. 4, 2024).

57. Daniel Meister et al., *Immigration Act, 1976*, CAN. MUSEUM OF IMMIGR., <https://pier21.ca/research/immigration-history/immigration-act-1976> (last visited Apr. 4, 2024).

58. Paula Simons & Clare Clancy, *On point: Fifty years ago, Canada changed its immigration rules and in doing so changed the face of this country*, EDMONTON J. (June 29, 2017), <https://edmontonjournal.com/news/insight/on-point-fifty-years-ago-canada-changed-its-immigration-rules-and-in-doing-so-changed-the-face-of-this-country>.

provided two additional grounds under which a claimant may be deemed a person in need of protection: “risk of torture or cruel and unusual treatment or punishment.”⁵⁹ The Immigration and Refugee Protection Act dictates that a person in need of protection is afforded the same rights as a Convention refugee, including “the right of non-refoulement and the right to apply for permanent residence.”⁶⁰

Under Canada’s decentralized immigration system, the federal government possesses the sole authority to process asylum applications and grant refugee status.⁶¹ Consequently, any perceived failure of Canada’s asylum system falls on the governing administration.⁶² The current administration under Prime Minister Justin Trudeau has received cross-party criticism for failing to expand Canada’s open nation approach to refugees.⁶³ In 2017, Prime Minister Trudeau tweeted that Canada was open “[t]o those fleeing persecution, terror, & war” in response to former President Trump’s “Muslim Ban.”⁶⁴ The Trudeau administration was chastised for prioritizing ideology over the needs and capacity of the country, particularly during a housing and cost-of-living crisis.⁶⁵ In response, the Trudeau administration reinstituted visa requirements for Mexican nationals traveling to Canada.⁶⁶ With

59. IRPA §§ 97(1)(a)–(b).

60. *Chapter 14 - Persons in need of protection*, CAN. IMMIGR. & REFUGEE BOARD, ch. 14.1, <https://www.irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef14.aspx> (last modified Dec. 16, 2021).

61. *Claiming asylum in Canada - what happens?*, GOV’T OF CAN., https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html (last modified Oct. 6, 2021).

62. See Marie-Danielle Smith, *Trudeau tweet caused influx of refugee inquiries, confusion within government, emails reveal*, NAT’L POST (Apr. 3, 2018), <https://nationalpost.com/news/politics/trudeau-tweet-caused-influx-of-refugee-inquiries-confusion-within-government-emails-reveal>.

63. See Douglas Todd, *Douglas Todd: Canadian leaders more wary about asylum seekers*, VANCOUVER SUN (Mar. 14, 2024), <https://vancouversun.com/opinion/columnists/douglas-todd-canadian-leaders-more-wary-about-asylum-seekers>.

64. *US refugee ban: Canada’s Justin Trudeau takes a stand*, BBC NEWS (Jan. 29, 2017), <https://www.bbc.com/news/world-us-canada-38786656>.

65. Michael Barutciski, *Federal failures broke Canada’s asylum system: Michael Barutciski*, MACDONALD LAURIER INST. (Jan. 31, 2024), <https://macdonaldlaurier.ca/fed-failures-broke-asylum-system/>; Todd, *supra* note 64.

66. These visa requirements were previously lifted by the Trudeau administration in 2016. *Changes to electronic travel authorization (eTA) and visitor visa requirements for Mexican citizens*, GOV’T OF CAN., <https://www.canada.ca/en/>

Trudeau's reinstituted visa requirements, Mexicans who travel to Canada by air must prove they plan to leave Canada at the end of their visit and possess necessary travel funds.⁶⁷ In some instances, Mexican travelers may also need to provide medical examinations or a letter of invitation from a Canadian resident.⁶⁸ Moreover, any asylum-seeker crossing the U.S. border into Canada, with some exceptions, will be denied entry under the Safe Third Country Agreement explained below in Section C.⁶⁹

The Trudeau administration's policies are discordant with Canada's national identity and ideology. Asylum is meant to protect individuals fleeing persecution as a last resort.⁷⁰ Canada's international humanitarian obligations should not be compromised because its political tides are internally shifting due to healthcare system failures and housing market struggles. Instead, Canada's open ideology and commitment to humanitarianism should incentivize its government to rectify domestic issues and satisfy its international obligations.

C. Current Canadian Sentiment Towards Newcomers

Currently, the acceptance of immigrants and refugees is a controversial issue in Canadian politics.⁷¹ However, Canada's five major political parties share a consensus on key areas of immigration.⁷² The Liberal Party, Conservative Party, New Democratic Party, Green Party, and the Bloc Québécois are all in favor of economic immigration and allocating resources towards integrating newcomers.⁷³ The parties diverge on humanitarian immigration, as the Conservatives and Bloc Québécois

immigration-refugees-citizenship/campaigns/eta-work-visa-mexico.html (last modified June 19, 2024).

67. *Visitor visa: Who can apply*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/eligibility.html> (last modified Sept. 11, 2024).

68. *Id.*

69. *See infra* pp. 13–14.

70. IRPA §§ 97(1)(a)–97(1)(b).

71. Anna Mehler Paperny, *Backlash against immigrants challenges Canada's welcoming image*, REUTERS (Sept. 6, 2024 3:07 AM), <https://www.reuters.com/world/americas/backlash-against-immigrants-challenges-canadas-welcoming-image-2024-09-06/>.

72. *See generally Canada's Political Parties*, *supra* note 7.

73. *Id.*

prioritize highly skilled immigrants and privately sponsored refugees.⁷⁴ While Canada's political parties disagree on certain priorities and procedures, their political discourse presents newcomers as economic solutions to concerns such as labor shortages.⁷⁵ Furthermore, Canada's multi-party political system and decentralized immigration system, create ample space for more perspectives and robust discussion surrounding immigration, shifting the public sentiment.⁷⁶

Canada's multicultural and open-to-the-world identity also stems from sharing a border with only one nation.⁷⁷ Canadian political discourse and media lack a sense of threat created by the presence of an "uncontrolled border" which promotes an "under-siege mentality."⁷⁸ Instead, Canadians consider immigration as a controlled system and a trustworthy process.⁷⁹ These factors have resulted in Canadian society possessing an aptitude for multiculturalism and resilience towards populism.⁸⁰

Despite this resilience, racism and xenophobia became prominent within the highest levels of Canada's government. In 2021, Canada's Bloc Quebecois Party Leader, Yves-Francois Blanchet, stated that "questions arise" due to the newly appointed Transport Minister Omar Alghabra's role as head of the Canadian Arab Federation, which the Bloc calls a "political Islamic movement."⁸¹ Prime Minister Trudeau denounced the comments as political pandering and fear-mongering, which is irreconcilable with Canada's multicultural identity.⁸² Notably, Blanchet never articulated these questions, nor did he raise specific

74. *Id.*

75. Demetrios G. Papademetriou & Natalia Banulescu-Bogdan, *Understanding and Addressing Public Anxiety About Immigration*, MIGRATION POL'Y INST. 16–17 (July 2016), https://www.migrationpolicy.org/sites/default/files/publications/TCM_Trust_CouncilStatement-FINAL.pdf.

76. Hiebert, *supra* note 6, at 10, 12.

77. *Id.* at 12.

78. *Id.*

79. Irene Bloemraad, *Understanding "Canadian Exceptionalism" in Immigration and Pluralism Policy*, MIGRATION POL'Y INST. 4 (July 2012), <https://www.migration-policy.org/sites/default/files/publications/CanadianExceptionalism.pdf>.

80. *Id.* at 13.

81. Peter Zimonjic, *Trudeau says Bloc leader is using 'coded' language in attack on Transport Minister Omar Alghabra*, CBC NEWS (Jan. 15, 2021, 11:32 AM), <https://www.cbc.ca/news/politics/omar-alghabra-minister-bloc-blanchet-trudeau-1.5875222>.

