

**TRANS RIGHTS ARE HUMAN RIGHTS:  
PROTECTING TRANS MINORS' RIGHT TO GENDER-  
AFFIRMING CARE**

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ABSTRACT

*Children and adolescents experiencing gender dysphoria often feel extreme distress associated with feelings of gender incongruence between their internal gender identity and their gender assigned at birth. Current medical recommendations overwhelmingly support an individualized, multi-disciplinary approach of gender-affirming care for minors, with options including prepubertal social transition, pubertal hormone suppression, and eventual cross-sex gender-affirming hormones and gender-affirming surgical interventions. Despite broad consensus regarding this standard of medical treatment, Republican lawmakers in multiple states have proposed legislation that threaten to prohibit transgender minors from accessing gender-affirming care, even with parental consent. These prohibitions would cause severe emotional harm to transgender children and would likely cause children with intense feelings of gender dysphoria to suffer from increased anxiety, depression, suicidal ideation, and potential self-harm.*

*This Note argues that Republican attempts to pass legislation preventing or prohibiting gender-affirming care for minors are not based in concern for children, but a continuation of conservative animus against the transgender community. This Note also argues that the proposed legislation is unconstitutional in violation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The proposed legislation violates the Equal Protection*

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*Clause because it discriminates on the basis of sex by way of gender stereotyping and gender identity; it violates the Due Process Clause by stifling fundamental rights of gender autonomy and parental rights to direct the care of minors.*

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## INTRODUCTION

"I would say that I have a girl brain and a boy body, and I think like a girl, but I . . . just have a boy body . . ." <sup>1</sup> At fifteen months old, Jazz Jennings, assigned male at birth, felt like a girl. <sup>2</sup> She insisted on wearing dresses and often wore her sister's clothing. <sup>3</sup> Her parents soon realized that her insistence regarding her gender identity was not just a phase. <sup>4</sup> At four, Jazz was prohibited from wearing a tutu at a school dance recital. <sup>5</sup> Jazz's mother, heartbroken by Jazz's obvious sadness at this exclusion, realized that she must allow Jazz to live her truth. <sup>6</sup> Jazz's fifth birthday party became her "coming out," the first time she presented publicly as a girl. <sup>7</sup> Jazz boldly chose to

1. *I Am Jazz: All About Jazz* (TLC television broadcast July 15, 2015) [hereinafter *All About Jazz*].

2. *20/20: My Secret Self: A Story of Transgender Children* (ABC television broadcast Apr. 27, 2007) [hereinafter *My Secret Self*]. "From the moment [s]he could speak, Jazz made it clear [s]he wanted to wear a dress. At only fifteen months, [s]he would unsnap [her] onesies to make it look like a dress." *Id.* She would also correct her mother when she praised her with "good boy," saying, "No, mommy. Good girl." *Id.*

3. *All About Jazz*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

wear an iridescent, rainbow-colored bathing suit to her party.<sup>8</sup> “Even at the age of five, I just knew that this was a big step. Here I am. You could see me. It was a big accomplishment, and it was honestly . . . the best day of my life.”<sup>9</sup> By then, Jazz had adamantly insisted she was a girl for over three years.<sup>10</sup> Her subsequent social transition involved a pronoun-change, girls’ clothing, and feminine hairstyles.<sup>11</sup>

At eleven, fearing the inevitable onset of male puberty,<sup>12</sup> Jazz, supported by her parents and in consultation with her physician,<sup>13</sup> began puberty blockers.<sup>14</sup> These hormones prevented pubertal onset so that Jazz would not have to experience physical changes associated with male puberty, such as a deepening voice or growth of facial and body hair.<sup>15</sup> After taking puberty blockers for a year-and-a-half while carefully monitored by her physician,<sup>16</sup> Jazz began a cross-hormone regimen of gender-affirming estrogen to initiate female development.<sup>17</sup> At eighteen, Jazz underwent her first gender-affirming surgery.<sup>18</sup> In her more than seventeen years with a medical diagnosis of gender dysphoria (GD), Jazz’s identification as a girl has never wavered. “I wish everyone

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8. *Id.*

9. *Id.*

10. *See My Secret Self*, *supra* note 2.

11. *Id.*

12. *See id.* (describing Jazz’s feelings of gender dysphoria as a young child). “This child will come into my bedroom in the middle of the night: ‘Mommy, mommy I had a bad dream that I had a beard and a moustache like Daddy, and I don’t ever want to have a beard or a moustache.’” *Id.*

13. *20/20: Transgender at 11: Jazz’s Story* (ABC television broadcast Jan. 19, 2013). Jazz’s physician has publicly affirmed her decision to transition: “Jazz is 100% girl. And there’s absolutely no doubt in my mind that [her parents have] done the right thing.” *Id.*

14. *All About Jazz*, *supra* note 1.

15. *See id.* (discussing puberty blockers’ effectiveness in “prevent[ing] [Jazz] from progressing far enough with male puberty that she would have long-term effects such as mustache that are difficult to get rid of”). Jazz’s mother noted, “I think that [Jazz] would be completely depressed and probably suicidal if she had to go through male puberty.” *Id.*

16. *Id.*

17. *Id.*

18. *See I Am Jazz: It’s a Girl!* (TLC television broadcast Jan. 29, 2019). Jazz has since had two additional gender-affirming surgeries. Jazz Jennings (@jazzjennings\_), INSTAGRAM (Feb. 4, 2020), <https://www.instagram.com/p/B8Ky12xnq54/>.

would understand that it isn't controversial. It's about a girl living her life. That's what I am: just a teenage girl living her life."<sup>19</sup>

However, some political and religious conservatives *have* deemed GD a controversial issue.<sup>20</sup> Starting in 2019, Republican lawmakers in multiple states proposed legislation that would prohibit transgender youth from receiving gender-affirming healthcare.<sup>21</sup> Conservative politicians wish to forbid transgender minors from accessing vital medical care in contradiction with overwhelming medical evidence supporting the benefits of gender-affirming treatment.<sup>22</sup> This is a pivotal moment for transgender people in the United States. Conservative politicians have become organized and energized in their attacks against transgender individuals; anti-trans bills exploded in 2021.<sup>23</sup> At transgender peoples' expense, conservatives have used gender identity as a wedge political issue in the hopes of winning elections.<sup>24</sup> They stoke fear in their electorate by warning against non-existent threats to women posed by transgender people's presence in public bathrooms and sports.<sup>25</sup> Now, they are warning against the perceived

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19. Rachel Kramer Bussel, *Jazz Jennings on Overcoming Depression, Fighting Trans Bathroom Laws and Brushing Off Haters*, PAPER (June 24, 2016), <https://www.papermag.com/jazz-jennings-pride-1880835224.html>; Corinne Sullivan, *23 Inspiring Jazz Jennings Quotes that Send a Powerful Message*, POPSUGAR (June 3, 2020), <https://www.popsugar.com/beauty/photo-gallery/47309681/image/47309685/On-Identity?fullsite=1>.

20. See discussion *infra* Section II.B.

21. See Chelsey Cox, *As Arkansas Bans Treatments for Transgender Youth, 15 Other States Consider Similar Bills*, USA TODAY (Apr. 8, 2021, 7:41 PM), <https://www.usatoday.com/story/news/politics/2021/04/08/states-consider-bills-medical-treatments-transgender-youth/7129101002/>.

22. See discussion *infra* Section II.B.

23. See Jeremy W. Peters, *Why Transgender Girls Are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. TIMES, <https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html> (May 3, 2021); Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN, <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> (Apr. 15, 2021, 9:46 AM).

24. See Sam Levin, *How Trans Children Became 'a Political Football' for the Republican Party*, GUARDIAN (Mar. 23, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/mar/23/anti-trans-bills-us-transgender-youth-sports>.

25. *Id.*

threat of gender-affirming care to children.<sup>26</sup> This political posturing has harmful effects and real victims.<sup>27</sup>

This Note addresses conservatives' attempts to attack transgender rights and gain political momentum under the guise of "protecting children" by proposing legislation that would prevent transgender minors from receiving necessary medical treatment. This Note also explains the constitutional deficiencies of the proposed legislation—specifically, that it violates the Fourteenth Amendment's Equal Protection and Due Process Clauses. Part I defines GD and the current clinical guidelines recommended to treat the condition, which are widely accepted by the medical community. Part II discusses previous conservative attempts to pass anti-trans legislation and current attempts to whittle away at transgender rights. Part III argues that this proposed legislation is medically unsound and not supported by the medical community. Finally, Part IV explains that the legislation is unlikely to withstand legal scrutiny under the Constitution.

## I. GENDER DYSPHORIA AND GENDER-AFFIRMING MEDICAL TREATMENT

An estimated 1.4 million Americans identify as transgender.<sup>28</sup> Transgender individuals experience a "gender identity [or]

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26. *Id.*

27. *See id.* Republicans' introduction of anti-trans legislation has created political discourse that constantly questions transgender people's very existence and the legitimacy of their experience, which has had deleterious effects on transgender people. *See, e.g.,* Charlotte Clymer (@cmclymer), TWITTER (Apr. 15, 2021, 2:10 PM), <http://twitter.com/cmclymer/status/1382758157378842624> ("Listening to grown adults debate your humanity is exhausting. I am tired."); *see* Levin, *supra* note 24.

28. ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N. T. BROWN, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016). A number of Americans identify as non-binary, which means that they do not identify within the categories of male or female; rather, "[n]on-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories." *See Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> (last visited Apr. 1, 2022). Additionally, non-binary individuals may "also identify as transgender, [although] not all non-binary people do." *Id.* This Note focuses on transgender individuals who may have differing experiences of dysphoria and differing standards and preferences of gender-affirming care as compared to gender non-binary individuals.

expression” that differs from their sex assigned at birth.<sup>29</sup> Because of this discordance, many transgender people experience GD: discomfort and distress because of “a persistent and authentic disconnect” between their sex assigned at birth and their internal perception.<sup>30</sup> This distress presents in a myriad of ways,<sup>31</sup> but may lead to physical symptoms like body ache, panic attack, or stomach ache, and emotional symptoms like embarrassment and emotional despair.<sup>32</sup> Individuals experiencing GD often adopt behaviors to avoid negative feelings, like avoiding speaking because of discomfort with a voice that sounds wrong, or dread associated with showering because of the unavoidable confrontation with a body that seems foreign.<sup>33</sup> Over time, discord between assigned gender and experienced gender identity may lead to anxiety, depression, suicidal ideation, or self-harm.<sup>34</sup> GD is not limited to adults and may affect children as young as two.<sup>35</sup>

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29. *Transgender and Non-Binary People FAQ*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-faq> (last visited Apr. 1, 2022).

30. *Transgender Children & Youth: Understanding the Basics*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-children-and-youth-understanding-the-basics> (last visited Apr. 1, 2022).

31. See generally Laura Beltrán Villamizar, *Nonbinary Photographer Documents Gender Dysphoria Through a Queer Lens*, NPR (June 30, 2020, 7:42 AM), <https://www.npr.org/sections/pictureshow/2020/06/30/883930251/documenting-gender-dysphoria> (detailing transgender individuals’ experiences with GD).

32. Lex Pulice-Farrow, Claire E. Cusack & M. Paz Galupo, “*Certain Parts of My Body Don’t Belong to Me*”: *Trans Individuals’ Descriptions of Body-Specific Gender Dysphoria*, 17 *SEXUALITY RSCH. & SOC. POL’Y* 654, 660 (2020).

33. *Id.* at 659–60. (“I am mostly uncomfortable with my chest and voice. They feel inherently wrong and embarrassing (as if it’s something to hide, something that shouldn’t be there) and I . . . try to speak as little as possible. . . . When I shower and dress, I’ve got to look at and touch (and thereby feel) parts of my body that shouldn’t be there. This creates a literally nauseating dissonance that kind of throws me out of my own head. I’m shocked by what’s happening (seeing/feeling my body), because it’s so far from the(/my) truth and I don’t understand how it happened.”).

34. See *id.* at 655, 662.

35. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, ELI COLEMAN, WALTER BOCKTING, MARSHA BOTZER, PEGGY COHEN-KETTENIS, GRIET DECUYPERE, JAMIE FELDMAN, LIN FRASER, JAMISON GREEN, GAIL KNUDSON, WALTER J. MEYER, STAN MONSTREY, RICHARD K. ADLER, GEORGE R. BROWN, AARON H. DEVOR, RANDALL EHRBAR, RANDI ETTNER, EVAN EYLER, ROB GAROFALO, DAN H. KARASIC, ARLENE ISTAR LEV, GAL MAYER, HEINO MEYER-BAHLBURG, BLAINE PAXTON HALL, FRIEDMANN PFÄFFLIN, KATHERINE RACHLIN, BEAN ROBINSON, LOREN S.

Approximately 150,000 adolescents between ages thirteen and seventeen identify as transgender.<sup>36</sup> The American Psychological Association distinguishes adolescence from childhood based on puberty development, beginning between ages ten and twelve.<sup>37</sup> GD diagnosis requires minimum criteria as defined in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*,<sup>38</sup> including that symptoms last at least six months in both children and adolescents.<sup>39</sup> According to the DSM-5, GD is a “marked incongruence between one’s experienced/expressed gender and assigned gender” manifested by a minimum of six associated symptoms in children<sup>40</sup> or two associated symptoms in adolescents and adults.<sup>41</sup> For children, symptoms must coincide

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SCHECHTER, VIN TANGPRICHA, MICK VAN TROTSENBURG, ANNE VITALE, SAM WINTER, STEPHEN WHITTLE, KEVAN R. WYLIE & KEN ZUCKER, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 12 (7th ed. 2012) [hereinafter WPATH STANDARDS OF CARE]; see also Selin Gülgöz, Jessica J. Glazier, Elizabeth A. Enright, Daniel J. Alonso, Lily J. Durwood, Anne A. Fast, Riley Lowe, Chonghui Ji, Jeffrey Heer, Carol Lynn Martin & Kristina R. Olson, *Similarity in Transgender and Cisgender Children’s Gender Development*, 116 PROC. NAT’L ACAD. SCIS. U.S. 24480, 24480 (2019).