82. *Id.*

accusations against Alghabra.⁸³ This incident was the second time in three years that Alghabra's ethnicity was used to question his credentials.⁸⁴ In both cases, Alghabra's birthplace was targeted using coded language like "questions arise", yet actual questions were never produced.⁸⁵

Hence, concerns over public safety and security pressured Canada's government into passing legislation restricting refugees' rights.⁸⁶ Under the Balanced Refugee Reform Act⁸⁷, the Minister of Citizenship and Immigration is authorized to designate and categorize a country of origin as 'safe,' with the use of four factors: (1) whether it is party to the 1951 Refugee Convention and 1984 Convention Against Torture; (2) whether its policies and practices reflect its obligations under those conventions; (3) its human rights record; and (4) whether it has partnered with the Canadian Government to share responsibility for refugee protection claims.⁸⁸ If the application of an asylum-seeker from a safe country of origin is denied, they cannot appeal the decision and will be subject to expedited removal.⁸⁹ Canada effectively ended its safe country of origin policy in 2019 by removing all countries from its designated list, pending future legislative repeal.⁹⁰ The government found the policy failed to discourage abuse of the asylum system and only impeded applicants' processing times.⁹¹ Furthermore, several federal

83. *Id.*

84. In 2018, Conservative Senator Denise Batters called for questioning of Alghabra's birth in Saudi Arabia, after he spoke with media about Canada's diplomatic dispute with the country. Brennan MacDonald, *Conservative senator apologizes for tweet citing Liberal MP's Saudi background*, CBC NEWS (Aug. 9, 2018, 11:35 AM), <https://www.cbc.ca/news/politics/powerandpolitics/conservative-senator-apologizes-liberal-mp-tweet-1.4779161>.

85. *Id.*; Zimonijic, *supra* note 82.

86. Benjamin Perryman, *Citizenship, Belonging, and Deportation*, 11 CAN. J. HUM. RTS. 91, 104 (2023).

87. Balanced Refugee Reform Act, S.C. 2010, c 8 (Can.).

88. *Canada-U.S. Safe Third Country Agreement*, GOV'T OF CAN. (Mar. 27, 2023), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mamdate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html#toc2>.

89. *Canada ends the Designated Country of Origin practice*, GOV'T OF CAN. (May 17, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>.

90. *Id.*

91. *Id.*

courts struck down provisions in Canada's safe country of origin policy for violating the Charter's equality provisions, namely depriving foreign nationals of an automatic stay of removal.⁹²

Canadian courts have also scrutinized the Safe Third Country Agreement.⁹³ The agreement requires a refugee to claim protection in the first country—the United States or Canada—that they arrive in with four exceptions: unaccompanied minors, family members of Canadian citizens, document holders, and public interest exceptions.⁹⁴ While the agreement permits the designation of other safe third countries, the United States is the only nation that Canada has designated as safe.⁹⁵ In two cases, from 2007⁹⁶ and 2023⁹⁷, Canadian Federal Courts found the Safe Third Country Agreement unconstitutional because returning a refugee to the U.S. would deprive them of their right to life, liberty, and security under section 7 of the Charter of Rights and Freedoms (“Charter”).⁹⁸ The plaintiffs argued the one-year filing bar for asylum in the U.S. violated the UN Conventions Relating to Refugees and disproportionately impacted gender-based asylum claims.⁹⁹ Both cases were reversed on appeal, as the Canadian federal courts found they lacked authority over U.S. policies and any disparities can be tolerated so long as they are not “fundamentally unfair.”¹⁰⁰ The U.S. and Canada expanded the Safe Third Country Agreement in March 2023 entry to

92. Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2022-113, 156 C. Gaz. Part II, <https://gazette.gc.ca/rp-pr/p2/2022/2022-06-08/html/sor-dors113-eng.html#> (May 20, 2022) (Can.).

93. Petra Molnar, Celine Cooper & Clayton Ma, *Canada-United States Safe Third Country Agreement*, CAN. ENCYC., <https://www.thecanadianencyclopedia.ca/en/article/canadaunited-states-safe-third-country-agreement> (Mar. 27, 2023).

94. *Id.*

95. *Id.*

96. *See generally* Canadian Council for Refugees v. Canada, [2007] F.C. 1262 (Can.).

97. *See generally* Canadian Council for Refugees v. Canada, [2017] F.C. 1131 (Can.).

98. Molnar, Cooper & Ma, *supra* note 94.

99. Canadian Council for Refugees v. Canada, [2007] F.C. 1262 (Can.); Canadian Council for Refugees v. Canada, [2017] F.C. 1131 (Can.).

100. The Queen v. Canadian Council for Refugees, [2008] F.C.A. 229 (Can.); Canadian Council for Refugees v. Canada (C&I), [2023] S.C.R. 17; *Canada-U.S. Safe Third Country Agreement*, *supra* note 89.

encompass the entire land border¹⁰¹, citing a need to respond to increased “irregular immigration.”¹⁰²

These issues reflect the growing tension between Canada’s neutral narrative surrounding immigration and the recent rise in xenophobic sentiment.¹⁰³ The Canadian government considers the public’s opinion regarding immigration policy through various methods including opinion polls, town halls, conferences, and expert opinions.¹⁰⁴ This discourse often utilizes coded language to assess citizens’ opinions and concerns regarding immigration policy.¹⁰⁵ Terminology such as “diverse,” “diversity,” “visible minorities,” and “people who are different from most Canadians” are often used as surrogate terms referring to non-white immigrants.¹⁰⁶ “Non-traditional” parts of the world refer to Canada’s history as a European settler-state whose early immigrants came from predominantly white countries of European heritage.¹⁰⁷ These terms allow surveyors to legitimately ask Canadians to evaluate the non-white population as too many or too few.¹⁰⁸ Coded language has warped immigration discourse.¹⁰⁹ For example, terminology like “visible minorities” appears in Canada’s Employment Act¹¹⁰ and seems softer than racially charged terms like “colored people.”¹¹¹ Allowing “diversity” to stand for

101. Prior to March 2023, the STCA only applied at designated ports of entry. *Canada-U.S. Safe Third Country Agreement*, *supra* note 89.

102. Irregular immigration “has no clear legal definition” but generally refers to any individuals who cross the border without authorization. Stephanie J. Silverman & Clayton Ma, *Irregular Immigration and Canada*, CAN. ENCYC., <https://www.the-canadianencyclopedia.ca/en/article/irregular-immigration>, (Sept. 21, 2023).

103. Aisosa Belele, *Understanding Populism and its Growth in Canada and the United States*, 5 RESPUBLICA 9, 11–12 (2021), <https://jps.library.utoronto.ca/index.php/respublica/issue/view/2433>.

104. Peter S. Li, *The Racial Subtext in Canada’s Immigration Discourse*, 2 J. INT’L MIGRATION & INTEGRATION 77, 82 (2001).

105. *Id.* at 78.

106. *Id.* at 83, 87.

107. *Id.* at 83.

108. *Id.* at 87.

109. YATES, ET AL., *supra* note 3, at 2.

110. Employment Equity Act, S.C. 1995, c 44, § 2 (Can.).

111. Edward Ou Jin Lee & Shari Brotman, *SPEAK OUT! Structural Intersectionality and Anti-Oppressive Practice with LGBTQ Refugees in Canada*, 30 CAN. SOC. WORK REV. 157, 164 (2014) [hereinafter *Speak Out!*].

all non-white individuals in every context has turned the word, and the group it represents, into a scapegoat for societal anxieties.¹¹²

Despite the robust populist rhetoric domestically and worldwide, Canada's immigration goals remain resilient.¹¹³ Surveys and polls still use coded language to reify the idea that Canadians have the right to pass judgment on newcomers solely based on their race and identity.¹¹⁴ Yet, Canadians' tolerance towards "visible minorities" has increased during the 21st century.¹¹⁵ A 2019 Ekos Research Associates poll showed that 39% of Canadians believed there were too many visible minorities in Canada, down from 60% in 1993.¹¹⁶ As it stands, Canada's neutral narrative regarding immigration and its decentralized immigration system facilitate progressive action and reform without the fear of severe political backlash.¹¹⁷

Turning to asylum, public sentiment in Canada towards refugees themselves remains positive.¹¹⁸ Any political repercussions or successes stemming from asylum befall the federal government because they alone control the asylum and refugee process.¹¹⁹ The Trudeau administration received widespread support from all Canadian political parties when Prime Minister Trudeau accepted hundreds of thousands of refugees from Syria and Ukraine from 2015 to 2023.¹²⁰ But, support for the administration's humanitarian goals waned as Canada's asylum system

112. Li, *supra* note 105, at 82–88.

113. Papademetriou & Banulescu-Bogdan, *supra* note 76, at 4.

114. Li, *supra* note 105, at 88.

115. *Increased Polarization on Attitudes to Immigration Reshaping the Political Landscape in Canada*, EKOS POL. 1–2 (Apr. 15, 2019), https://www.ekospolitics.com/wp-content/uploads/full_report_april_15_2019.pdf.