36. Sara Solovitch, *When Kids Come in Saying They Are Transgender (Or No Gender), These Doctors Try to Help*, WASH. POST (Jan. 21, 2018), [https://www.washingtonpost.com/national/health-science/when-kids-come-in-saying-they-are-transgender-or-no-gender-these-doctors-try-to-help/2018/01/19/f635e5fa-dac0-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/national/health-science/when-kids-come-in-saying-they-are-transgender-or-no-gender-these-doctors-try-to-help/2018/01/19/f635e5fa-dac0-11e7-a841-2066faf731ef_story.html).

37. *Adolescence*, AM. PSYCH. ASS’N, <https://dictionary.apa.org/adolescence> (last visited Apr. 1, 2022).

38. AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-5]. Previous DSM versions referred to GD as gender identity disorder. See *DSM-IV-TR Diagnostic Criteria for Gender Identity Disorder*, PSYCHIATRIC NEWS (July 18, 2003), <https://psychnews.psychiatryonline.org/doi/full/10.1176/pn.38.14.0032>. According to the latest version, DSM-5, “[t]he current term is more descriptive . . . and focuses on [GD] as the clinical problem, not identity per se.” DSM-5, *supra*, at 451.

39. DSM-5, *supra* note 38, at 451.

40. *Id.* The symptoms, one of which must be Criterion A1, are as follows: “[a] strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one’s assigned gender)”; a strong desire to cross-dress; a desire for “cross-gender roles in make-believe play”; a preference for gender-stereotypical “toys, games or activities” of the desired gender; preferred playmates of the desired gender, a rejection of gender-stereotyped “toys, games, and activities” of the gender assigned at birth; “a strong dislike of one’s sexual anatomy;” and desire for “secondary sex characteristics that match one’s experienced gender.” *Id.*

41. *Id.* Adolescent symptoms include “[a] strong desire to be rid of one’s primary and/or secondary sex characteristics”; to have the perceived gender’s sex characteristics’ “a strong

with “clinically significant distress or impairment in social, school[/occupational], or other important areas of functioning,”<sup>42</sup> including refusal to attend school and/or “development of depression, anxiety, and substance abuse.”<sup>43</sup>

In 2017, the Endocrine Society created evidence-based clinical hormone treatment guidelines for individuals experiencing GD.<sup>44</sup> The guidelines, which adopt the DSM-5’s criteria, highlight the multidisciplinary nature of gold-standard gender-affirming treatment, including the importance of mental health care.<sup>45</sup> In 2012, the World Professional Association for Transgender Health (WPATH) issued its latest standards of care for the medical treatment of transgender individuals.<sup>46</sup> The treatment guidelines set forth by the Endocrine Society and WPATH both recommend treatment that affirms transgender adolescents’ gender identity.<sup>47</sup> A number of other prominent

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desire to be of the other gender”; to be treated as the desired gender; and a “strong conviction that one has the typical feelings and reactions of the other gender.” *Id.*

42. *Id.* at 453.

43. *Id.* at 455.

44. See Wylie C. Hembree, Peggy T. Cohen-Kettenis, Louis Gooren, Sabine E. Hannema, Walter J. Meyer, M. Hassan Murad, Stephen M. Rosenthal, Joshua D. Safer, Vin Tangpricha & Guy G. T’Sjoen, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3869 (2017).

45. See *id.*

46. See generally Eli Coleman, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People: An Introduction*, in PRINCIPLES OF GENDER SPECIFIC MEDICINE: GENDER IN THE GENOMIC ERA 69–75 (Marianne J. Legato ed., 3d ed. 2017).

47. *Id.* at 70. As the rate of minors who identify as transgender increases, parents have increasingly supported their children and permitted them to express themselves in line with their experienced gender identity. Amanda Holpuch, *Trans Children Allowed to Express Identity ‘Have Good Mental Health,’* GUARDIAN (Feb. 26, 2016, 10:25 AM), <https://www.theguardian.com/society/2016/feb/26/crucial-study-transgender-children-mental-health-family-support>. A 2015 study of over 20,000 transgender people found that 60% reported their immediate family as “generally supportive of their transgender identity.” SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 8 (2016). This high rate of acceptance does not discount the many transgender minors lacking family support and the difficulties they face. See generally Federica Vergani, Note, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FIU L. REV. 903 (2019).

medical organizations likewise recommend gender-affirming treatment for adolescents.<sup>48</sup>

### A. Stages of Gender-Affirming Medical Care

Transitioning is an extremely personal process. GD initially presents at varying ages and may dissipate at different levels of treatment.<sup>49</sup> For example, some transgender individuals may feel that their dysphoria dissipates after a social transition, while others may feel a need to proceed with gender-affirming surgeries to feel their gender identity is most accurately

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48. Organizations recommending gender-affirming medical treatment for adolescents include the American Medical Association, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Association of Clinical Endocrinologists, American Society of Andrology, Pediatric Endocrine Society, American College of Nurse Midwives, and American College of Obstetricians and Gynecologists, among others. See AM. MED. ASS'N, HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS 5 (2019) ("Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people and has called for health insurance coverage for treatment of [GD]."); AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender Diverse Youth, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Nov. 8, 2019), [https://www.aacap.org/AACAP/Latest\\_News/AACAP\\_Statement\\_Responding\\_to\\_Efforts-to\\_ban\\_Evidence-Based\\_Care\\_for\\_Transgender\\_and\\_Gender\\_Diverse.aspx](https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx); Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS 1, 10 (2018); Hembree et al., *supra* note 44, at 3869; LAMBDA LEGAL, PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE (2018), [https://www.lambdalegal.org/sites/default/files/publications/downloads/resource\\_trans-professional-statements\\_09-18-2018.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf); Emily Wax-Thibodeaux & Samantha Schmidt, *Republican State Lawmakers Push Bills to Restrict Medical Treatments for Transgender Youths*, WASH. POST (Jan. 22, 2020), [https://www.washingtonpost.com/national/republican-state-lawmakers-push-bills-that-restrict-medical-treatments-for-transgender-youth/2020/01/22/7cbdf6ca-3948-11ea-9541-9107303481a4\\_story.html](https://www.washingtonpost.com/national/republican-state-lawmakers-push-bills-that-restrict-medical-treatments-for-transgender-youth/2020/01/22/7cbdf6ca-3948-11ea-9541-9107303481a4_story.html). Anti-trans activists have the support of the American College of Pediatricians, an organization that has "declared that gender transition for minors is a form of 'child abuse.'" FAM. RSCH. COUNCIL, DO NOT STERILIZE CHILDREN: WHY PHYSIOLOGICAL GENDER TRANSITION PROCEDURES FOR MINORS SHOULD BE PROHIBITED 24 (Jennifer Bauwens ed. 2021). The Southern Poverty Law Center has designated the American College of Pediatricians as a hate group, describing them as "a fringe anti-LGBTQ hate group that masquerades as the premier U.S. association of pediatricians . . . [who] push anti-LGBTQ junk science, primarily via far-right conservative media and filing amicus briefs in cases related to" LGBTQ issues. *American College of Pediatricians*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians> (last visited Apr. 1, 2022).

49. See *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (Nov. 2020).

expressed.<sup>50</sup> The stages of gender transition are generally classified by their level of intrusiveness,<sup>51</sup> as discussed below.

### 1. *Social transitioning*

Social transitioning is the first stage of, and least invasive, medically recommended gender-affirming treatment. For young children with GD, social transitioning is recommended on a case-by-case basis as a first step carefully overseen by a mental health professional.<sup>52</sup> Social transitioning includes experimentation with gender-stereotyped clothing and hairstyles or a name and/or pronoun change to better reflect the individual's identity.<sup>53</sup> Because GD dissipates in approximately 85% of children before the onset of adolescence, the Endocrine Society's guidelines recommend that parents with young children expressing GD present any social transition as a reversible "exploration" rather than an irreversible decision.<sup>54</sup>

### 2. *Hormones for puberty suppression*

Adolescents with GD meeting the aforementioned requirements may be eligible for gonadotropin-releasing hormone (GnRH) administration, which delays puberty to allow additional time for full gender identity exploration.<sup>55</sup> Common GnRH treatment methods include injections or

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50. *Id.*

51. See discussion *infra* Sections I.A.1–4. Some experts have proposed an alternative model for transgender treatment, the Informed Consent Model, which would give the transgender individual more control over their gender-affirming care. See generally Sarah L. Schulz, *The Informed Consent Model of Transgender Care: An Alternative to the Diagnosis of Gender Dysphoria*, 58 J. HUMANISTIC PSYCH. 72 (2018).

52. See WPATH STANDARDS OF CARE, *supra* note 35, at 74.

53. See *Transition Roadmap*, UCSF TRANSGENDER CARE, <https://transcare.ucsf.edu/transition-roadmap> (last visited Apr. 1, 2022).

54. See WPATH STANDARDS OF CARE, *supra* note 35, at 74.

55. Simone Mahfouda, Julia K. Moore, Aris Siafarikas, Florian D. Zepf & Ashleigh Lin, *Puberty Suppression in Transgender Children and Adolescents*, 5 LANCET 816, 817 (2017).

subcutaneous implants that can last up to a year.<sup>56</sup> Should the adolescent wish to discontinue treatment, its effects are completely reversible, with puberty reactivating upon hormone discontinuation.<sup>57</sup> Ideally, puberty blockers are prescribed before advanced pubertal development, as biological changes of puberty are irreversible and may hinder future transition.<sup>58</sup> With the administration of puberty blockers at puberty's onset, adolescents assigned female at birth will delay breast development and menses, and adolescents assigned male at birth will "avoid the development of broad shoulders, a deep voice, and facial hair."<sup>59</sup>

Because dysphoria in 85% of pre-pubertal children will dissipate prior to the onset of adolescence, the Endocrine Society recommends against hormone treatment in prepubertal children.<sup>60</sup> In fact, puberty-blocking hormones are only recommended during adolescence at the Tanner 2 stage of puberty, at which point the first signs of pubertal development may be noted.<sup>61</sup> Initiating puberty-blocking treatment at this developmental stage leads to greater satisfaction with physical results than withholding treatment until the age of maturity,<sup>62</sup> because delay of puberty-blocking treatment leads to the irreversible effects of puberty: breast development in transgender boys, and a deepening voice and increased jaw and brow prominence in transgender girls.<sup>63</sup> Transgender individuals who do not use puberty blockers often end up

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56. See LAURA E. KUPER, PUBERTY BLOCKING MEDICATIONS: CLINICAL RESEARCH REVIEW 4 (Lisa Simons, Ann & Robert H. Lurie Childs. Hosp. of Chi., Jae A. Puckett, Brian Mustanski & IMPACT LGBT Health & Dev. Program, eds., 2014).

57. See Mahfouda et al., *supra* note 55, at 816.

58. See Hembree et al., *supra* note 44, at 3881.

59. Daliah Silver, *Transforming America's Perspective: How Recognizing the Rights of Transgender Youth Will Empower the Next Generation*, 39 CHILDS. LEG. RTS. J. 233, 239 (2019).

60. Hembree et al., *supra* note 44, at 3879.

61. See *id.* at 3881. For breast development, Tanner Stage 2 immediately follows the prepubertal stage, when the "[b]reast and papilla elevate[] as [a] small mound." *Id.* For penis and testes, Tanner Stage 2 follows the prepubertal stage, when the penis and scrotum are slightly enlarged from less than 4 mL to between 4-6 mL with changed texture. *Id.*

62. *Id.* at 3880.

63. *Id.* at 3881.

requiring additional surgical or medical procedures to achieve their desired physical outcomes.<sup>64</sup>

Properly timing the initiation of puberty-blocking hormones is vital because children experiencing GD often feel additional anguish at the onset of puberty. Specifically, “their psychological well-being deteriorates significantly, and many develop depression and suicidal ideation.”<sup>65</sup> Therefore, analyzing the adolescent’s reaction to puberty’s onset can be a helpful tool to assess symptom intensity and to determine if puberty blockers are appropriate.<sup>66</sup> Additionally, although most children grow out of their feelings of dysphoria *before* they reach adolescence, there is evidence that GD is highly unlikely to dissipate should it persist *after* the onset of adolescence; a retrospective cohort study of over forty years of patient records found that only 1.9% of adolescents who began puberty blockers eventually ceased treatment.<sup>67</sup> Thus, delaying puberty blockers until the Tanner Stage 2 of puberty can limit treatment to those for whom GD is unlikely to desist.<sup>68</sup>

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64. See Laura L. Kimberly, Kelly McBride Folkers, Phoebe Friesen, Darren Sultan, Gwendolyn P. Quinn, Alison Bateman-House, Brendan Parent, Craig Konnoth, Aron Janssen, Leshia D. Shah, Rachel Bluebond-Langner & Caroline Salas-Humara, *Ethical Issues in Gender-Affirming Care for Youth*, 142 PEDIATRICS 1, 4 (2018).

65. Jason Lambrese, *Suppression of Puberty in Transgender Children*, 12 AM. MED. ASS’N J. ETHICS 645, 646 (2010); see also Hembree et al., *supra* note 44, at 3880 (“The experience of full endogenous puberty is an undesirable condition for the GD/gender-incongruent individual and may seriously interfere with healthy psychological functioning and well-being.”).

66. Hembree et al., *supra* note 44, at 3881; see also Silver, *supra* note 59, at 248 (“Puberty brings a unique set of challenges; the youth may experience depression and loathing for existing in the ‘wrong’ body—the symptoms of [GD]—and making transitioning harder later in life.”).

67. Chantal M. Wiepjes, Nienke M. Nota, Christel J.M. de Blok, Maartje Klaver, Annelou L.C. de Vries, S. Annelijn Wensing-Kruger, Renate T. de Jongh, Mark-Bram Bouman, Thomas D. Steensma, Peggy Cohen-Kettenis, Louis J.G. Gooren, Baudewijntje P.C. Kreukels & Martin den Heijer, *The Amsterdam Cohort of Gender Dysphoria Study (1972–2015): Trends in Prevalence, Treatment, and Regrets*, 15 J. SEXUAL MED. 582, 584 (2018).