116. *Id.*

117. Hiebert, *supra* note 6, at 16–17.

118. A 2022 survey by Focus Canada found that seven in ten Canadians supported current immigration levels, the largest majority reported in 45 years. Keith Neuman, *Canadian public opinion about immigration and refugees*, ENVIRONICS INST. 1 (Oct. 25, 2022), https://www.environicsinstitute.org/docs/default-source/project-documents/focus-canada—fall-2022—immigration-refugees/focus-canada-fall-2022—canadian-public-opinion-about-immigration-refugees—final-report.pdf?sfvrsn=b31e22e9_2.

119. Smith, *supra* note 63.

120. Todd, *supra* note 64; Laura Osman, *Tens of thousands of Ukrainians expected to come to Canada in the next few months*, CTV NEWS (Jan. 18, 2024, 2:49 PM), <https://www.ctvnews.ca/politics/tens-of-thousands-of-ukrainians-expected-to-come-to-canada-in-the-next-few-months-1.6731673>.

became severely backlogged with 2.2 million cases pending.¹²¹ Some have called for expedited procedures to process asylum applications faster to help reduce taxpayer costs.¹²² Others, like Chris Friesen¹²³, Chief Operating Officer for Immigrant Services Society of British Columbia,¹²⁴, advocate for a long-term solution.¹²⁵ A comprehensive strategy would garner trust in the asylum process and prevent reactive changes to policy which erode public confidence.¹²⁶ Notably, Canada's Judiciary has demonstrated a willingness to make asylum decisions which adhere to Canada's laws and values, regardless of the current political climate.¹²⁷ By committing to consistency, Canada may blend its national ideology with its asylum process and make impactful decisions, like granting asylum to a transgender U.S. citizen.

D. 2SLGBTQI+ Asylum-Seekers in Canada

Outside of Europe, Canada has often been the first country to establish and codify rights for 2SLGBTQI+ individuals.¹²⁸ The 2SLGBTQI+ acronym stands for "Two-Spirit, lesbian, gay, bisexual, transgender, queer, intersex, and additional people who identify as part of sexual and

121. Can. Immigr. News, *New IRCC Backlog Update: 2.2 Million Files Await Processing*, MEDIUM (May 2, 2024), <https://medium.com/@canadaimmigrationnews/new-ircc-backlog-update-2-2-million-files-await-processing-262e978c8e47>.

122. Todd, *supra* note 64.

123. "Chris has been at the forefront as a key leader of the shifting immigration and refugee resettlement changes in BC and Canada." *Chris Friesen*, THE CONFERENCE BOARD OF CAN., <https://www.conferenceboard.ca/speakers/chris-friesen/> (last visited Sep. 30, 2024).

124. ISSofBC is a social services organization in Vancouver, British Columbia, that provides immigrant and refugee services including settlement, English language skills, and employment assistance. *About Us*, ISSBC, <https://issbc.org/about-us/> (last visited Sept. 30, 2024).

125. *Id.*

126. Romain Schué, *Secret Immigration Canada Measure Leads to Increase in Asylum Claims*, RADIO-CANADA (July 1, 2023, 1:00 AM), <https://ici.radio-canada.ca/nouvelle/1992746/immigration-trudeau-asile-canada>.

127. *See infra* p. 32.

128. Edward Ou Jin Lee & Shari Brotman, *Identity, Refugeeess, Belonging: Experiences of Sexual Minority Refugees in Canada*, 48.3 MCGILL SCH. OF SOC. WORK 241, 242 (2011) [hereinafter *Identity, Refugeeess, Belonging*].

gender diverse communities.”¹²⁹ In 1967, Canada’s House of Commons proposed a bill decriminalizing same-sex activity with then Prime Minister Pierre Trudeau famously stating, “[t]he state has no place in the bedrooms of the nation.”¹³⁰ In 1991, Canada was one of the first Western nations to recognize sexual orientation as grounds for persecution of refugees.¹³¹ This was later supported in 1993,¹³² when Canada’s Supreme Court held that an individual’s sexual orientation constituted a “particular social group” and, therefore, qualified for asylum protection.¹³³ That same year, Canada’s Immigration and Refugee Board published the first national guidelines for gender-related persecution claims.¹³⁴ The publication was intended to heighten the sensitivity of immigration officials to the unique issues women seeking protection face and provide a model for evaluating asylum claims by women.¹³⁵ Canada’s guidelines had

129. *What is 2SLGBTQI+?*, GOV’T OF CAN., <https://women-gender-equality.canada.ca/en/free-to-be-me/what-is-2slgbtqi-plus.html> (last modified Aug. 27, 2023).

130. ‘*No place for the state in the bedrooms of the nation*’, CBC ARCHIVES (June 21, 2018), <https://www.cbc.ca/archives/no-place-for-the-state-in-the-bedrooms-of-the-nation-1.4681298>; This bill was enacted in 1969 but only exempted consenting adults over 21 years old from “gross indecency” charges; the “gross indecency” offence was repealed in 1987. Ron Levy, *The 1969 Amendment and the (De)criminalization of Homosexuality*, CAN. ENCYC. (Nov. 26, 2019), <https://www.thecanadianencyclopedia.ca/en/article/the-1969-amendment-and-the-de-criminalization-of-homosexuality>.

131. *Speak out!*, *supra* note 112, at 162–64.

132. *Can. (Att’y Gen.) v. Ward*, [1993] 2 S.C.R. 689 (Can.) [hereinafter *Ward*].

133. Nicole Laviolette, *The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward*, 55 UNIV. TORONTO FAC. L. REV. 1, 3 (1996).

134. Harris, *supra* note 17, at 304.

135. See generally Valerie L. Oosterveld, *The Canadian Guidelines on Gender-Related Persecution: An Evaluation*, 8 INT’L J. REFUGEE L. 569 (1996).

widespread influence and were adopted by the U.S.¹³⁶ and Australia¹³⁷ in 1996, and the United Kingdom¹³⁸ in 2000.¹³⁹

As Canada entered the 21st century, it continued to serve as an influential leader among nations regarding 2SLGBTQI+ rights.¹⁴⁰ In 2003, the Ontario Court of Appeals¹⁴¹ determined that the common law definition of marriage, between only a man and a woman, violated Section 15 of the Charter, which guarantees equal rights.¹⁴² When Canada codified same-sex marriage protections in the Civil Marriage Act of 2005,¹⁴³ it began to shape American discourse.¹⁴⁴ The *Halpern* decision and Civil Marriage Act incentivized demand in the U.S. for judicial intervention by the Supreme Court on the issue,¹⁴⁵ to the chagrin of some justices.¹⁴⁶

A distinguishing factor between Canadian and U.S. politics is the separation of church and state. In 2005, Canada was the first country to legalize same-sex marriage in the Americas despite outcries from

136. The 1993 Canadian guidelines regarding gender-related persecution claims are cited in the introduction of the U.S. guidelines published in 1996. *Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender (May 26, 1996)*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/s/l/65633.htm> (last visited Apr. 4, 2024).

137. AUSTL. DEP'T OF IMMIGR. & MULTICULTURAL AFFS., REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (1996).

138. IMMIGR. APP. AUTH., ASYLUM GENDER GUIDELINES (2000) (UK).

139. Harris, *supra* note 17, at 305.

140. See Sasha Issenberg, *How Canada brought same-sex marriage to the United States*, GLOBE AND MAIL (July 24, 2021), <https://www.theglobeandmail.com/opinion/article-how-canada-brought-same-sex-marriage-to-the-united-states/>.

141. *Halpern v. Can. (Att'y Gen.)*, [2003] O.J. No. 2268 (Can. Ont. C.A.) (QL) [hereinafter *Halpern*].

142. See Issenberg, *supra* note 141.

143. Civil Marriage Act, S.C. 2005, c 33 (Can.).

144. Issenberg, *supra* note 141.

145. *Id.*

146. “The Court today pretends . . . that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada.” *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting); “Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.” *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

religious officials.¹⁴⁷ Prime Minister Jean Chretien made clear that his role as a political representative requires “a wider perspective” beyond his personal religion.¹⁴⁸ Protections for gender identity and expression are enumerated in Canada’s Human Rights Act¹⁴⁹ and Criminal Code.¹⁵⁰ Amendments in 2017 added gender identity and expression as an identifiable group protected from discrimination and hate speech.¹⁵¹ However, Canada has not codified gender identity as an enumerated protected ground for asylum.

Even in progressive nations like Canada, the 2SLGBTQI+ communities still face threats of extreme violence and hatred.¹⁵² In June 2023, an individual stabbed three people in a gender studies class at Canada’s University of Waterloo,¹⁵³ reminiscent of the Montreal Massacre.¹⁵⁴ Furthermore, research by certain Canadian experts, such as psychologist James Cantor¹⁵⁵, is weaponized by U.S. political conservatives to justify discriminatory transgender policies.¹⁵⁶

147. Jose Woehrling & Rosalie Jukier, *Religion and the Secular State in Canada*, INT’L CTR. FOR L. & RELIGIOUS STUD. 183, 200 (2016), <https://classic.iclrs.org/content/blurb/files/Canada%20Report%20Final%20English%202011a.pdf>.

148. Anne McIlroy, *Canadian government to defy church on gay marriage*, GUARDIAN (Aug. 11, 2003), <https://www.theguardian.com/world/2003/aug/11/worlddispatch.gayrights>.

149. Canadian Human Rights Act, R.S.C. 1985, c H-6.

150. Criminal Code, R.S.C. 1985, c C-46, § 318(4) (Can.).

151. Nina Dragicevic, *Canada’s gender identity rights Bill C-16 explained*, CBC DOCS POV, <https://www.cbc.ca/cbcdocspov/features/canadas-gender-identity-rights-bill-c-16-explained> (last visited Apr. 4, 2024).

152. Catharine Tunney, *CSIS warns that the ‘anti-gender movement’ poses a threat of ‘extreme violence*, CBC News (Feb. 15, 2024, 1:00 AM), <https://www.cbc.ca/news/politics/csis-lgbtq-warning-violence-1.7114801>.

153. Joe Sutton & Emma Tucker, *24-year-old suspect charged with stabbing 3 people during gender studies class at Canada’s University of Waterloo in ‘hate-motivated’ attack, police say*, CNN (June 29, 2023, 5:18 PM), <https://www.cnn.com/2023/06/29/americas/canada-waterloo-university-stabbing/index.html>.

154. Stéphanie Lanthier & Celine Cooper, *École Polytechnique Tragedy (Montreal Massacre)*, CAN. ENCYC. (Mar. 29, 2021), <https://www.thecanadianencyclopedia.ca/en/article/polytechnique-tragedy>.

155. Jonathan Montpetit & Sylvene Gilchrist, *U.S. conservatives are using Canadian research to justify anti-trans laws*, CBC NEWS (Oct. 21, 2023, 1:00 AM), <https://www.cbc.ca/news/investigates/james-cantor-gender-affirming-care-bans-1.6979356>.

156. *Id.*

Canadian acceptance of U.S. transgender asylum-seekers works to reinforce its multicultural identity. Canada's mosaic approach to multiculturalism¹⁵⁷ views acceptance as an inherent right and rejects the idea that a group deserves recognition because the majority has finally accepted them.¹⁵⁸ The Canadian mosaic identity presents a combinatorial culture with a framework that allows for compromise and resolution.¹⁵⁹ Canada cannot hold onto its open national identity while ignoring the plight of a persecuted group in its only neighboring country. Accordingly, Canada should affirm its status as a premiere safe-haven for refugees and immigrants by accepting U.S. transgender asylum-seekers and codifying gender identity as a protected ground for asylum.

E. U.S. Asylum-Seekers in Canada

The United Nations High Commissioner for Refugees reported that nearly 75% of asylum claims made by U.S. citizens between 2000 and 2021 were filed in Canada.¹⁶⁰ A combination of geopolitical and legal considerations resulted in a significant denial rate of claims.¹⁶¹ During the 2000s, hundreds of U.S. military members sought refuge in Canada to avoid deployment to Iraq.¹⁶² Service members like Joshua Key and Jeremy Hinzman were horrified by their experiences during deployment and argued that the U.S. government's invasion of Iraq was illegal, and thus, refused to participate.¹⁶³ Canada's Immigration

157. "Contrary to the 'melting pot' notion prevalent in the United States, Canada sees itself as a mosaic celebrating multiple identities." Woehrling & Jukier, *supra* note 148, at 155 n.2.

158. Hiebert, *supra* note 6, at 9.

159. *Id.*

160. *Refugee Data Finder*, U.N. REFUGEE AGENCY, <https://www.unhcr.org/refugee-statistics/download/?v2url=3dcdbe> (last visited Nov. 27, 2024).

161. Rathod, *supra* note 9, at 192.

162. *Id.* at 198.

163. After Hinzman's application for conscientious objector status was rejected and he received orders to redeploy to Iraq, he fled with his family to Canada. Anne McIlroy, *Flight from the fight*, GUARDIAN (Apr. 12, 2004, 8:33 PM), <https://www.theguardian.com/world/2004/apr/13/law.iraq>; Key stated that he witnessed a child killed during combat and fled to Canada during a two-week furlough after a military lawyer told him his choices were to "get back on that plane [to Iraq] or you're going to prison." Ashifa Kassam, *Iraq war resisters who fled to Canada ask Justin Trudeau*

Review Board denied Key's and Hinzman's claims, along with many other similar cases, citing a fear of "making judgments about U.S. foreign policy."¹⁶⁴ In the context of accepting U.S. asylum seekers, some countries accept the claims to embarrass the United States.¹⁶⁵ Often, the United States' status as a "functioning democracy" negatively impacts a U.S. citizen's chances of being granted asylum.¹⁶⁶ For example, U.S. citizen Danni Askini, a transgender activist, fled to Sweden in 2018 after receiving death threats.¹⁶⁷ Ultimately, she was denied asylum in 2020 and relocated to Washington, D.C., where she now works as Co-Executive Director of National Programs at a civil & human rights organization.¹⁶⁸

For Canada, asylum claims by U.S. citizens gain traction in cases that align with Canada's national identity of steadfast adherence to universal rights and humanitarianism.¹⁶⁹ The most recent spike in U.S. asylum claims in Canada occurred between 2017 and 2019, fueled by the Trump administration's legislative efforts.¹⁷⁰ Policies like the transgender military ban and limiting transgender access to public restrooms "upended humanitarian immigration policies."¹⁷¹ While there have been thousands of U.S. asylum claims in Canada, less than 400 claims have been granted since 2000, and there are no known examples of a successful transgender U.S. citizen claim.¹⁷²

to allow them to stay, GUARDIAN (Aug. 2, 2016, 7:30 AM), <https://www.theguardian.com/world/2016/aug/02/iraq-war-resisters-canada-trudeau-us-military>.

164. Patrick J. Glen, *Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status*, 26 WIS. INT'L L.J. 965, 985 (2009) (discussing, in detail, the denial of claims lodged by U.S. war resisters in Canada).

165. *Fugitive Rocks U.S.-Costa Rica Relations*, TICO TIMES (Aug. 1, 2008), <https://ticotimes.net/2008/08/01/fugitive-rocks-u-s-costa-rica-relations>.

166. Pauline Park, *Trump's first trans refugee seeking asylum in Sweden*, WASH. BLADE (Nov. 23, 2018), <https://www.washingtonblade.com/2018/11/23/trumps-first-trans-refugee-seeking-asylum-in-sweden/>.