68. WPATH STANDARDS OF CARE, *supra* note 35, at 24. It should be noted that initiating puberty blockers at Tanner Stage 2 may make later gender-affirming surgeries more difficult. *Id.* For example, in male-to-female transitions, initiation of puberty-blocking hormones at Tanner Stage 2 reduces the size of both the penis and scrotum, which will limit the tissue available to surgeons in later vaginoplasty procedures. *Id.* Penile inversion vaginoplasty is a commonly desired gender-affirming “bottom” surgery for transgender women in which tissue from the penis is used to create a “vaginal vault.” See Toby Meltzer, *Vaginoplasty Procedures*,

Puberty suppressing hormones, though not yet FDA-approved for GD, are FDA-approved to delay early-onset puberty.<sup>69</sup> Puberty-blockers for precocious puberty and congenital adrenal hyperplasia<sup>70</sup> have existed as a treatment option for adolescents as early as 1981.<sup>71</sup> Available medical research has shown the treatment to be “safe and effective”<sup>72</sup> with children treated with puberty blockers retaining normal reproductive function as adults.<sup>73</sup>

### 3. Cross-sex hormones for gender affirmation

Following the administration of puberty-blockers to delay the onset of puberty, transgender individuals who continue to experience GD may become eligible for partially reversible

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*Complications and Aftercare*, UCSF TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/vaginoplasty>.

69. KUPER, *supra* note 56, at 4. This early onset puberty is known as “precocious puberty.” See Florence Comite, Gordon B. Cutler, Jr., Jean Rivier, Wylie W. Vale, Lynn Loriaux & William F. Crowley, Jr., *Short-Term Treatment of Idiopathic Precocious Puberty with a Long-Acting Analogue of Luteinizing Hormone-Releasing Hormone—A Preliminary Report*, 305 NEW ENG. J. MEDICINE 1546, 1546 (1981).

70. *Congenital Adrenal Hyperplasia*, CHILDS. HOSP. OF PHILA., <https://www.chop.edu/conditions-diseases/congenital-adrenal-hyperplasia> (last visited Apr. 1, 2022). Congenital adrenal hyperplasia is a disease that affects adolescents by interfering with the adrenal glands’ ability to make certain hormones, including cortisol; the resulting “hormone imbalances can lead to serious illness, atypical genitalia, early puberty, growth concerns and other problems.” *Id.*

71. Comite et al., *supra* note 69, at 1546; see Jacqueline Ruttimann, *Blocking Puberty in Transgender Youth*, ENDOCRINE NEWS (Jan. 2013), <https://endocrinenews.endocrine.org/blocking-puberty-in-transgender-youth/>.

72. Ruttimann, *supra* note 71.

73. Erica A. Eugster, *Treatment of Central Precocious Puberty*, 3 J. ENDOCRINE SOC’Y 965, 967, 969 (2019). A 2019 literature review of GnRH treatment for precocious puberty described the treatment as “hav[ing] an admirable safety profile” and stated that “[i]nformation regarding long-term outcomes of patients treated with GnRHs with respect to gonadal function are reassuring” with “no perceived health consequences . . . and no increased need for assisted reproductive technology. Limited follow-up in adolescent boys previously treated with a GnRH . . . reveals similarly normal testicular function and [normal] sperm counts.” *Id.* See also Caroline Salas-Humara, Gina M. Sequeira, Wilma Rossi & Cherie Priya Dhar, *Gender Affirming Medical Care of Transgender Youth*, 49 CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE 1, 6 (2019) (“While [GnRH agonists] have been used for over 30 years to suspend puberty in youth with central precocious puberty, and therefore the side effect and efficacy profile is known in this cohort, there is a dearth of long-term data about their use in transgender youth.”).

interventions with feminizing/masculinizing hormones.<sup>74</sup> Hormone therapy for female-to-male transitions causes “deepened voice, clitoral enlargement . . . , growth in facial and body hair, cessation of menses, atrophy of breast tissue, . . . and decreased percentage of body fat compared to muscle mass.”<sup>75</sup> Male-to-female hormone therapy causes “breast growth, . . . decreased libido and erections, decreased testicular size, and increased body fat percentage compared to muscle mass.”<sup>76</sup> As during all points of gender-affirming care, initiating these hormones is a critical decision that must be coordinated through an individualized, multi-disciplinary approach to ensure the treatment is appropriate.<sup>77</sup>

The Endocrine Society and WPATH both recommend that the onset of cross-sex hormones, if indicated, commence at age sixteen, when most adolescents are deemed competent to provide informed consent and make medical decisions in their own best interest.<sup>78</sup> However, the Endocrine Society notes that in some cases, cross-sex hormones may be appropriate for individuals younger than sixteen, especially if Tanner Stage 2 puberty occurred at an early age, because lengthy treatment with puberty blockers may inhibit bone health.<sup>79</sup> The effects of gender-affirming hormones are *not* fully reversible and include the potential reduction or complete loss of fertility for transgender people.<sup>80</sup> For transgender girls who take feminizing estrogen, permanent physical changes include breast enlargement, shrinking of the testes, and decreased sperm production.<sup>81</sup> Permanent effects of masculinizing

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74. See WPATH STANDARDS OF CARE, *supra* note 35, at 18, 20.

75. *Id.* at 36.

76. *Id.*

77. See *id.* at 41–42.

78. Hembree et al., *supra* note 44, at 3884; WPATH STANDARDS OF CARE, *supra* note 35, at 20.

79. Hembree et al., *supra* note 44, at 3884–85.

80. *Id.* at 3878.

81. *Feminizing Hormone Therapy*, NEB. MED., <https://www.nebraskamed.com/transgender-care/feminizing-hormone-therapy> (last visited Mar. 31, 2022).

testosterone include increased body hair (face and body), scalp hair loss, deepened voice, enlarged clitoris, and infertility.<sup>82</sup>

#### 4. *Gender-affirming surgeries*

Gender-affirming surgeries for transgender men typically include mastectomies (breast removal), phalloplasties (penis construction), and hysterectomies (uterus removal).<sup>83</sup> Typical gender-affirming surgeries for transgender women include breast augmentation, vaginoplasty (vagina construction), and orchiectomy (testicle removal).<sup>84</sup> Surgeries for transgender minors in the United States are rare.<sup>85</sup> A bilateral mastectomy is the most common surgery for transgender males, likely because of “functional limitations and psychological distress from having breasts ([e.g.], discomfort from binding breasts, limitations on choice of physical activity and clothing, [and] difficulty in being recogni[z]ed as male).”<sup>86</sup>

Although rare, some transgender males as young as thirteen have undergone chest masculinization surgery in the United States.<sup>87</sup> These surgeries often have set age limitations; for example, Boston Children’s Hospital sets minimum age limits for chest reconstruction (fifteen), phalloplasty (eighteen), and

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82. *Masculinizing Hormone Therapy*, NEB. MED., <https://www.nebraskamed.com/transgender-care/masculinizing-hormone-therapy> (last visited Mar. 31, 2022).

83. WPATH STANDARDS OF CARE, *supra* note 35, at 57.

84. *Id.*

85. *See generally* Mahfouda et al., *supra* note 55, at 816, 819.

86. *See* Simone Mahfouda, Julia K Moore, Aris Siafarikas, Timothy Hewitt, Uma Ganti, Ashleigh Lin & Florian Daniel Zepf, *Gender-Affirming Hormones and Surgery in Transgender Children and Adolescents*, 7 LANCET: DIABETES & ENDOCRINOLOGY 1, 11 (2018). Chest masculinization surgery often involves a double mastectomy to remove unwanted breast tissue and nipple grafts to reshape and reposition the “nipple-areola complex” for a more masculine effect. Samyd S. Bustos, Antonio J. Forte, Pedro Ciudad & Oscar J. Manrique, *The Nipple Split Sharing vs. Conventional Nipple Graft Technique in Chest Wall Masculinization Surgery: Can We Improve Patient Satisfaction and Aesthetic Outcome?* 44 AESTHETIC PLASTIC SURGERY 1478, 1479 (2020).

87. Johanna Olson-Kennedy, Jonathan Warus, Vivian Okonta, Marvin Belzer & Leslie F. Clark, *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts*, 172 JAMA PEDIATRICS 431, 433 (2018).

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vaginoplasty (seventeen).<sup>88</sup> In addition to the age requirements, this premier surgical center requires additional confirmation from treating medical practitioners and therapists of “persistent, well documented, [GD],” as well as letters from at least three medical practitioners confirming readiness for the procedure and confirming a minimum of one year of “living full time” in their preferred gender for bottom surgery.<sup>89</sup>

## II. THE LEGISLATION

Transgender minors and gender-affirming medical care entered national political discourse as a result of a custody battle in Dallas, Texas between a mother who supported her child’s identification as a girl and a father who did not.<sup>90</sup> Anne Georgulas and Jeffrey Younger were married in 2010 and had twins in 2012, both assigned male at birth, before Georgulas filed for divorce in 2015.<sup>91</sup> At three years old, one of the twins began to identify as a girl, and chose the name Luna.<sup>92</sup> In 2018, Georgulas, a pediatrician, filed to modify the parenting agreement after a dispute arose over the proper response to Luna’s GD.<sup>93</sup> Her request sought to enjoin Younger from rejecting Luna’s gender identity.<sup>94</sup> Throughout this period, at

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88. *Center for Gender Surgery: Eligibility for Surgery*, BOS. CHILDS. HOSP., <https://www.childrenshospital.org/programs/center-gender-surgery-program/eligibility-surgery> (last visited Mar. 31, 2022).

89. *Id.*

90. Katelyn Burns, *What the Battle Over a 7-Year-Old Trans Girl Could Mean for Families Nationwide*, VOX (Nov. 11, 2019, 9:00 AM), <https://www.vox.com/identities/2019/11/11/20955059/luna-younger-transgender-child-custody>.

91. *In re JA.D.Y. & Ju.D.Y.*, No. 05-16-01412-CV, 2018 WL 3424359, at \*1 (Tex. App. July 16, 2018).

92. Burns, *supra* note 90.

93. See Dawn Ennis, *Texas Is Afraid of a 7-Year-Old Transgender Girl*, FORBES (Oct. 26, 2019, 2:12 PM), <https://www.forbes.com/sites/dawnstaceyennis/2019/10/26/texas-is-afraid-of-a-7-year-old-transgender-girl/?sh=5611a8d156fa>.

94. Luke Macias, *A Father’s Fight for the Life of His Son*, YOUTUBE (Jan. 28, 2019), [https://www.youtube.com/watch?v=kUYFJcw7qm4&feature=emb\\_logo](https://www.youtube.com/watch?v=kUYFJcw7qm4&feature=emb_logo) [hereinafter *A Father’s Fight for the Life of His Son*]. Younger appeared on a conservative podcast, *The Luke Macias Show*, in January 2019 to talk about his experiences. See generally *id.* Luke Macias bills himself as the

Luna's young age, she was solely undergoing social transition; no medical interventions had begun as Luna had not yet reached the Tanner Stage 2 of puberty.<sup>95</sup> Luna's father refused to accept a transgender child and claimed that Georgulas was forcing an unwanted existence on his child.<sup>96</sup>

This custody dispute continued for fifteen months until a jury trial was held in October 2019.<sup>97</sup> The jury granted Georgulas sole custody of both children in an eleven-to-one decision.<sup>98</sup> A conservative media frenzy followed; a petition rife with misinformation garnered over 250,000 signatures seeking to convince Texas politicians to "step in immediately to save [James] and all other children under the threat of 'social transitioning.'"<sup>99</sup> Many political figures weighed in and the familial dispute caught the attention of conservative lawmakers in Texas.<sup>100</sup> After the jury's decision, Texas Governor Greg Abbott announced that the state's Attorney General's Office

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"conservative voice of Texas." Luke Macias, <https://lukemacias.com/> (last visited Apr. 1, 2022). During the podcast, Younger explained that:

[Georgulas] sought to enjoin me from using masculine pronouns. . . . She wants the court to force me to go to transgender education that I have to actually pass. . . . She wants to reduce my visitation to the point where I have no overnight visits. And, further, she wants to enjoin my speech outside of the home so that I can never present James as a boy to the outside world nor use his real name nor use masculine pronouns, even when I speak about him when he's not even there.

*A Father's Fight for the Life of His Son*, *supra*.

95. Burns, *supra* note 90; see also Hembree et al., *supra* note 44, at 3881.

96. *A Father's Fight for the Life of His Son*, *supra* note 90.

97. Burns, *supra* note 90.

98. Ennis, *supra* note 93.

99. Save "BOY Ja.D.Y. from Chemical Castration, CHANGE.ORG, <https://www.change.org/p/save-boy-ja-d-y-from-chemical-castration> (last visited Apr. 1, 2022). The petition erroneously declared that "[s]ex change surgery on young children is a horrific form [of] child-abuse that is liable to cause [James] and countless other children grave suffering in the years ahead." *Id.* The petition contains classic conservative conflation of gender-affirming treatment, such as in one sentence demanding that seven-year-old James be prevented from subjection to social transition, and in the very next sentence discussing the "horrific" (and non-existent) practice of "sex change surgery on young children." *Id.*

100. Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Oct. 24, 2019, 7:44 AM), <https://twitter.com/DonaldJTrumpJr/status/1187334051386089472> ("This is child abuse. People need to start to stand up against this bullshit. Enough is enough."); Senator Ted Cruz (@SenTedCruz), TWITTER (Oct. 23, 2019, 8:01 PM), <https://twitter.com/SenTedCruz/status/1187157024888496128> ("This is horrifying & tragic. For a parent to subject such a young child to life-altering hormone blockers to medically transition their sex is nothing less than child abuse.").

and social services department were investigating the matter.<sup>101</sup> Other Texas lawmakers similarly decried gender-affirming treatment as child abuse and vowed to introduce legislation prohibiting the treatment for minors.<sup>102</sup> In response, Judge Cooks set aside the jury decision and granted the parents joint custody and joint medical decision-making authority.<sup>103</sup> Conservative legislators in many states introduced proposed legislation to prohibit transgender minors from accessing gender-affirming treatment shortly thereafter; the first bill was introduced in Illinois in February 2019.<sup>104</sup> The custody dispute between Georgulas and Younger continued in Texas state court; in August 2021, Georgulas successfully obtained temporary full custody and permission to withhold information from Younger, with Younger only permitted to have supervised visitation rights.<sup>105</sup>

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101. Greg Abbott (@GregAbbott\_TX), TWITTER (Oct 23, 2019, 7:58 PM), [https://twitter.com/GregAbbott\\_TX/status/1187156266449330176](https://twitter.com/GregAbbott_TX/status/1187156266449330176).