167. *Id.*

168. *Announcing: Danni Askini as Co-Exec. Director of National Programs*, GENDER JUST. LEAGUE, <https://www.genderjusticeleague.org/announcing-danni-coed-national-programs/> (last visited Sept. 30, 2024).

169. *See generally* DAVID SCOTT FITZGERALD, REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS 127 (2019).

170. Rathod, *supra* note 9, at 190.

171. *Id.* at 195.

172. *Id.* at 192.

Canadian courts have also entertained asylum claims from U.S. citizens regarding unresolved humanitarian issues within the United States. Skyler James is a lesbian who served in the U.S. Army under the Don't Ask Don't Tell policy.¹⁷³ The policy forced 2SLGBTQI+ individuals to hide their sexual orientation while serving in the military or suffer a dishonorable discharge.¹⁷⁴ When James was outed by a fellow soldier, she was not discharged, but instead endured harassment, hate mail, and death threats. James stated that she decided to go absent without leave ("AWOL")¹⁷⁵ and flee to Canada when she received a letter vividly describing the writer's plan to kill her while she slept.¹⁷⁶ She claimed asylum and won her appeal in front of the Immigration and Refugee Board, but she eventually surrendered herself at a U.S. military base after the Don't Ask Don't Tell policy was repealed.¹⁷⁷

Unlike the Don't Ask Don't Tell policy, there is no single law infringing the rights of transgender U.S. citizens, which can be repealed by the U.S. government. Instead, Canada should qualify transgender U.S. citizens as refugees because the widespread nature of anti-2SLGBTQI+ rhetoric in the United States acquiesces persecution against transgender individuals.

F. Anti-2SLGBTQI+ Rhetoric in the United States

In the United States, the transgender community faces various forms of oppression, which relegates the entire group's status to that of second-class citizens.¹⁷⁸ Numerous states prohibit transgender individuals from using public restrooms consistent with their gender and

173. Bob Meola, *The journey of war resister Skyler James*, COURAGE TO RESIST (Sept. 28, 2012), <https://couragetoresist.org/skyler-james-journey/>.

174. *Repeal of "Don't Ask, Don't Tell"*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/our-work/stories/repeal-of-dont-ask-dont-tell> (last visited Apr. 4, 2024).

175. In the military, AWOL is an unexcused leave of absence which can not only have significant ramifications on one's reputation, but could result in "dishonorable discharge, forfeiture of pay, or even imprisonment." Adam, *Understanding AWOL Punishment: Impacts & Legal Consequences*, UNIF. CODE MIL. JUST., <https://ucmj.us/ucmj/awol-punishment/> (last visited Sept. 30, 2024).

176. Meola, *supra* note 174.

177. *Smith v. Canada* (Minister of Citizenship & Immigr.), [2009] F.C. 1194 (Can.).

178. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Oct. 15, 2024).

receiving gender-affirming care or transgender care at all.¹⁷⁹ Additionally, the prohibitive cost of living and healthcare make it unfeasible to relocate within the United States.¹⁸⁰

In 2023, U.S. state legislatures cumulatively proposed 520 anti-2SLGBTQI+ bills, of which 220 specifically targeted transgender and non-binary individuals.¹⁸¹ Seventy of these laws were enacted, impacting various areas including access to gender-affirming care, the permissibility of misgendering of transgender students, and censoring school curriculum.¹⁸² As of February 13, 2024, the American Civil Liberties Union identified, and actively monitors, 530 anti-2SLGBTQI+ bills progressing through state legislatures.¹⁸³

Even in states where legal protections exist for transgender health care, the exorbitant cost of malpractice insurance, and high risk of litigation, often leads doctors to refrain from offering transgender care entirely.¹⁸⁴ In Illinois, a state with gender-affirming care protection, the average malpractice policy cost is \$8,000-\$10,000 per year.¹⁸⁵ However, a clinic applying for malpractice insurance to treat transgender youth can reach quotes of \$50,000 per year.¹⁸⁶ In states where courts have blocked anti-trans legislation, lawmakers have enacted malpractice insurance regulations against gender-affirming care.¹⁸⁷ In 2023, Tennessee¹⁸⁸,

179. See HRC Report 2021, *supra* note 4.

180. *Study Reveals Significant Barriers for TGNC Adults Accessing Healthcare in the U.S.*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Aug. 5, 2024), <https://publichealth.jhu.edu/2024/study-reveals-significant-barriers-for-tgnc-adults-accessing-healthcare-in-the-us>.

181. Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing In States Across the Country*, HUM. RTS CAMPAIGN (May 23, 2023), <https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country>.

182. *Id.*

183. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> (last updated Sept. 5, 2024).

184. Cecilia Nowell, *Malpractice Insurance Prices Are Stopping Small Clinics From Offering Gender-Affirming Care to Minors*, TIME (Dec. 21, 2023, 7:00 AM), <https://time.com/6549690/rising-malpractice-premiums-price-small-clinics-out-of-gender-affirming-care-for-minors/>.

185. *Id.*

186. *Id.*

187. *Id.*

188. TENN. CODE ANN. § 68-33-105 (2023).

Florida¹⁸⁹, and Missouri¹⁹⁰ all passed laws extending the statute of limitations for filing a malpractice claim by up to 30 years for individuals who received gender-affirming care as a minor.¹⁹¹ The heightened litigation risk, and lack of legal protections surrounding transgender healthcare, lead to egregious policy premiums.¹⁹² Consequently, clinics in states that ban gender-affirming care for minors often stop treating transgender individuals entirely.¹⁹³

The U.S. government's acquiescence of widespread anti-2SLGBTQI+ laws and its failure to protect gender identity have created a widespread fear of persecution among transgender individuals.¹⁹⁴ Transgender individuals face an insurmountable challenge in fighting anti-transgender legislation, while laws like Florida's hormone treatment ban are championed by the state's legislature.¹⁹⁵ Following the Supreme Court's overturning of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.*,¹⁹⁶ state courts continue to uphold anti-2SLGBTQI+ laws, arguing issues like gender-affirming care are not rooted in U.S. history and tradition and should be left up to the states.¹⁹⁷

189. FLA. STAT. § 766.318 (2023).

190. Missouri Save Adolescents from Experimentation (SAFE) Act, MO. REV. STAT. § 191.1720 (2023).

191. *Id.*; The average statute of limitations for filing a medical malpractice suit is one to five years from the date of the injury. *E.g.*, CAL. CIV. PROC. CODE § 340.5 (West 1996) (statute of limitations of three years); OR. REV. STAT. ANN. § 12.110(4) (West 2024) (statute of limitations of two years); N.Y. C.P.L.R. § 214-a (McKinney 2018) (statute of limitations of two years and six months); KY. REV. STAT. ANN. § 413.140(1)(e) (West 2019) (statute of limitations of one year); MD. CODE ANN., CTS. & JUD. PROC. § 5-109 (West 2002) (statute of limitation of five years).

192. Nowell, *supra* note 185.

193. *See id.*

194. *Human Rights Violations against Transgender Communities in the US*, HUM. RTS. WATCH (Sept. 12, 2023, 6:52 PM), <https://www.hrw.org/news/2023/09/12/human-rights-violations-against-transgender-communities-us>.

195. Melissa Block, *Florida families face confusion after gender-affirming care ban temporarily blocked*, NPR (June 9, 2023, 4:43 PM), <https://www.npr.org/2023/06/09/1181350551/florida-confusion-gender-affirming-care-ban-injunction-desantis>.

196. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

197. Mitch Smith, *Transgender Care Ban Allowed to Take Effect in Alabama, Appeals Panel Says*, N.Y. TIMES (Aug. 21, 2023), <https://www.nytimes.com/2023/08/21/us/alabama-transgender-care-ban.html> [hereinafter *Transgender Care Ban*].