102. See Karen Zraick, *Texas Father Says 7-Year-Old Isn't Transgender, Igniting a Politicized Outcry*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/texas-transgender-child.html>. A popular hashtag, #SaveJamesYounger, arose stemming from the situation. See *id.*; see also Matt Krause (@RepMattKrause), TWITTER (Oct. 23, 2019, 9:03 PM), <https://twitter.com/RepMattKrause/status/1187172853621428226> (“I will introduce legislation that prohibits the use of puberty blockers in these situations for children under 18. We missed our opportunity to do so in the 86th Session. We won’t miss the next one. #savejamesyounger.”); Cody Harris (@CodyforTexas TWITTER (Oct. 23, 2019, 9:25 PM), <https://twitter.com/CodyforTexas/status/1187178296896827392> (“I will gladly co-author that bill, Matt.”); Steve Toth (@Toth\_4\_Texas), TWITTER (Oct. 26, 2019, 12:08 PM), [https://twitter.com/Toth\\_4\\_Texas/status/1188125242054578176](https://twitter.com/Toth_4_Texas/status/1188125242054578176) (“The 1st bill I file in the 87th will add ‘Transitioning [o]f a Minor’ as Child Abuse. Upwards of 500 minors are being transitioned in TX[.] We didn’t protect these children in the 86th[.] The wrath of Texans will be heard in the 87th. Texas will step up to #SaveJamesYounger.”).

103. Ennis, *supra* note 93.

104. H.B. 3515, 101st Gen. Assemb. (Ill. 2020).

105. Temporary Restraining Order & Order Setting Hearing for Temporary Orders, *Ex parte* J.A.D.Y. & J.U.D.Y., No. DF-15-09887 (Tex. Dist. Ct. 2021).

A. *Proposed Legislation to Prohibit Gender-Affirming Treatment for Minors*

Legislation proposed in multiple states<sup>106</sup> has sought to prohibit minors from receiving GD treatment.<sup>107</sup> All of the bills introduced in 2020 died at the end of the respective legislative sessions, but conservative lawmakers in at least nineteen states were quick to reintroduce versions of the bills at the start of 2021.<sup>108</sup> Except for one Democratic sponsor,<sup>109</sup> every single sponsor of the proposed legislation are members of the Republican party.<sup>110</sup> The first of these bills to receive media attention was proposed in South Dakota<sup>111</sup>—a conservative stronghold “often used as a testing ground for conservative

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106. See Chelsey Cox, *As Arkansas Bans Treatments for Transgender Youth, 15 Other States Consider Similar Bills*, USA TODAY (Apr. 8, 2021, 7:4 PM), <https://www.usatoday.com/story/news/politics/2021/04/08/states-consider-bills-medical-treatments-transgender-youth/7129101002/>. In addition to state-level legislation, in August 2020, Republican representative Doug LaMalfa introduced similar federal legislation that would penalize medical professionals who perform “gender reassignment medical interventions” with a fine and/or imprisonment up to five years. See H.R. 8012, 116th Cong. (2d Sess. 2020). The legislation died without passage. See *id.*

107. See, e.g., H.B. 1057, 95th Gen. Assemb., Reg. Sess. (S.D. 2020).

108. H.B. 1, Reg. Sess. (Ala. 2021); S.B. 10, Reg. Sess. (Ala. 2021); S.B. 1511, 55th Leg., Reg. Sess. (Ariz. 2021); H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 935, Reg. Sess. (Fla. 2021); H.B. 401, Reg. Sess. (Ga. 2021); S.B. 224, 122nd Gen. Assemb. (Ind. 2021); H.B. 1505, 122nd Gen. Assemb. (Ind. 2021); H.B. 193, 89th Gen. Assemb. (Iowa 2021); S.B. 214, Reg. Sess. (Kan. 2021); H.B. 2210, Reg. Sess. (Kan. 2021); H.B. 336, Reg. Sess. (Ky. 2021); S.B. 2171, Reg. Sess. (Miss. 2021); S.B. 442, 101st Gen. Assemb. (Mo. 2021); H.B. 33, 101st Gen. Assemb. (Mo. 2021); H.B. 427, 67th Gen. Assemb. (Mont. 2021); H.B. 68, Gen. Sess. (N.H. 2021); S.B. 583, 58th Gen. Assemb. (Okla. 2021); S.B. 676, 58th Gen. Assemb., Reg. Sess. (Okla. 2021); H.B. 1004, 58th Gen. Assemb. (Okla. 2021); H.B. 4047, 124th Gen. Assemb. (S.C. 2021); S.B. 657, 112th Gen. Assemb. (Tenn. 2021); H.B. 578, 112th Gen. Assemb. (Tenn. 2021); H.B. 68, 87th Gen. Assemb., (Tex. 2021); H.B. 1399, 87th Gen. Assemb., (Tex. 2021); S.B. 1646, 87th Gen. Assemb., 3d Spec. Sess. (Tex. 2021); S.B. 28, 87th Gen. Assemb., Reg. Sess. (Tex. 2021); H.B. 92, Gen. Sess. (Utah 2021); H.B. 2171, Reg. Sess. (W.Va. 2021); Mey Rude, *Democratic Politician is Architect of South Carolina Anti-Trans Bill*, ADVOCATE (Mar. 18, 2021, 3:26 PM), <https://www.advocate.com/politics/2021/3/18/democratic-politician-architect-south-carolina-anti-trans-bill>.

109. Rude, *supra* note 108.

110. See *id.*

111. See H.B. 1057, 2020 Leg., Reg. Sess. (S.D. 2020). The South Dakota bill passed in the House of Representatives with forty-six yeas and twenty-three nays. *Id.* Upon introduction in the Senate, the bill was referred to committee and subsequently failed. *Id.*; *South Dakota House Bill 1057*, LEGISCAN, <https://legiscan.com/SD/bill/HB1057/2020> (last visited Apr. 1, 2022).

bills.”<sup>112</sup> Introduced on January 14, 2020,<sup>113</sup> the bill would prohibit medical professionals from treating transgender youth “for the purpose of attempting to change or affirm the minor’s perception of [their] sex, if that perception is inconsistent with the minor’s sex,” including treatments involving puberty blockers, gender-affirming hormone treatments, and surgical interventions.<sup>114</sup> Bills proposed in 2021 have similar language. Many of the bills prohibit gender-affirming therapy or counseling<sup>115</sup> or “gender transition procedures” for minors under eighteen,<sup>116</sup> while others prohibit procedures on individuals under twenty-one.<sup>117</sup> Prohibited procedures include prescribing drugs or any medical or surgical service,<sup>118</sup> but procedures on intersex children or children with disorders of sexual hormone production were expressly exempt from the bills’ purview.<sup>119</sup> Consequences imposed on medical practitioners for violation of the prohibition differ by state but commonly involve professional discipline, including potential “suspension or revocation” of professional licensure,<sup>120</sup> creation of a civil cause of action for affirming treatment completed in violation of the prohibition,<sup>121</sup> or even potential criminal felony

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112. Wax-Thibodeaux & Schmidt, *supra* note 48.

113. During an interview promoting H.B. 1057, Representative Deutsch, who introduced the bill, described gender-affirming treatments as “mutilation” and “bizarre medical experiments” and compared gender-affirming treatment to Nazi doctors’ medical experiments conducted on unwilling participants during the Holocaust. Devan Cole, *South Dakota State Lawmaker Says He Regrets Drawing Comparison Between Transgender Medical Procedures and Nazi Doctor Experiments*, CNN, <https://www.cnn.com/2020/01/28/politics/south-dakota-fred-deutsch-transgender-bill-nazi-holocaust/index.html> (Jan. 28, 2020, 3:40 PM). He later apologized for the comparison, calling his comments “regrettable.” *Id.*

114. H.B. 1057, 2020 Leg., Reg. Sess. (S.D. 2020).

115. S.B. 23, 87th Leg., 2d Spec. Sess. (Tex. 2021).

116. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); *see also* S.B. 442, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 33, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

117. S.B. 676, 58th Leg., 1st Sess. (Okla. 2021).

118. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

119. *Id.*

120. S.B. 583, 58th Leg., 1st Sess. (Okla. 2021); *see also* S.B. 442, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 33, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

121. H.B. 336, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

charges.<sup>122</sup> Texas's proposed bill classifies any medical professional who treats transgender children with gender-affirming care, or any parent who consents to such treatment, as child abusers.<sup>123</sup> This is especially concerning as any parents charged with abuse for affirming their child's gender could be at risk of having their parental rights challenged by social services. Tennessee's proposed legislation is milder, only prohibiting puberty blockers and hormones but allowing an exception if both parents consent to treatment and the treatment is signed off by at least two physicians and a third who is board-certified in child and adolescent psychiatry.<sup>124</sup>

Arkansas was the first state to pass its version of legislation prohibiting gender-affirming treatment for minors on March 29, 2021.<sup>125</sup> Arkansas' governor, Asa Hutchinson, was expected to sign the bill into law as he had previously signed-off on other anti-trans legislation.<sup>126</sup> However, in an unexpected move, Governor Hutchinson vetoed the ban, calling it "a vast government overreach" because of its interference between the physician-patient relationship.<sup>127</sup> However, the very next day, on April 6, 2021, the Arkansas legislature overwhelmingly

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122. S.B. 214, 2021 Leg., Reg. Sess. (Kan. 2021); H.B. 2210, 2021 Leg., Reg. Sess. (Kan. 2021).

123. See S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021); see also H.B. 38, 87th Leg., 2nd Spec. Sess. (Tex. 2021).

124. H.B. 578, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

125. See *Arkansas Is First State to Ban Gender-Affirming Treatments for Trans Youth*, GUARDIAN (Apr. 6, 2021, 8:06 PM), <https://www.theguardian.com/society/2021/apr/06/arkansas-transgender-youth-gender-affirming-treatment-ban>.

126. See Martin Pengelly, *Arkansas Governor Who Vetoed Anti-Trans Law Defends Other Anti-Trans Bills*, GUARDIAN (Apr. 11, 2021, 11:00 AM), <http://www.theguardian.com/us-news/2021/apr/11/arkansas-governor-asa-hutchinson-anti-trans-bills>. In 2021, Governor Hutchinson signed an Arkansas bill that banned transgender girls from girls' sports and another bill that permitted medical professionals to refuse to treat transgender individuals because of moral or religious objections. See *id.*

127. Vanessa Romo, *Arkansas Governor Vetoes Ban on Gender-Affirming Care for Trans Youth*, NPR (Apr. 5, 2021, 5:46 PM), <http://www.npr.org/2021/04/05/984555637/arkansas-governor-vetoes-anti-transgender-treatment-ban-for-minors>.

overrode the governor's veto, and the first bill banning transgender minors from gender-affirming care became law.<sup>128</sup>

### B. Conservative Lawmakers and Anti-Trans Legislation

Anti-trans sentiment espoused by conservative lawmakers is certainly not new. Conservative organizations and politicians have spoken disrespectfully about transgender existence,<sup>129</sup> coordinated political efforts with misleading information to galvanize Republican voters by stirring up fears about the existence of transgender individuals,<sup>130</sup> and drafted legislation to stop transgender minors from freely expressing their gender identities, most recently with “bathroom bills” which aim to prohibit transgender students from using restrooms associated with their gender identity.<sup>131</sup> By April 2021, thirty-three states had introduced over 100 anti-trans bills—more than ever before.<sup>132</sup>

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128. See *Arkansas Is First State to Ban Gender-Affirming Treatments for Trans Youth*, *supra* note 125; H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021). The ACLU sued the state of Arkansas on May 25, 2021, shortly after the legislation's enactment. See Complaint at 1, *Brandt v. Rutledge*, No. 4:21CV450-JM (E.D. Ark. May 25, 2021). On July 21, 2021, the ACLU succeeded in obtaining a preliminary injunction enjoining the law from taking effect during the pendency of the litigation. See Order, No. 4:21CV00450-JM (E.D. Ark. July 21, 2021).

129. Tracy Jan & Jeff Stein, *HUD Secretary Ben Carson Makes Dismissive Comments About Transgender People, Angering Agency Staff*, WASH. POST (Sept. 19, 2019), <https://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff/>. In 2019, employees of HUD reported that in an agency meeting, former HUD Secretary Ben Carson made disparaging remarks about transgender people, including “express[ing] concern about ‘big, hairy men’ trying to infiltrate women’s homeless shelters” and lamenting that society no longer seemed to know the difference between men and women. See *id.*

130. See Gabby Orr, *The Wedge Issue That’s Dividing Trumpworld*, POLITICO (Aug. 7, 2020, 7:08 AM), <https://www.politico.com/news/magazine/2020/08/07/wedge-issue-dividing-trump-world-392323> (“A group of social conservatives wants the president to embrace anti-transgender issues to reverse his sagging poll numbers.”).

131. See Olga Khazan, *The True Harm of Bathroom Bills*, ATLANTIC (May 19, 2016), <https://www.theatlantic.com/health/archive/2016/05/transgender-bathrooms-suicide/483351/>. These bathroom bills have largely failed. See, e.g., Aria Jones, *‘Bathroom Bill 2.0’: Effort to Bar Transgender Athletes in Texas Schools Gets Hearing*, AUSTIN AM.-STATESMAN (Mar. 26, 2021, 8:01 AM), <https://www.statesman.com/story/news/2021/03/26/texas-transgender-athletes-bill-gets-senate-hearing/7002916002/>.

132. Krishnakumar, *supra* note 23.

In conjunction with attempts to cut transgender minors' access to gender-affirming care, conservatives have also introduced legislation in multiple states seeking to prohibit transgender girls from playing gender-segregated sports on girls' athletic teams and would potentially subject students to genital inspections to confirm that their athletic team correlates with their gender assigned at birth.<sup>133</sup> The first bill accomplishing this prohibition was passed in Mississippi on March 11, 2021 and went into effect on July 1, 2021.<sup>134</sup> Republican lawmakers have also introduced legislation seeking to prevent taxpayer funds from being used for "inmate gender-confirmation surgery or hormone therapy"<sup>135</sup> and have proposed religious exemptions to permit those with certain beliefs to discriminate against transgender people in areas of adoption, foster care, and education.<sup>136</sup>

The dispute over gender-affirming care for transgender minors even entered the 2020 presidential election. At a Philadelphia town hall, the mother of an eight-year-old transgender girl asked then-presidential candidate Joe Biden what his plans were to "ensure that the lives and rights of LGBTQ people are protected under [United States law]."<sup>137</sup> President Biden responded that with regards to children expressing a transgender identity, "there should be zero

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133. Julie Moreau, *Dozens of Anti-LGBTQ State Bills Already Proposed in 2020*, *Advocates Warn*, NBC NEWS (Jan. 23, 2020, 1:26 PM), <https://www.nbcnews.com/feature/nbc-out/dozens-anti-lgbtq-state-bills-already-proposed-2020-advocates-warn-n1121256>; Anagha Srikanth, *Florida's New Ban on Transgender Students in Sports Would Allow Schools to Subject Minors to Genital Inspections*, HILL (Apr. 15, 2021), <https://thehill.com/changing-america/respect/equality/548534-floridas-new-ban-on-transgender-students-in-sports-would>.

134. S.B. 2536, 2021 Leg., Reg. Sess. (Miss. 2021).

135. H.B. 2144, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

136. See *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> (Dec. 12, 2021).

137. Caitlin O'Kane, *Biden Tells Mother of Transgender Daughter There Should Be "Zero Discrimination"*, CBS NEWS (Oct. 16, 2020, 6:51 AM), <https://www.cbsnews.com/news/biden-town-hall-transgender-rights-zero-discrimination/>; Samantha Schmidt, *A Mother Told Biden About Her Transgender 8-Year-Old Child. Then Came the Attacks*, WASH. POST (Oct. 29, 2020, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2020/10/29/mother-told-biden-about-her-transgender-8-year-old-child-then-came-attacks/>.

discrimination . . . [t]here is no reason to suggest that there should be any right denied [to] your daughter . . . that your other daughter has a right to be and do. None. Zero.”<sup>138</sup> Following his response, conservative political groups responded in uproar, with one organization, the American Principles Project (APP), announcing that President-Elect Biden’s answer explicitly endorsed “sex changes for children as young as eight years old.”<sup>139</sup> The APP used Biden’s statement as an opportunity for political gain and spread similar misinformation through a mass text-messaging campaign.<sup>140</sup>

### III. MEDICAL REFUTATION OF THE PROPOSED LEGISLATION’S REASONING

Gender-affirming care is life-saving care. Transgender adolescents contending with GD are at a much higher risk for suicidal behavior than their cisgender peers: a study conducted in 2018 found that “[f]emale to male adolescents reported the highest rate of attempted suicide” at 50.8%; and 29.9% of male to female adolescents attempted suicide.<sup>141</sup> This stark reality is completely transformed when transgender adolescents’ gender identity is affirmed. A 2017 study comparing transgender children with supportive family systems to cisgender children found that “allowing children to present in everyday life as their gender identity rather than their natal sex is associated

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138. *The Vice President and the People: A Special Edition of 2020*, ABC NEWS (Oct. 15, 2020, 1:23 PM), <https://abc.com/shows/election-2020/episode-guide/season-01/15-the-vice-president-and-the-people-a-special-edition-of-2020>.

139. *Biden Explicitly Endorses Sex Changes for Children During ABC News Town Hall*, AM. PRINCIPLES PROJECT (Oct. 15, 2020), <https://americanprinciplesproject.org/elections/biden-explicitly-endorses-sex-changes-for-children-during-abc-news-town-hall/>.

140. See Cade Metz, *Disinformation Moves from Social Networks to Texts*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/technology/disinformation-moves-from-social-networks-to-texts.html>.

141. Russell B. Toomey, Amy K. Syvertsen & Maura Shramko, *Transgender Adolescent Suicide Behavior*, 142 PEDIATRICS, no. 4, 2018, at 1. In contrast, only 17.6% of cisgender females and 9.8% of cisgender males reported suicidal behavior. *Id.*

with *developmentally normative* levels of depression and anxiety.”<sup>142</sup>

Conservatives often cite the statistic that dysphoric feelings naturally dissipate in roughly 85% of children experiencing them prior to the onset of adolescence in order to argue that “watchful waiting” is a superior alternative to gender-affirming social transition and puberty suppressing hormone treatment.<sup>143</sup> However, studies analyzing the association of pubertal suppression with positive mental health outcomes overwhelmingly support the use of hormone treatment in adolescents.<sup>144</sup> In cases where minors experience “strong and consistent physical dysphoria,”<sup>145</sup> delaying the introduction of puberty blockers in individuals (beyond Tanner Stage 2 of puberty) is associated with “higher rates of depression, anxiety, eating disorders, and suicidality”<sup>146</sup> as well as an increased risk of “harm, including violence . . . [and] sexually transmitted infections (such as HIV).”<sup>147</sup>

Conservatives also use the same statistic to argue that hormone initiation in children is inappropriate when roughly 85% of dysphoric children will grow out of their dysphoria<sup>148</sup> and that many dysphoric individuals eventually come to regret

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142. Kristina R. Olson, Lily Durwood, Madeleine DeMeules & Katie A. McLaughlin, *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS 1, 5 (2016) (emphasis added).

143. See GABE MURCHISON, DEANNA ADKINS, LEE ANN CONARD, DIANE EHRENSAFT, TIMOTHY ELLIOTT, LINDA A. HAWKINS, XIMENA LOPEZ, HENRY NG & CAROLYN WOLF-GOULD, HUM. RTS. CAMPAIGN, SUPPORTING & CARING FOR TRANSGENDER CHILDREN 13 (2016); Emilie Kao & Nicholas Marr, *Newly Proposed Transgender Policies Could Harm Elderly and the Young*, HERITAGE FOUND. (July 2, 2019), <https://www.heritage.org/gender/commentary/newly-proposed-transgender-policies-could-harm-elderly-and-the-young>; Julian Vigo, *The Myth of the “Desistance Myth”*, PUB. DISCOURSE (July 2, 2018), <https://www.thepublicdiscourse.com/2018/07/21972/>.

144. See *What Is Gender Dysphoria?*, *supra* note 49, at 1.

145. Kuper, *supra* note 56, at 8.

146. *Id.*

147. Kimberly et al., *supra* note 64, at 2.

148. See Kao & Marr, *supra* note 143.

their decisions to undergo gender-affirming treatment.<sup>149</sup> This argument is erroneous and misleading. Although it is true that GD in young children dissipates upon adolescence in the majority of children, the only professionally recommended gender-affirming treatment for *children* is reversible social transitioning.<sup>150</sup> Transgender children who continue to experience GD as adolescents, at the onset of puberty, and who begin hormonal treatments generally “do not change their minds about medically transitioning” in the “vast majority” of cases.<sup>151</sup> A study from the Netherlands found that for the subset of gender dysphoric children whose dysphoria persisted into adolescence and who chose to initiate puberty blockers, only 1.9% decided to stop treatment.<sup>152</sup> Despite the partially irreversible nature of gender-affirming hormonal treatments, a patient expressing regret is extraordinarily rare.<sup>153</sup> In 2015, only fifteen of 6,793 patients, or 0.22%, treated with gender-affirming hormones expressed regret.<sup>154</sup>

Another misleading claim made by organizations and individuals opposed to gender-affirming treatment is that hormones are prescribed to young children.<sup>155</sup> According to one such organization, puberty-blocking drugs and cross-sex hormones, like testosterone, are currently prescribed to

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149. See, e.g., Walt Heyer, *Transgender Regret Is Real Even If the Media Tell You Otherwise*, FEDERALIST (Aug. 19, 2015), <https://thefederalist.com/2015/08/19/transgender-regret-is-real-even-if-the-media-tell-you-otherwise/>.

150. See WPATH STANDARDS OF CARE, *supra* note 35, at 74 (stating that the World Professional Association for Transgender Health’s Standards of Care “condone[s] genital surgery before 18”); Hembree et al., *supra* note 44, at 3881.

151. Jack Turban, *It’s Okay to Let Your Transgender Kid Transition – Even if They Might Change Their Mind in the Future*, VOX (Oct. 22, 2018, 9:41 PM), <https://www.vox.com/2018/10/22/18009020/transgender-children-teens-transition-detransition-puberty-blocking-medication; What Is Gender Dysphoria?>, *supra* note 49, at 8.

152. See Turban, *supra* note 151; see also *What Is Gender Dysphoria?*, *supra* note 49, at 7.

153. See Guy T’Sjoen, Jon Arcelus, Louis Gooren, Daniel T. Klink & Vin Tangpricha, *Endocrinology of Transgender Medicine*, 40 ENDOCRINE REVS. 97, 101 (2018).

154. *Id.*

155. See Brandon Showalter, *Parents of Gender-Confused Kids Demand Investigation of Gov’t-Funded Study on Puberty Blockers*, CHRISTIAN POST (July 31, 2019), <https://www.christianpost.com/news/parents-of-gender-confused-kids-demand-investigation-govt-funded-study-puberty-blockers.html>.

children “as young as [eight] years old.”<sup>156</sup> In reality, this statement actually conflates two separate treatments: reversible puberty blocking hormones and partially reversible gender-affirming hormones. Although puberty blockers may conceivably be prescribed to an eight-year-old child if they meet all the proper criteria and reach the Tanner Stage 2 of puberty by that age, puberty blocker treatment is completely reversible.<sup>157</sup> Gender-affirming hormones, or cross-sex hormones, are only prescribed to adolescents years after puberty-blocking hormones, and are never prescribed to young children.<sup>158</sup> Additionally, for many children who report feelings of GD at a young age, by the time cross-sex hormones are deemed appropriate treatment by medical professionals, the adolescents have been persistently expressing GD for many years.<sup>159</sup>

As research on GD continues, a clearer picture will likely emerge as to what specific symptoms among gender dysphoric children indicate that dysphoria is likely to persist into adolescence and adulthood.<sup>160</sup> For example, increased “cross-gender behavior” and display of “more intense [GD] during childhood” is indicative of persistent dysphoria later in life.<sup>161</sup> Additionally, individuals with persistent dysphoria often “described their childhood experiences with gender differently . . . insisting that they *were* the ‘other’ gender, while desisters had said they *wished* they were that gender.”<sup>162</sup> These unknowns highlight the importance of the current multi-disciplinary and individualized treatment.

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156. *Id.*

157. See Turban, *supra* note 151.

158. See Hembree et al., *supra* note 44, at 3884; see also Turban, *supra* note 151.

159. See Hembree et al., *supra* note 44, at 3885.

160. See MURCHISON ET AL., *supra* note 143, at 14.

161. *Id.*; see Madeleine S.C. Wallien & Peggy T. Cohen-Kettenis, *Psychosexual Outcome of Gender-Dysphoric Children*, 47 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1413, 1420–21 (2008).

162. See MURCHISON ET AL., *supra* note 143, at 14.

Despite conservative panic to the contrary, doctors do not allow just anyone to initiate hormone treatment therapy; medical professionals managing gender-affirming care are not haphazardly handing out hormones to every child who experiences some form of gender questioning.<sup>163</sup> Specifically, WPATH only recommends reversible puberty-blocking treatment for minors when a mental health professional has deemed such treatment appropriate based on “a long-lasting and intense pattern of gender nonconformity or [GD that has] . . . worsened with the onset of puberty,” and all “coexisting psychological, medical, or social problems that could interfere with treatment . . . have been addressed.”<sup>164</sup> Additionally, prior to the initiation of puberty-blocking hormones, it is recommended that a pediatric endocrinologist confirm that, at a minimum, Tanner Stage 2 puberty has begun in the adolescent.<sup>165</sup> Finally, practitioners are required to ensure that both the adolescent patient and their parents/guardians are fully informed about all potential short- and long-term side effects of the hormone treatment, “including potential loss of fertility if the individual subsequently continues with sex hormone treatment,” as well as viable “options to preserve fertility.”<sup>166</sup> In fact, a recent study of over 20,000 transgender adults found that 16.9% had been interested in puberty blockers as part of their gender affirmation.<sup>167</sup> However, healthcare providers only cleared 2.5% of those for treatment with puberty blockers, evidencing the stringent care with which healthcare providers prescribe these treatments.<sup>168</sup>

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163. See Tony Perkins, *Puberty Blocker Shocker: Activist Docs Push Drugs for Kids*, FAM. RSCH. COUNCIL (Mar. 11, 2020), <https://www.frc.org/updatearticle/20200311/puberty-shocker>; see also WPATH STANDARDS OF CARE, *supra* note 35 at 17.

164. Hembree et al., *supra* note 44, at 3878.

165. See *id.*

166. *Id.*

167. See Jen Christensen, *Puberty Blockers Can Be ‘Life-Saving’ Drugs for Trans Teens, Study Shows*, CNN HEALTH, <https://www.cnn.com/2020/01/23/health/transgender-puberty-blockers-suicide-study/index.html> (Jan. 23, 2020, 7:14 AM).