Additionally, the Supreme Court's ruling in *Dobbs* calls into question the protections afforded to 2SLGBTQI+ individuals in the United States through a series of case law.¹⁹⁸ Following *Dobbs*, Justice Thomas stated the Court should reconsider a line of precedent regarding same-sex relationships and same-sex marriage.¹⁹⁹ States like Tennessee have relied heavily on *Dobbs* when defending legislation banning transgender care.²⁰⁰ The U.S. government is greatly impeded by rampant partisanship and cannot codify legislation to protect sexual orientation and gender identity.²⁰¹ This contrasts directly with Canada's more effective and proactive government, which is better equipped to address challenges by enacting legislation that reflect societal progression.²⁰²

II. PROPOSAL AND ANALYSIS

For the following hypothetical, X is a transgender U.S. citizen residing in Florida and is seeking asylum in Canada. X may apply for asylum at a Canadian port of entry, from within Canada, or even online. Here, X will be applying for asylum at Canada's border based on a fear of transphobic persecution.

Part A of this section outlines the facts relating to X's Canadian asylum claim and the requirements they must meet to be successful. Part B discusses X's exhaustion of all potential options for state protection. Part C analyzes the viability of any Internal Flight Alternatives that may be available to X. Finally, Part D explores additional factors that may affect X's asylum claim.

198. Zane McNeill, *The Supreme Court Ruling the Right Is Using to Eradicate Transgender People*, NEW REPUBLIC (Feb. 14, 2024), <https://newrepublic.com/article/178681/dobbs-ruling-war-trans-community>.

199. Quint Forgey & Josh Gerstein, *Justice Thomas: SCOTUS 'should reconsider' contraception, same-sex marriage rulings*, POLITICO (June 24, 2022, 01:45 PM), <https://www.politico.com/news/2022/06/24/thomas-constitutional-rights-00042256>.

200. The U.S. Supreme Court is scheduled to rule on whether Tennessee's and Kentucky's gender-affirming care bans are constitutional on December 4, 2024. Gillian Branstetter, *The Supreme Court Case on Trans Health Care, Explained*, ACLU, N.J. (Nov. 21, 2024, 8:00 AM), <https://www.aclu-nj.org/en/news/supreme-court-case-trans-health-care-explained>.

201. See generally *The Equality Act*, HUM. RTS. CAMPAIGN, (June 22, 2023), <https://www.hrc.org/resources/equality>.

202. Papademetriou & Banulescu-Bogdan, *supra* note 76, at 16–17.

A. Facts

X is a Black 21-year-old transgender female (she/they) who was banned from playing university sports consistent with their gender identity. X does not have a strong support system or family to rely on. After being outed, X's roommate sent X death threats, forcing X to flee the United States. X's asylum claim is based on their fear of transphobic persecution by specific individuals, the government of the United States, the state of Florida, and the American society broadly. X can demonstrate state acquiescence of their persecution through Florida's sports ban²⁰³ characterized by a series of other anti-2SLGBTQI+ laws.²⁰⁴ X's asylum claim is further warranted due to the wave of anti-2SLGBTQI+ violence during the Trump administration, and their lack of access to gender-affirming care and resources. The anti-2SLGBTQI+ legislation Florida proposed in 2023 has targeted minors' access to care for those under 18 years of age.²⁰⁵ If X were a minor, they would have stronger evidence of persecution; however, their claim would likely take years to adjudicate and could become moot once X turned 18. Instead, X's persecution is based on their received death threats, the discriminating sports ban, and the hostile climate in the United States. X must first file a claim with the Immigration and Refugee Board. The Immigration and Refugee Board then makes an initial determination which X may appeal to the Refugee Appeal Division for review.²⁰⁶

The recent Canadian Court of Appeals case, *Canada v. Bellamy*,²⁰⁷ is instructive for X's claim. In *Bellamy*, the Refugee Appeal Division granted the asylum claim of a transgender U.S. citizen, but reversed on

203. Associated Press, *On The First Day Of Pride Month, Florida Signed A Transgender Athlete Bill Into Law*, NPR (June 2, 2021, 7:54 AM), <https://www.npr.org/2021/06/02/1002405412/on-the-first-day-of-pride-month-florida-signed-a-transgender-athlete-bill-into-l>.

204. HRC Staff, *Gov. DeSantis Signs Slate of Extreme Anti-LGBTQ+ Bills, Enacting a Record-Shattering Number of Discriminatory Measures Into Law*, HUM. RTS. CAMPAIGN (May 17, 2023), <https://www.hrc.org/press-releases/gov-desantis-signs-slate-of-extreme-anti-lgbtq-bills-enacting-a-record-shattering-number-of-discriminatory-measures-into-law>.

205. *Id.*

206. *Can. (Minister of Citizenship & Immigr.) v. Bellamy*, [2024] F.C. 166 (Can.).

207. *Id.*

appeal.²⁰⁸ The Appeals Court based its reversal on a failure by the claimant to show she exhausted all options for state protection and did not satisfy the Court's two-pronged Internal Flight Alternatives test.²⁰⁹ The two-pronged test analyzes whether an individual could relocate to a specific region in their country of origin, by asking whether (1) the individual would face a serious chance of persecution or harm in the proposed Internal Flight Alternatives, and (2) whether it is unreasonable for the individual to relocate to the proposed Internal Flight Alternatives under any circumstance.²¹⁰

B. Exhausting State Protection

Here, X faces oppression as a Black U.S. citizen, a woman, and a transgender person. Transgender U.S. citizens, especially those of color, face serious, and often life-threatening, risks. A 2015 U.S. Transgender Survey by UCLA reported that people of color made up 71% of homicides related to anti-LGBTQ violence.²¹¹ Over a third of transgender individuals surveyed in 2022 reported living in poverty and nearly 20% reported as unemployed.²¹² While 47% of respondents considered moving to another state due to anti-transgender state legislation, only 5% made the move.²¹³

Marginalization and lack of resources cause many transgender women to resort to sex work, leading to an even greater risk of violence.²¹⁴ Sex workers and Black individuals are more likely than their counterparts to be incarcerated.²¹⁵ Jails and prisons often misgender

208. *Id.* at para. 62.

209. *Id.*

210. *Id.* at para. 59.

211. Ari Shaw, *Violence and Law Enforcement Interactions with LGBT People in the US*, UCLA WILLIAMS INST. (Mar. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Violence-Law-Enforce-Mar-2020.pdf>.

212. Sandy E. James, Jody L. Herman, Laura E. Durso & Rodrigo Heng-Lehtinen, *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NAT'L CENTER FOR TRANSGENDER EQUAL. 21 (2022), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

213. *Id.* at 23.

214. Kaniya Walker, *To Protect Black Trans Lives, Decriminalize Sex Work*, ACLU (Nov. 20, 2020), <https://www.aclu.org/news/lgbtq-rights/to-protect-black-trans-lives-decriminalize-sex-work>.

215. *Id.*

transgender women, placing them in male-only facilities, furthering their risk of being assaulted.²¹⁶ Conversely, transgender victims often forego seeking help from law enforcement because of common negative interactions of violence and misgendering.²¹⁷ In 2022, 83% of the reported homicides against the U.S. transgender community involved victims that were people of color,²¹⁸ over half of which were against Black transgender women.²¹⁹ In 2022, authorities and journalists²²⁰ misgendered or deadnamed 56% of transgender homicide victims.²²¹

Considering these statistics, there is ample evidence to support X's claim that U.S. police forces and state governments do not protect transgender citizens, exhausting X's options for protection. Unfortunately, this may still be insufficient to convince a Canadian Court of Appeal. On April 1, 2024, U.S. President Biden acknowledged International Transgender Day of Visibility and its concurrence with the Catholic Easter holiday.²²² The President's acknowledgment induced praise from the 2SLGBTQI+ community and drew the ire of religious conservatives.²²³ However, President Biden's efforts may result in Canadian courts being less likely to find that the United States is unwilling to protect its citizens after such a strong political statement was made by its head of state.

216. *Id.*

217. *Id.*

218. *Fatal Violence Against the Transgender and Gender-Expansive Community in 2022*, HRC, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-expansive-community-in-2022> (last visited Apr. 4, 2024) [hereinafter *Fatal Violence*].

219. *Id.*

220. *Fatal Violence*, *supra* note 218.