168. See *id.*

Similar steps to obtain informed consent are required prior to the initiation of cross-sex hormones.<sup>169</sup> Because of the partially or wholly irreversible nature of certain gender-affirming treatments,<sup>170</sup> the Endocrine Society notes that clinicians may require that treatment only be allowed after confirmation by a multi-disciplinary team that the patient has experienced “the persistence of gender dysphoria/gender incongruence” and also has the “mental capacity to give informed consent,” which is usually reached by age sixteen.<sup>171</sup> Similarly, WPATH recommends that irreversible treatments, such as genital surgery, “not be carried out until . . . [the] patient[] [has] reach[ed] the legal age of majority in a given country.”<sup>172</sup> The minor’s ability to provide informed consent at this treatment stage is vital because the decision to undergo treatment with cross-sex hormones can result in decreased fertility.<sup>173</sup>

Even in the face of major medical organizations’ support of gender-affirming treatment as the appropriate standard of care and research showing overwhelming improvements in mental state as well as reduced distress among transgender minors receiving gender-affirming care, conservative organizations sponsoring and assisting with drafting the proposed legislation<sup>174</sup> have portrayed gender-affirming medical treatment as “crazed liberal doctors irreversibly ‘mutilating’ the

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169. See Hembree et al., *supra* note 44, at 3869–70.

170. See discussion *supra* Section I.A.

171. Hembree et al., *supra* note 44, at 3870.

172. WPATH STANDARDS OF CARE, *supra* note 35, at 21. WPATH also notes that, for partially reversible interventions, such as hormone therapy, “16-year-olds are legal adults for medical decision-making and do not require parental consent,” but further states that “[i]deally, treatment decisions should be made among the adolescent, the family, and the treatment team.” *Id.* at 20.

173. See *id.* at 32, 25–27 (discussing that, in addition to hormone therapy, some clinicians may discuss hysterectomy, bilateral mastectomy, or chest reconstruction or augmentation with patients); see also Hembree et al., *supra* note 44, at 3878.

174. These conservative organizations include the Liberty Counsel, Kelsey Coalition, Heritage Foundation, Alliance Defending Freedom, and the Eagle Forum. Wax-Thibodeaux & Schmidt, *supra* note 48; Wyatt Ronan, *BREAKING: First Anti-Trans Bill of 2021 Signed into Law by Mississippi Governor Tate Reeves*, HUM. RTS. CAMPAIGN (Mar. 11, 2021), <https://www.hrc.org/press-releases/breaking-first-anti-trans-bill-of-2021-signed-into-law-by-mississippi-governor-tate-reeves>.

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bodies of confused children” and have perpetuated myths regarding gender affirming treatment that are misleading and unsupported by medical research.<sup>175</sup> Those advocating to prohibit gender-affirming treatment often discount available evidence supporting the treatment as insufficiently tested and experimental while simultaneously spreading misinformation to their constituents regarding the treatment.<sup>176</sup> Although conservatives generally frame the legislation’s sole purpose as protecting children from harm,<sup>177</sup> some of the same politicians have publicly supported other anti-trans efforts.<sup>178</sup> Interestingly, the proposed legislation often contains an exception to allow “corrective” cosmetic surgery on infants and children assigned intersex at birth,<sup>179</sup> despite widespread findings that such procedures performed on intersex children may have harmful repercussions.<sup>180</sup>

#### IV. ARGUMENTS AGAINST THE CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

Should any of the proposed legislation be enacted, it must be challenged and struck down. The proposed legislation is in violation of the Equal Protection and Due Process Clauses of the

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175. Turban, *supra* note 151.

176. See, e.g., Erica Thomas, *AL Senate Approves Treatment Ban for Trans Kids, Bill Sponsored by Trussville’s Shelnut*, TRUSSVILLE TRIB. (Mar. 3, 2021), <https://www.trussvilletribune.com/2021/03/03/al-senate-approves-treatment-ban-for-trans-kids-bill-sponsored-by-trussvilles-shelnutt/>.

177. See, e.g., H.R. 8012, 116th Cong. (2020); S.B. 219, 2020 Reg. Sess. (Ala. 2020); H.B. 3515, 101st Gen. Assemb. (Ill. 2020); H.B. 1057, 95th Leg. Sess. (S.D. 2020).

178. See discussion *infra* Section IV.A.5.

179. See e.g., S.B. 219, 2020 Reg. Sess. (Ala. 2020).

180. See U.N. Public Statement, *Intersex Awareness Day—Wednesday 26 October*, OHCHR (Oct. 24, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=20739> (“[I]ntersex infants, children and adolescents are subjected to medically unnecessary surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies. When, as is frequently the case, these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights. . . . Profound negative impacts of these often irreversible procedures have been reported, including permanent infertility, incontinence, loss of sexual sensation, causing life-long pain and severe psychological suffering, including depression and shame linked to attempts to hide and erase intersex traits.”).

Fourteenth Amendment. The legislation violates the Equal Protection Clause under heightened scrutiny because it is facially discriminatory on the basis of sex stereotyping and gender identity.<sup>181</sup> Alternatively, if courts find the legislation facially neutral, it remains unconstitutional because it has a discriminatory impact and serves a discriminatory purpose against transgender individuals.<sup>182</sup> Furthermore, if courts decline to apply heightened scrutiny to an Equal Protection analysis, the legislation fails even rational basis review.<sup>183</sup> The legislation is also unconstitutional under the Due Process Clause because it infringes on what should be considered a fundamental due process right to gender autonomy and the long-recognized right of parents to control the upbringing of their children.<sup>184</sup> Finally, even if courts were to decline to consider gender autonomy as a fundamental right subject to heightened scrutiny under a due process analysis, the law should still be struck down because it is not rationally related to a legitimate state goal.<sup>185</sup>

*A. Legislation Banning Transgender Minors' Medical Care Violates the Equal Protection Clause of the Constitution's Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>186</sup> Statutes that “create[] ‘arbitrary or irrational’ distinctions between classes of people out of ‘a bare . . . desire to harm a politically unpopular group’” are unconstitutional.<sup>187</sup> In determining whether a state’s law violates equal protection, the analysis depends upon

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181. See discussion *infra* Section IV.A.1.

182. See discussion *infra* Section IV.A.3.

183. See discussion *infra* Section IV.A.5.

184. See discussion *infra* Sections IV.B.1–2.

185. See discussion *infra* Sections IV.B.4.

186. U.S. CONST. amend. XIV, § 1.

187. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985)).

the level of scrutiny afforded the classification at issue.<sup>188</sup> As a general rule, most classifications are subject to the lowest level of scrutiny—rational basis review.<sup>189</sup> Highly deferential to the lawmaking body, rational basis review presumes statutory validity that “will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>190</sup> Statutes that classify by “suspect classes” such as race, alienage, or national origin are subject to strict scrutiny, which is treated as “presumptively invidious”<sup>191</sup> and upheld only if “suitably tailored to serve a compelling state interest.”<sup>192</sup> Sex classification has been deemed “quasi-suspect”<sup>193</sup> and is analyzed using intermediate scrutiny,<sup>194</sup> placing the burden on the state to provide an “exceedingly persuasive” justification that the challenged classification “serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”<sup>195</sup>

1. *Legislation prohibiting transgender minors from receiving necessary medical care is a facially discriminatory sex-based classification subject to intermediate scrutiny*

Heightened scrutiny must apply in review of the proposed legislation because it classifies individuals based on sex. The Supreme Court has held that states must provide an “exceedingly persuasive” rationale for sex/gender-based classifications.<sup>196</sup> As Justice Gorsuch recently noted in the landmark *Bostock* decision, under Title VII, discrimination

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188. *Id.*

189. *Id.*

190. *Cleburne*, 473 U.S. at 440.

191. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

192. *Cleburne*, 473 U.S. at 440.

193. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 761 (2014).

194. *Id.*

195. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982)).

196. *Id.*

based on sexual orientation or gender identity is, by definition, discrimination based on sex “because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>197</sup> Although *Bostock* is a statutory ruling, the idea that discrimination against a person based on their sexual orientation or gender identity invariably discriminates based on one’s sex easily translates to equal protection claims of sex discrimination; when creating a classification based on sexual orientation or gender identity, one *must* consider sex to do so.<sup>198</sup>

Proposed legislation seeking to prohibit medical treatment for transgender individuals is a classification based on transgender status that is necessarily a classification based on sex. The legislation is effectively facially discriminatory against transgender minors because it bars them from receiving the only medical care available to treat GD while *expressly* excepting from the legislation’s purview any medical treatment for cisgender individuals that overlaps with gender-affirming care, such as puberty blockers for precocious puberty or genital surgery for intersex children.<sup>199</sup> States rarely erect such barriers to medical care, instead usually deferring to medical experts for best treatment practices.<sup>200</sup> States’ *insistence* on interfering with the patient-physician relationship with regard to transgender medicine is actually based on a refusal to accept the medical

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197. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

198. *See id.*

199. *See, e.g.*, H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (“‘Gender transition procedures’ do not include: (i) Services to persons born with a medically verifiable disorder of sex development, including [ambiguous genitalia] . . . (ii) Services provided when a physician has otherwise diagnosed a disorder of sexual development that the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action.”).

200. *See* DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 8 (2020) (suggesting that legislative barriers to medical care are rare except in regard to abortion); *see also* *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, ACOG, <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislativeinterference-with-patient-care-medical-decisions-and-the-patient-physician-relationship> (Aug. 2021) (discussing the importance of legislators staying out of the patient and physician relationship).

community's broad consensus that treatment of transgender minors should affirm the minor's feelings that their gender identity is mismatched with their biological gender.<sup>201</sup> This refusal reflects an underlying, profound discomfort outside the binary conception of gender: a feeling that something is inherently wrong with children differing in behavior and external presentation from the stereotypes typically associated with their gender assigned at birth.<sup>202</sup> But, in *United States v. Virginia*, the Supreme Court rejected states' use of gender stereotypes and "overbroad generalizations about the different . . . preferences of males and females" as the basis for legislation, and reiterated that justifications for classification must be "genuine, not hypothesized or invented."<sup>203</sup> Because the proposed legislation is based on a refusal to accept medical treatment that affirms gender stereotypes outside the norm, it should be subject to intermediate scrutiny.

2. *Heightened scrutiny should apply to facially discriminatory gender identity classifications*

The proposed legislation should also be subject to heightened scrutiny because "transgender people constitute *at least* a quasi-suspect class."<sup>204</sup> The Supreme Court has yet to weigh in on whether gender identity is a suspect class entitled to heightened scrutiny under an equal protection analysis. In *Windsor v. United States*, the Second Circuit summarized Supreme Court precedent to delineate the factors used to determine whether a classification should be deemed quasi-suspect, including whether the class: (1) "has been historically 'subjected to

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201. See *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2165 (2021) ("[E]very major U.S. medical association recognizes that gender-affirming healthcare is medically necessary treatment for dysphoria.").

202. See generally *Glenn v. Brumby*, 663 F.3d 1312, 1319–20 (11th Cir. 2011) (listing cases where courts rejected discrimination on the basis of gender stereotyping).

203. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

204. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (emphasis added).

discrimination,”<sup>205</sup> (2) “has a defining characteristic that ‘frequently bears [a] relation to ability to perform or contribute to society,’”<sup>206</sup> (3) “exhibits ‘obvious, immutable, or distinguishing characteristics that define them as a discrete group,’”<sup>207</sup> and (4) “is ‘a minority or politically powerless.’”<sup>208</sup> The court’s decision was later affirmed by the Supreme Court.<sup>209</sup>

Analyzing homosexuality and gender identity under these factors, some federal circuit courts have applied heightened scrutiny to equal protection claims alleging discrimination based on sexual orientation or gender identity. In *Windsor*, the court held that homosexuality was a quasi-suspect class deserving of intermediate scrutiny.<sup>210</sup> The Ninth Circuit determined in *Karnoski v. Trump* that the military’s decision to disqualify openly transgender individuals from military service “on its face treats transgender persons differently than other persons,” concluding that intermediate scrutiny must apply.<sup>211</sup> Similarly, the Eleventh Circuit applied a heightened scrutiny standard in deciding that a school violated the Equal Protection Clause by prohibiting a student from using the restroom coinciding with his gender identity, finding that “discrimination against a transgender individual because of [his or her] gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>212</sup>

Considering the factors supporting heightened scrutiny as summarized in *Windsor*, gender identity classifications are quasi-suspect classes deserving of intermediate scrutiny. First, the transgender community “has been historically ‘subjected to

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205. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

206. *Id.* (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985)).

207. *Id.* (quoting *Bowen*, 483 U.S. at 602).

208. *Id.*; see also *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–81 (9th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014).

209. See *United States v. Windsor*, 570 U.S. 744 (2013).

210. See *Windsor*, 699 F.3d at 181–182.

211. *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019).

212. *Adams v. Sch. Bd. of St. John’s Cnty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)).

discrimination.”<sup>213</sup> Discrimination against the transgender community is well-documented. Laws prohibiting cross-dressing appeared as early as the 1690s in Massachusetts, with a greater number of localities passing similar laws throughout the United States in the 1850s.<sup>214</sup> More recently, in the 1950s and 1960s, transgender individuals’ “very presence in public space was criminalized, and they were at greater risk of extralegal violence from the police and some members of the public.”<sup>215</sup> The Fourth Circuit noted that “one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.”<sup>216</sup>

Transgender people continue to frequently be the victims of hate crimes, with violent murders of transgender people in the United States reaching its highest level in 2020.<sup>217</sup> The 2015 U.S. Transgender Survey reported overwhelming discrimination across all areas of life, including housing,<sup>218</sup> employment,<sup>219</sup> and

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213. See *Windsor*, 699 F.3d at 181 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987)).

214. SUSAN STRYKER, *TRANSGENER HISTORY: THE ROOTS OF TODAY’S REVOLUTION* 46–47 (2d ed. 2017).

215. *Id.* at 72.

216. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610–11 (4th Cir. 2020) (quoting *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018)).

217. See *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited Apr. 1, 2022) (highlighting how the Human Rights Campaign found that 2020 had the highest numbers ever recorded of murders of “transgender or gender non-conforming people,” with “Black and Latinx transgender women” most severely affected); see also Jamie Wareham, *Murdered, Suffocated and Burned Alive—350 Transgender People Killed in 2020*, FORBES (Nov. 11, 2020, 6:00 AM), <https://www.forbes.com/sites/jamiewareham/2020/11/11/350-transgender-people-have-been-murdered-in-2020-transgender-day-of-remembrance-list/?sh=52b947ce65a6> (describing how worldwide murders of transgender people also broke records in 2020, with 350 murders recorded by November 2020).

218. JAMES ET AL., *supra* note 47, at 176.

219. *Id.* at 150. (“More than one-quarter (27%) of those who held or applied for a job in the past year reported not being hired, being denied a promotion, or being fired during that year because of their gender identity or expression.”).

healthcare.<sup>220</sup> Overall, the survey found that many transgender people experienced discrimination in school,<sup>221</sup> were more likely to live below the poverty line as compared to the general population,<sup>222</sup> and experienced three times the level of unemployment.<sup>223</sup> Thirty percent “experienced homelessness at some point in their lives”<sup>224</sup> and 58% reported being verbally harassed, misgendered, or physically or sexually assaulted by police.<sup>225</sup> Additionally, transgender parents reported discrimination during family law proceedings.<sup>226</sup> As a result of this overwhelming discrimination, transgender people attempt suicide at *twelve times* the rate of the general United States population.<sup>227</sup>

Second, the class has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society.”<sup>228</sup> Classifications without any “sensible ground for differential treatment . . . call for a heightened standard of review.”<sup>229</sup> For example, state classifications based on age for “assuring physical preparedness”<sup>230</sup> and mental capacity, given “the real and undeniable differences between the [mentally disabled] and others,”<sup>231</sup> have been accepted by the Supreme

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220. *Id.* at 96. One-third of survey respondents reported “at least one negative experience” with a health practitioner because of their transgender status, including 24% having “to teach the provider about transgender people in order to receive appropriate care” and 15% contending with “invasive or unnecessary questions about being transgender.” *Id.*

221. *Id.* at 4.

222. *Id.* at 5.

223. *Id.* at 12.

224. *Id.* at 13.

225. *Id.* at 14.

226. *See generally* Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019) (explaining that there are many cases where “evidence of persistent bias” against transgender parents is present in family court decisions and analyses).

227. JAMES ET AL., *supra* note 47, at 112. Forty-eight percent “of all respondents reported that they had seriously thought about killing themselves in the past twelve months, compared to 4% of the U.S. general population.” *Id.* at 112.

228. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–441 (1985) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

229. *Id.* at 440.

230. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

231. *Cleburne*, 473 U.S. at 444.

Court as a basis to apply rational basis review. Here, classification based on transgender status or non-conforming gender identity has no basis in transgender people's ability to function or flourish in or contribute to society,<sup>232</sup> but rather stem from conservatives' refusal to accept transgender status and non-binary gender identity as legitimate or acceptable.

Third, gender identity exhibits some "obvious, immutable, or distinguishing characteristics that define them as a discrete group."<sup>233</sup> Similar to sexual orientation, deemed an immutable characteristic by the Supreme Court in *Obergefell v. Hodges*,<sup>234</sup> gender non-conformity too is an immutable characteristic that cannot be chosen. Society's recognition of gender non-conforming individuals casts them as "other:" "[b]eing perceived or 'passed' as a gender-normative cisgender person grants you a kind of access to the world that is often blocked by being perceived as trans."<sup>235</sup> Additionally, as stated in *Windsor*, just as homosexual status is often "necessarily revealed in order to exercise a legal right,"<sup>236</sup> here, non-conforming gender identity can be outwardly distinguishable or easily determinable. For example, many transgender individuals' status is often revealed when they must present identification. "Only 11% of [transgender individuals surveyed] reported that *all* of their IDs had the name and gender they preferred, while more than two-thirds (68%) reported that *none* of their IDs had the name and gender they preferred."<sup>237</sup> This discrepancy often "outs" transgender individuals and frequently causes issues with everyday activities such as voting, flying, driving, obtaining employment, or engaging with law enforcement.<sup>238</sup>

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232. *See id.* at 440–41.

233. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

234. *Obergefell v. Hodges*, 576 U.S. 644, 657–58, 681 (2015).

235. STRYKER, *supra* note 214, at xi.

236. *Windsor v. United States*, 699 F.3d 169, 184 (2d Cir. 2012).

237. JAMES ET AL., *supra* note 47, at 9.

238. Ranjani Chakraborty, Lucas Waldron, & Ken Schwencke, *Video: For Trans People, It's Difficult and Costly to Update an ID. But It Can Also Be Dangerous Not To*, PROPUBLICA (Aug. 16, 2018, 5:00 AM), <https://www.propublica.org/article/for-trans-people-difficult-and-costly-to>

Finally, the transgender community is a political minority and has historically faced political underrepresentation and discrimination.<sup>239</sup> Advancements have recently been made in transgender representation throughout American politics: three transgender women were elected to serve in their states' legislatures in 2020.<sup>240</sup> Additionally, in 2021, President Biden nominated an openly transgender woman, Dr. Rachel Levine, to serve as his assistant Secretary of Health.<sup>241</sup> However, as of the November 2020 election cycle, there were only thirty-two transgender elected officials in the United States,<sup>242</sup> and there has never been an openly transgender federal congressperson.<sup>243</sup> Given the historical inequities that transgender individuals have faced, gender identity clearly warrants heightened scrutiny.

Proponents of the proposed legislation may argue that it is not facially discriminatory because, rather than prohibiting

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update-an-id-but-it-can-also-be-dangerous-not-to; Alex Verman, *Know Before You Go: Tips for Transgender and Nonbinary Travelers*, AFAR (May 30, 2019) <https://www.afar.com/magazine/know-before-you-go-tips-for-transgender-and-nonbinary-travelers>.

239. See GENNY BEEMYN, *TRANSGENDER HISTORY IN THE UNITED STATES, ABOUT THIS E-BOOK* (Genny Beemyn, ed., 2014) ("The history of transgender and gender nonconforming people in the United States is one of struggle, but also of self-determination and community building.").

240. Gwen Aviles, *Transgender Candidates Make Election History*, HARPER'S BAZAAR (Nov. 4, 2020, 11:02 AM), <https://www.harpersbazaar.com/culture/politics/a34567467/election-2020-trans-winners/>. Sarah McBride became a Delaware state senator, Taylor Small was elected in Vermont, and Stephanie Byers was elected in Kansas. *Id.*

241. See *Senator Paul Says He Can't Vote for HHS Nominee Over Stance on Gender Transition for Minors*, C-SPAN (Feb. 25, 2021), <https://www.c-span.org/video/?c4948428/senator-paul-vote-hhs-nominee-stance-gender-transition-minors>. At Dr. Levine's Senate confirmation hearing, Senator Rand Paul interrogated Dr. Levine regarding gender-affirming healthcare for minors, incorrectly and misleadingly conflating gender-affirming surgeries with "universally condemned" genital mutilation. *Id.* That same day, House of Representatives member Marjorie Taylor Greene hung a large sign outside of her office that stated, "There are two genders: MALE & FEMALE. 'Trust the Science!'" Chandelis Duster, *Marjorie Taylor Greene Posts Anti-Transgender Sign Across Hall from Lawmaker with Transgender Child*, CNN, <https://www.cnn.com/2021/02/25/politics/marjorie-taylor-greene-anti-transgender-sign/index.html> (Feb. 25, 2021, 12:59 PM).

242. Piper McDaniel & David Garcia, *Trans and Nonbinary Candidates Set Record Wins in Red and Blue States*, NPR (Nov. 9, 2020, 6:42 PM), <https://www.npr.org/2020/11/09/931819214/trans-and-nonbinary-candidates-set-record-wins-in-red-and-blue-states>.

243. See Reid J. Epstein, *Sarah McBride is Set to Be the Nation's Highest-Ranking Transgender Official*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/us/politics/sarah-mcbride-delaware-transgender.html>.

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transgender children from receiving certain medical treatment, it prohibits all minor children from receiving the treatment.<sup>244</sup> In *Loving v. Virginia*, the Supreme Court made clear that although a statute applied criminal punishment for miscegenation to white and Black violators alike, the statute still made a racial classification.<sup>245</sup> Similarly, here, although the proposed legislation is carefully worded to only refer to a class of “minors” and equally applies the prohibition of medical treatment to *all* minors, this neutral wording is transparent. The treatment proscribed is only medically indicated for transgender individuals. Cisgender children have no need for the treatment and are completely unaffected by its prohibition. The legislation effectively only cuts *transgender* children from necessary care and is facially discriminatory on that basis.

3. *Even if the proposed legislation is deemed facially neutral, it has discriminatory impact and purpose and is thus subject to heightened scrutiny*

Even if the legislation were deemed facially neutral, it would still be subject to intermediate scrutiny because it has a discriminatory impact and a discriminatory purpose.<sup>246</sup> In *Washington v. Davis*, plaintiffs challenged a police entrance exam that Black recruits disproportionately failed.<sup>247</sup> The Supreme Court agreed that the test disproportionately impacted Black applicants, but held that to warrant strict scrutiny, the plaintiffs had to show discriminatory impact and purposeful discrimination against Black applicants.<sup>248</sup> Similarly, in *Personnel Administrator of Massachusetts v. Feeney*, female plaintiffs challenged a veterans’ preference law that disproportionately favored males for civil service

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244. See, e.g., S.B. 10, 2021 Leg., Reg. Sess. (Ala. 2021) (demonstrating that the language of the proposed legislation is artfully worded to apply to all children).

245. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

246. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

247. *Id.* at 232.

248. *Id.* at 242.

employment.<sup>249</sup> The Court found that the law disadvantaged females and non-veteran males; without invidious discriminatory purpose, the statute was subject to rational basis review of the veteran/non-veteran classification.<sup>250</sup>

Here, the discriminatory impact of the proposed legislation is clear. The law prohibits all minors from receiving a specific treatment that is only medically indicated for transgender individuals experiencing intense feelings of GD. Thus, the only class affected by the bills' prohibition are transgender minors. Even where portions of gender-affirming treatment overlap with cisgender medical treatments and procedures, such as the use of puberty blockers for precocious puberty or congenital adrenal hyperplasia and cosmetic surgeries on intersex children, the bills specifically *exempt* those cisgender procedures to ensure that only transgender children are affected.<sup>251</sup> Thus, the legislation has a discriminatory impact on transgender minors alone.

Of course, legislators are unlikely to admit that legislation is purposefully discriminatory, thus leading the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development* to articulate multiple factors to assist in determining whether "invidious discriminatory purpose" motivated legislation, thus warranting heightened scrutiny.<sup>252</sup> These factors include, (1) "historical background," especially "official actions taken for invidious purposes;" (2) events leading up to the legislation; (3) "[d]epartures from the normal procedural sequence;" (4) "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;" and (5) legislative history.<sup>253</sup>

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249. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 259 (1979).

250. *Id.* at 277–78.

251. *See, e.g.*, S.B. 10, 32nd Leg., Reg. Sess. (Ala. 2021).

252. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

253. *Id.* at 267–68.

Analyzing these factors, the historical background illuminates the discriminatory purpose behind the proposed legislation regarding medical treatment for transgender minors. The transgender community has historically been discriminated against and vulnerable to attack, both by private citizens and state actors, with a number of anti-cross-dressing laws throughout the United States in the 1850s,<sup>254</sup> and “greater risk[s] of extralegal violence from the police and some members of the public.”<sup>255</sup> In 2015, conservative lawmakers tried to bar transgender individuals from public restrooms associated with their gender identity, and spread a false narrative that bad actors would use inclusive bathroom policies to harass women.<sup>256</sup> The election of Donald Trump in 2016 saw “a setback of such proportions [for transgender rights] that it threaten[ed] to utterly wipe out [preceding years’] remarkable gains,” which culminated in a ban of transgender individuals from military service.<sup>257</sup> The legislation’s discriminatory purpose is highlighted by multiple states’ recent attempts to pass legislation that would prohibit adolescent transgender girls from playing on girls’ sports teams.<sup>258</sup> Furthermore, the conservative organizations who support this anti-trans legislation support other initiatives based in animus, such as legislation that aims to protect therapists’ ability to engage in harmful conversion therapy to force LGBTQ individuals into heterosexuality and binary gender.<sup>259</sup>

Discriminatory purpose can also be gleaned from the substantive departure in practice that the proposed legislation

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254. STRYKER, *supra* note 214, at 46–47.

255. *Id.* at 70.

256. *Id.* at 227.

257. *Id.* at 230.

258. See Julie Moreau, *Dozens of Anti-LGBTQ State Bills Already Proposed in 2020, Advocates Warn*, NBC NEWS (Jan. 23, 2020, 1:26 PM), <https://www.nbcnews.com/feature/nbc-out/dozens-anti-lgbtq-state-bills-already-proposed-2020-advocates-warn-n1121256>.

259. See, e.g., Andrea Jones, *How ‘Conversion Therapy’ Bans Hurt Kids*, HERITAGE FOUND. (Feb. 18, 2020), <https://www.heritage.org/gender/commentary/how-conversion-therapy-bans-hurt-kids> (providing an example of an argument made against legislation banning conversion therapy).

has taken from the traditional hands-off approach to the physician-patient relationship in other areas of adolescent medicine. Legislators' need to insert themselves in the physician-patient relationship only with regard to transgender youth reflects an implied assumption that the standard of care for transgender minors is not actually medically necessary, but elective. It highlights a broader discriminatory view that a person's gender identity being discordant with biological gender is a choice. Thus, the proposed legislation, even if deemed facially neutral, has discriminatory impact and purpose, and is thus subject to heightened or intermediate scrutiny.