221. A deadname is "the name that a transgender person was given at birth and no longer uses upon transitioning." *Deadname*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deadname#:~:text=dead%E2%80%8Bname%20'ded%2D,n%C3%A4m,no%20longer%20uses%20upon%20transitioning> (last visited Apr. 4, 2024).

222. Maggie Astor, *A Transgender Holiday Fell on Easter. Republicans Lashed Out at Biden.*, N.Y. TIMES (Apr. 1, 2024), <https://www.nytimes.com/2024/04/01/us/politics/transgender-easter-biden-trump.html>.

223. *Id.*

C. Internal Flight Alternatives

X bears the burden of proving there are no possible Internal Flight Alternatives that she could take when the United States is generally deemed a functioning and safe country.²²⁴ X will face an uphill battle to demonstrate why they cannot simply move to a state like California, which has laws protecting 2SLGBTQI+ rights.²²⁵

However, moving to California would not allow X to escape the rampant anti-transgender discourse present in the United States. The patchwork nature of 2SLGBTQI+ protection in the United States leaves X's rights in a precarious position that could evaporate overnight.²²⁶ Moreover, the incoming Trump administration in 2025 will likely bring an abrupt change in executive policy and another wave of federal anti-transgender and anti-immigrant litigation.²²⁷ Absent protections for transgender people codified by Congress, individuals like X will live in constant fear for their safety and dignity, regardless of which state they reside in.

Another major barrier to transgender care is the financial burden. The U.S. states that have codified protection for transgender care also have high populations and high cost of living.²²⁸ The price of gender-affirming care and surgery are additional prohibitive barriers that X faces. The Florida ban on gender-affirming care for minors has

224. Rathod, *supra* note 9, at 226.

225. Kiara Alfonseca, *California passes slate of LGBTQ protections*, ABC NEWS (Sept. 27, 2023, 8:51 AM), <https://abcnews.go.com/US/california-passes-slate-lgbtq-protections/story?id=103501392>.

226. Asma Khalid, Domenico Montanaro & Saige Miller, *Trans Americans Face Patchwork Of Differing Laws*, NPR (Apr. 11, 2023, 4:40 PM), <https://www.npr.org/2023/04/11/1169276806/trans-americans-face-patchwork-of-differing-laws>.

227. Ted Hessen & Kristina Cooke, *Inside Trump's plan for mass deportations – and who wants to stop him*, Reuters (Nov. 10, 2024, 1:34 AM), <https://www.reuters.com/world/us/inside-trumps-plan-mass-deportations-who-wants-stop-him-2024-11-06/>; Bill Barrow, *Trump and Vance make anti-transgender attacks central to their campaign's closing argument*, AP News (Nov. 1, 2024, 10:56 AM), <https://apnews.com/article/trump-harris-transgender-politics-61eff97a64fac581ffc5f762be4c57d3>.

228. See Coby Lefkowitz, *Progressive Cities Aren't Living Up To Their Values*, MEDIUM (Apr. 15, 2023), <https://cobylefko.medium.com/progressive-cities-arent-living-up-to-their-values-f7bdd4b8e22>; see also *Equality Maps: Transgender Healthcare "Shield" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare/trans_shield_laws (last visited Oct. 31, 2024).

caused some clinics to stop providing gender-affirming care altogether.²²⁹ X would need to either fly back and forth between a state without anti-2SLGBTQI+ legislation or permanently uproot their life, leave school, and move. Neither of these options are economically feasible, especially for a person in X's position.

As Canadian courts analyze the Internal Flight Alternatives test on a case-by-case basis, if X can satisfy the test by supplying concrete evidence that she specifically cannot relocate to a particular location. In other words, X must show she will continue to suffer hardship and disadvantage, regardless of where she relocates. Further, rates of persecution towards transgender individuals in New York,²³⁰ California,²³¹ Colorado,²³² or other states deemed safe may also support X's claim that she will suffer serious harm and risk of injury even if she relocates. Additional factors can include whether their roommate, or other persecutors, possess the means and motivation to follow X to wherever she relocates.

D. Other Factors Related to X's Claim

There are other factors that will impact X's claim. Part 1 examines X's advantages and disadvantages as a U.S. citizen acclimating to another Western nation. Part 2 explores alternative forms of relief X may qualify for should their asylum claim be denied. Finally, Part 3 addresses potential counterarguments to X's claim.

229. Thalia Beaty, Brendan Farrington & Hannah Schoenbaum, *Transgender adults in Florida are blindsided that a new law also limits their access to health care*, AP NEWS (June 4, 2023, 1:17 PM), <https://apnews.com/article/florida-transgender-health-care-adults-e7ae55eec634923e6593a4c0685969b2>.

230. Between 2018 and 2023, the number of reported incidents of transgender hate crimes increased by 140% (from 10 to 24). OFF. BUDGET POL'Y & ANALYSIS, *The Concerning Growth of Hate Crime in New York State* (Aug. 2024), <https://www.osc.ny.gov/reports/concerning-growth-hate-crime-new-york-state>.

231. Between 2021 and 2023, the number of anti-transgender hate crimes in California increased by 70% (from 38 to 65). *See Hate Crime in California 2023*, CAL. DEP'T OF JUST. 35 (2023), https://data-openjustice.doj.ca.gov/sites/default/files/2024-06/Hate%20Crime%20In%20CA%202023f_0.pdf.

232. Between 2021 and 2022, Colorado saw a 14% increase in reported hate crimes. Jaleesa Irizarry, *Hate crimes in Colorado are on the rise*, 9NEWS (Feb. 28, 2024, 5:46 PM), <https://www.9news.com/article/news/crime/hate-crimes-colorado-rise-transgender/73-5cc2e1b7-6448-4fa5-8317-65605650c163>.

1. *Advantages and Disadvantages*

If denied asylum, X could still utilize the legislative “safety-valves”, outlined by the Supreme Court of Canada in the 2023 case, *Canadian Council for Refugees v. Canada (C&I)*.²³³ The safety-valves include administrative deferrals of removal;²³⁴ temporary resident permits;²³⁵ humanitarian and compassionate exemptions;²³⁶ and public policy exemptions.²³⁷ An administrative deferral of removal is only granted temporarily and for refugees of certain countries.²³⁸ X would likely not qualify for this relief. X may obtain a temporary resident permit, a discretionary permit issued by an immigration officer, if they believe the circumstances justify it.²³⁹ But this is not a sustainable option for X as a temporary resident permit may be canceled at any time and does not offer a pathway to citizenship.²⁴⁰

Finally, the Minister of Citizenship and Immigration possesses the authority under humanitarian²⁴¹ or public policy considerations²⁴² to grant permanent resident status to certain foreign nationals deemed inadmissible. The Minister of Citizenship and Immigration grants public policy considerations to meet specific needs in Canadian society, like

233. *Canadian Council for Refugees v. Can. (Minister of Citizenship & Immigr.)*, [2023] S.C.C. 17 (Can.).

234. *Id.* at para. 148.

235. IRPA, *supra* note 49, at § 24(1), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-24.html>.

236. *Id.* § 25(1), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-25.html>.

237. *Id.* § 25.2(1), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-25.2.html>.

238. *Removal from Canada*, CAN. BORDER SERV. AGENCY, <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html> (last modified Sept. 27, 2024).

239. IRPA, *supra* note 49, at § 24(1) (Can.), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-24.html>.

240. *See Guide 5554 - Applying to remain in Canada as a temporary resident permit holder*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5554-applying-remain-canada-temporary-resident-permit-holder.html> (last modified Sept. 27, 2024).

241. IRPA, *supra* note 49, at § 25(1) (Can.), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-25.html>.

242. *Id.* § 25.2(1), <https://laws-lois.justice.gc.ca/eng/acts/i-2.5/section-25.2.html>.

labor shortages.²⁴³ While unlikely, X could receive permanent residence through such a permit if they qualify for an established category.

X can also receive permanent residency under humanitarian and compassionate grounds if they demonstrate that refolement would subject them to a life-threatening risk, or cruel and unusual punishment.²⁴⁴ Denise Harvey, a 47-year-old U.S. citizen, was granted relief under these grounds in 2008, when she was convicted of having unlawful sex with a minor.²⁴⁵ Harvey was granted protection despite fierce opposition from then Minister of Citizenship and Immigration Chris Alexander²⁴⁶ because the age of consent in Canada is generally 16 years old.²⁴⁷

Here, X's claim is distinguishable because their intent is not to avoid responsibility for a conviction, but rather to find refuge in a country where the government does not consider them a second-class citizen.

2. *Alternatives to Asylum*

X may potentially have some advantages seeking asylum in Canada. For example, one of the main challenges 2SLGBTQI+ individuals face when making an asylum claim in a Western nation like Canada is that they must conform to Western conceptions of sexual orientation and gender identity.²⁴⁸ Canadian law contains guidelines for Immigration and Refugee Board hearings involving gender identity,

243. *Amended temporary public policy to lift the limitation that eligible study permit holders can work without a work permit no more than 20 hours per week off-campus during regular academic sessions*, GOV'T CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/off-campus-work-2023-update.html> (last modified Dec. 14, 2023).

244. Rathod, *supra* note 9, at 194.

245. Katrina Clarke, *Florida sex-offender who had relations with 16-year-old granted refugee status in Canada*, NAT'L POST (May 15, 2014), <https://nationalpost.com/news/canada/florida-sex-offender-who-had-relations-with-16-year-old-granted-refugee-status-in-canada>.

246. Alexander twice sought review of the decision, stating he found it "mind-boggling that individuals from [the] United States . . . think it's acceptable to file asylum claims in Canada." Roxanna Woloshyn, *Florida sex offender granted asylum in Canada*, CBC NEWS (May 16, 2014, 7:48 PM), <https://www.cbc.ca/news/canada/saskatchewan/florida-sex-offender-granted-asylum-in-canada-1.2646061>.

247. *Id.*

248. *Speak out!*, *supra* note 112, at 164.

however, these are merely informative and do not control the proceedings.²⁴⁹ Here, X's advantage stems from growing up within the United States and their familiarity with Western conceptions of gender identity and transgender individuals.

It may be challenging for X to present their valid form of identification, as their photo and name changed since their transition. However, Florida's refusal²⁵⁰ to issue X an updated driver's license could also bolster their claim of persecution as proof of government discrimination.²⁵¹ Additionally, X will benefit from coming from the United States, a global superpower, where there is ample credible evidence and documentation to support their claim.²⁵²

There are other issues plaguing asylum cases in both Canada and the United States, such as courts that struggle to distinguish between sexual orientation and gender identity. To categorize themselves as "transgender", transgender asylum seekers must prove their membership in a particular social group, and this requires them to repeatedly come out to immigration officials.²⁵³ This process is problematic because transgender individuals must explain their sex and gender identity to border officials, lawyers, psychologists, employers, and more.²⁵⁴ Moreover, they must recount every instance of persecution they endured, all of which they are accustomed to hiding for survival.²⁵⁵ However, 2SLGBTQI+ groups in Canada have found ways to help newly arriving refugees gather evidence for their claim.²⁵⁶ This can include becoming a

249. *Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics*, IMMIGR. & REFUGEE BD. CAN. (Dec. 17, 2021), <https://www.irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>.

250. *FAQ on DHSMV Memo*, EQUAL. FLA., <https://www.eqfl.org/faq-dhsmv-memo> (last visited Oct. 1, 2024).

251. *See* *Senadheerage v. Can. (Minister of Citizenship & Immigr.)*, [2020] F.C.J. No. 1000. (QL) "Requiring corroboration . . . must be properly calibrated, to avoid putting claimants in an impossible situation".

252. *Independent Human Rights*, *supra* note 44, at 442.

253. *Speak out!*, *supra* note 112, at 166–68.

254. *Id.* at 166.

255. *Id.* at 167.

256. *Murray*, *supra* note 2, at 25–6.

volunteer or a member of a 2SLGBTQI+ community in Canada to boost evidence of their claim.²⁵⁷

3. *Counterarguments*

Opponents may argue that granting X asylum will open the floodgates for many more U.S. citizens to claim asylum in Canada. For example, a woman seeking an abortion in Texas may seek asylum due to Texas's restrictive and punitive abortion laws.²⁵⁸ These laws allow private citizens to file lawsuits against anyone suspected of performing or inducing an abortion.²⁵⁹ Alternatively, an individual experiencing homelessness in Oregon may seek asylum in light of the Supreme Court's recent decision upholding the state's legislation to punish unhoused persons for sleeping outside.²⁶⁰

However, there is little evidence to suggest that a potential flood of claims exists. Although Canadian immigration authorities granted protected person status to Denise Harvey²⁶¹, they rejected a similar claim one year later.²⁶² Importantly, asylum requires an individual to uproot their life and give up all familiarity in the hopes of living free from persecution. There is no convenient conveyor belt carrying asylum-seekers to Canada's ports of entry. The realities of life for many individuals prevent them from ever being able to make an asylum claim. Therefore, it is Canada's obligation to codify gender identity as a protected ground for asylum and expand its asylum guidelines to accept U.S. citizens suffering persecution.

Granting X their requested relief would maintain asylum's purpose of offering protection to persecuted individuals fleeing threats of serious injury or death. Transgender U.S. citizens, who are considered

257. *Id.*

258. *See Abortion in Texas*, CTR. REPROD. RTS., <https://reproductiverights.org/case/texas-abortion-ban-us-supreme-court/abortion-in-texas/> (last visited Sep. 30, 2024).

259. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208 (2021) (creating a private right of action to bring a civil claim against anyone involved in facilitating an abortion, including "reimbursing the costs of an abortion through insurance").

260. *See City of Grants Pass, Oregon v. Johnson*, 144 S.Ct. 2202 (2024).

261. *See infra* Part II Section D1.

262. Julie Masis, *More US citizens — yes, citizens — are seeking refuge in Canada*, WORLD (Mar. 2, 2017), <https://theworld.org/stories/2017/03/02/more-americans-are-trying-become-refugees-canada>.

second-class citizens, and whose rights are being attacked by a global superpower, should be granted asylum in Canada.

CONCLUSION

Accepting transgender U.S. asylum seekers affirms Canada's identity as a mosaic of multiculturalism and open nation for persecuted individuals. While countries may hesitate to critique the United States and invoke its wrath, a case like X's provides Canada the opportunity to distinguish itself from the United States and reinforce its commitment to humanitarianism and universal rights. A precedent already exists for Canada to distinguish its policy from the United States, on issues ranging from foreign conflicts to 2SLGBTQI+ rights and same-sex marriage.

Canada has long been held as a safe haven for 2SLGBTQI+ individuals worldwide, yet it suffers from undue anti-2SLGBTQI+ influence from U.S. politics. Like many nations around the world, Canada has seen an increase in nationalist rhetoric and xenophobia since the start of the 21st century.²⁶³ A disproportionate amount of this vitriol is aimed at the 2SLGBTQI+ community. Canada's decentralized immigration system and the safety-valves contained within its legislation, uniquely poise the nation to act on current humanitarian crises, like the one facing transgender individuals in the United States.

Considering recent court decisions for U.S. citizen asylum claims, especially transgender citizens, it is unlikely the Canadian asylum system would accept X's claim. Although the patchwork of U.S. state laws can make regions of the country inhospitable for the 2SLGBTQI+ community, those states that uphold transgender rights create pockets of safe havens that put reasonable doubt into every U.S. citizen's asylum claim. Nevertheless, Canada should accept transgender U.S. asylum seekers and value humanitarianism over formalism. By doing so, Canada would uphold the rights of transgender individuals, the 2SLGBTQI+ community, immigrants, refugees, and promote these values on a global stage.

263. See Paul Wells, *Nationalist movements could smother Justin Trudeau*: Paul Wells, TORONTO STAR (Nov. 25, 2016), https://www.thestar.com/news/canada/nationalist-movements-could-smother-justin-trudeau-paul-wells/article_88849d8f-8fbf-5f2c-9b73-d6235e3fe0fc.html; Catherine Dauvergne, *How The Charter Has Failed Non-Citizens In Canada*, 58 MCGILL L. J. 663, 673 (2013).