#### 4. *The legislation cannot withstand intermediate scrutiny*

Whether the legislation is subject to intermediate scrutiny because it is facially discriminatory based on a gender/sex classification, facially discriminatory because it classifies based on gender identity, which itself should be a quasi-suspect class, or facially neutral with discriminatory impact and purpose, it must be found unconstitutional unless the classification is "substantially related to a sufficiently important governmental interest."<sup>260</sup> The state has the burden to prove that its justification for classification based on sex is "exceedingly persuasive,"<sup>261</sup> and "genuine, not hypothesized or invented."<sup>262</sup> Here, the legislators' propounded justification for the denial of gender-affirming care to transgender minors is to protect children from harm because medically recommended gender-affirming treatment is harmful to minors.<sup>263</sup> The goal of safeguarding minors (when genuine) is certainly an important

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260. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

261. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

262. *Id.*

263. *See, e.g.*, H.B. 113, 67th Leg., Reg. Sess. (Mont. 2021) (describing H.B. 113's purpose as "to enhance the protection of minors").

governmental objective, but minors still retain constitutional Fourteenth Amendment protections.<sup>264</sup> Notably, the proposed means of protection—prohibiting transgender minors from accessing gender-affirming medical care—would do nothing to actually protect the youth impacted by the legislation, and would actually cause great mental and physical harm to transgender minors. In *Loving*, the state of Virginia argued that the Court should “defer to the wisdom of the state legislature” on the issue of interracial marriage because “the scientific evidence” of its effects were “substantially in doubt.”<sup>265</sup> The Court rejected this argument, finding that the anti-miscegenation measures were merely “designed to maintain White Supremacy.”<sup>266</sup> Here, outside of conservative conflation of treatments and data misrepresentation,<sup>267</sup> the scientific evidence is not in doubt: all of the major medical organizations support gender-affirming care, and the research overwhelmingly shows that gender-affirming care is extremely beneficial to transgender individuals, even life-saving.<sup>268</sup>

The legislation seeks to prohibit transgender minors from receiving evidence-based, gender-affirming treatment, including mental health care, puberty-blocking hormones, gender-affirming hormones, and surgeries.<sup>269</sup> Conservative advocates claim that the legislation is necessary because minors are too young to fully appreciate the treatment’s implications.<sup>270</sup> But in other areas of adolescent healthcare, minor patients, physicians, and parents are permitted in concert to make informed medical decisions predicated on evidence-based standards of care without state intervention. Only with regard

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264. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 692 (1977).

265. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

266. *Id.* at 11.

267. See discussion *supra* Part III.

268. See discussion *supra* Part III.

269. See discussion *supra* Section II.A.

270. See, e.g., H.B. 3515, 101st Gen. Assemb. (Ill. 2020) (describing how teenage brains, not fully developed, “are built to be novelty-seeking”).

to transgender healthcare do these states seek to impose their will.

For example, no legislation attempts to prohibit the use of identical puberty-blocking hormones in the treatment of precocious puberty. No legislation strives to prohibit minors from obtaining elective, irreversible cosmetic surgeries.<sup>271</sup> Other medical procedures with known risks, like gastric bypass surgery, are available to adolescents with parental consent.<sup>272</sup> Finally, the legislation expressly permits surgeries on intersex children despite the fact that “many of the surgeries that have historically been performed on intersexed infants appear to be essentially cosmetic and motivated by a social anxiety about atypical genitalia”<sup>273</sup> and may have harmful long-term effects.<sup>274</sup>

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271. Diana Zuckerman, *Teenagers and Cosmetic Surgery*, 7 ETHICS J. AM. MED. ASS'N 253, 253–54 (2005) (“In 2003, more than 223,000 cosmetic procedures were performed on patients 18 years of age or younger, and almost 39,000 were surgical procedures such as nose reshaping, breast lifts, breast augmentation, liposuction, and tummy tucks. . . . Studies by implant manufacturers report that most women have at least one serious complication within the first 3 years, including infection, hematomas and seromas, capsular contracture . . . , loss of nipple sensation, and hypertrophic scarring. . . . Liposuction also carries potentially serious risks. Primary risks include infection, damage to skin, nerves, or vital organs, fat or blood clots (that can migrate to the lungs, leading to death), and excessive fluid loss that can lead to shock or death.”).

272. See, e.g., Philip Schauer & Kathryn Weise, *Bariatric Surgery for Obese Adolescents: Weighing the Pros and Cons*, CONSULT QD (Apr. 7, 2016), <https://consultqd.clevelandclinic.org/bariatric-surgery-obese-adolescents-weighing-pros-cons/>. One study compared the differing long-term outcomes of adolescent and adult recipients of Roux-en-Y gastric bypass surgery and found that 1.9% of adolescents who had undergone the surgery died within five years of the surgery and that adolescents were more likely to require “abdominal reoperations” and were “significantly more likely than adults to have remission of type 2 diabetes and of hypertension.” Thomas H. Inge, Anita P. Courcoulas, Todd M. Jenkins, Marc P. Michalsky, Mary L. Brandt, Stavra A. Xanthakos, John B. Dixon, Carroll M. Harmon, Mike K. Chen, Changchun Xie, Mary E. Evans & Michael A. Helmrath, *Five-Year Outcomes of Gastric Bypass in Adolescents as Compared with Adults*, 380 NEW ENG. J. MED. 2136, 2136 (2019).

273. Robert Sparrow, *Gender Eugenics? The Ethics of PGD for Intersex Conditions*, 13 AM. J. BIOETHICS 29, 33 (2013).

274. See Julia A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY. L.A. L. REV. 849, 856 (2012). Beginning in the 1990s, intersex experts asserted that:

[C]osmetic genital surgeries caused more physical and psychological trauma than allowing the children to grow up with atypical genitalia. Many adults with an intersex condition who had been subjected to cosmetic genital surgery maintained that it often caused a loss or diminishment of erotic response, genital

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A statute cutting transgender minors from the medical care that improves their well-being would do the opposite of its purported goal. Thus, the means of prohibiting this treatment does not justify with exceeding persuasion this discriminatory classification.

5. *The proposed legislation fails even rational basis review*

Both the Fourth and Eleventh Circuits have accepted gender-affirming medical treatment as defined by WPATH to be the “authoritative standard[] of care” and recognize that “[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.”<sup>275</sup> Conservative legislators’ refusal to accept this standard of care despite overwhelming evidence that it comprises the best available treatment deeply conflicts with their claims that protection of transgender minors is their sole motivation. This disconnect renders the legislation “inexplicable by anything but animus toward the class it affects.”<sup>276</sup> Like *Romer v. Evans*, where a state law specifically targeted the LGBTQ community and denied them classification-based protections failed rational basis review because it bore no relationship to a “legitimate legislative end,”<sup>277</sup> the proposed legislation here specifically targets transgender minors and completely denies that community all medical care related to the treatment of their classification. Although rational basis review is highly deferential to the lawmaking body, which will usually uphold laws “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous,”<sup>278</sup> here, the law

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pain or discomfort, infections, scarring, urinary incontinence, and cosmetically unacceptable genitalia.

*Id.* at 860.

275. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595–96 (4th Cir. 2020) (quoting *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019)).

276. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

277. *Id.* at 633.

278. *Id.* at 632.

must fail. It does not just work to the disadvantage of a particular group within the law's proposed application, but to its entirety: it disadvantages every person to whom the law applies.

In *U.S. Dep't of Agriculture v. Moreno*, the Supreme Court, applying rational basis review to the government's denial of welfare benefits to unrelated housemates with the proffered goal of minimizing fraud, found that the denial did not rationally respond to fraud concerns.<sup>279</sup> Here, there is ample medical research showing that the proposed legislation would not benefit transgender minors in the slightest; instead, it would force them to undergo irreversible natural puberty that would permanently reduce the success of any gender transition undertaken as an adult.<sup>280</sup> Furthermore, the proposed legislation would drastically worsen the mental health outcomes of gender dysphoric minors, increasing the risk of suicidal ideation and self-injury.<sup>281</sup> Rather than preventing transgender minors from transitioning, it would instead force them underground in search of black market hormones to find relief for their GD.<sup>282</sup> Thus, banning transgender minors from receiving this gender-affirming care would not rationally protect them from harm.

The Court in *Moreno* also struck down the statute that arbitrarily denied welfare benefits because it identified the legislation's true motivation as based in animus: the statute's legislative history revealed a true desire to block "hippies" and "hippie communes" from welfare benefits.<sup>283</sup> The Court refused to allow lawmakers' animus to determine who could receive much-needed welfare benefits, stating that "a bare congressional desire to harm a politically unpopular group

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279. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536 (1973).

280. See Hembree et al., *supra* note 44, at 3880.

281. See Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 382–84 (2007); see also Vergani, *supra* note 47, at 924.

282. See Shield, *supra* note 281, at 381; see also Vergani, *supra* note 47, at 918.

283. See *Moreno*, 413 U.S. at 534.

cannot constitute a *legitimate* governmental interest.”<sup>284</sup> Here, the legislators’ true motivation of anti-trans sentiment is shoddily concealed. One sponsor, Alabama Senator Shelnett, revealed his true feelings after the bill passed in the Alabama Senate: “There’s no medical diagnosis . . . no medical condition that these kids have. It’s just in their mind.”<sup>285</sup> Alabama representative and bill sponsor, Wes Allen, made similar statements that his “biblical worldwide view” in which the phrase “all people are made in the image of God” means that “there are only two sexes, male and female.”<sup>286</sup> In 2016, Missouri legislator and sponsor Mike Moon endorsed the idea that “transgenderism is a ‘mental disorder’ that merits treatment, [and] sex change is ‘biologically impossible.’”<sup>287</sup> A Florida representative and sponsor described gender-affirming healthcare as “radical social experimentation.”<sup>288</sup> An Arizona sponsor tweeted, “FACTS are FACTS . . . there are only TWO genders!”<sup>289</sup>

A look at the position of conservative groups who assisted in the legislation’s drafting confirms that the legislation is not a genuine effort to protect children, but is actually based in discomfort with transgender existence. The Heritage Foundation endorses those who deny the legitimacy of transgenderism, publishing articles discussing a “transgender agenda” and arguing that “no child should be told *the lie* that

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284. *Id.*

285. Mike Cason, *Alabama Senate Passes Bill Banning Transgender Treatments for Minors*, AL.COM, <https://www.al.com/news/2021/03/alabama-senate-passes-bill-banning-transgender-treatments-for-minors.html> (Mar. 2, 2021, 4:41 PM).

286. Jaine Treadwell, *Allen: Bill Would Protect Children*, MESSENGER (Jan. 8, 2021, 8:05 PM), <https://www.troy messenger.com/2021/01/08/allen-bill-would-protect-children/>.

287. Letter from Mike Moon, Mo. State Rep., to Margie Vandeven, Mo. Comm’r of Educ. (May 16, 2016).

288. Anthony Sabatini (@AnthonySabatini), TWITTER (Feb. 11, 2021, 3:33 PM), <https://twitter.com/AnthonySabatini/status/1359963731153858564>.

289. Wendy Rogers (@WendyRogersAZ), TWITTER (Jan. 2, 2021, 12:39 PM), <https://twitter.com/WendyRogersAZ/status/1345424549811257346>.

they're 'trapped in the wrong body.'"<sup>290</sup> The Kelsey Coalition and Eagle Forum similarly completely deny the existence of GD, defining "human sexuality [as] an objective biological binary trait," and describing transgender individuals as "confused" and "impersonating" the opposite gender.<sup>291</sup> An Alliance Defending Freedom contributor described recent attempts to expand discrimination statutes to cover sexual orientation and gender identity as threatening women by allowing men to sleep in women's shelters: this insistence on misgendering transgender women amounts to a refusal to validate the transgender experience due to underlying animus.<sup>292</sup> Finally, animus can be found directly in the Kentucky bill's text, which would protect public employees' ability to express opinions "regarding gender identity or [GD],"<sup>293</sup> presumably to deny its legitimacy. The evidence is clear that the underlying rationale for the proposed legislation is a desire to deny the existence of transgender individuals.

Supporters of the legislation may argue that its passage would have the additional benefit of protecting children from harassment, teasing, and danger. After all, gender non-conforming children are documented as being more likely to experience harassment, feel unsafe, and miss more days of school because of safety concerns than other students.<sup>294</sup> However, the Supreme Court in *Palmore v. Sidoti* held in stark terms that prevalent prejudicial attitudes against a minority

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290. Ryan T. Anderson, *After Inaugural Rhetoric on Unity, Biden Signs Divisive Transgender Executive Order*, HERITAGE FOUND. (Jan. 21, 2021) (emphasis added), <https://www.heritage.org/gender/commentary/after-inaugural-rhetoric-unity-biden-signs-divisive-transgender-executive-order>.

291. Michelle Cretella, *Educational Policy Conference*, EAGLE COUNCIL XLIX (Feb. 1, 2020, 10:15 AM), <https://eagleforum.org/wp-content/uploads/2020/01/Cretella-Action.pdf>.

292. Sarah Kramer, *These Laws Threaten Your Privacy and Religious Liberty—Here's Everything You Need to Know*, ALL. DEFENDING FREEDOM (Mar. 4, 2019), <https://adflegal.org/blog/these-laws-threaten-your-privacy-and-religious-liberty-heres-everything-you-need-know>.

293. H.B. 336, 2021 Leg., Reg. Sess. (Ky. 2021).

294. See JOSEPH G. KOSCIW, EMILY A. GREYTAK, MARK J. BARTKIEWICZ, MADELYN J. BOESEN & NEAL A. PALMER, GLSEN, *THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS* 91 (2012).

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group does not justify discriminatory action.<sup>295</sup> *Palmore* considered a Florida court's decision to grant a father full custody over his child, not because the child's mother was unfit, but rather because the white mother fell in love with and married a Black man.<sup>296</sup> The lower courts reasoned that the decision was appropriate in order to protect the child from "the damaging impact" of bullying and stigma that would result from the mother's interracial relationship.<sup>297</sup> Although this case dealt with racial classifications and was analyzed under strict scrutiny, the Court's holding was made broadly: "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>298</sup> The Court's refusal to entertain public discrimination easily applies to the stigma experienced by the transgender community. Legislation cannot be based on a desire to avoid social pressures to conform.<sup>299</sup> Just because a conservative segment of the population refuses to accept the reality of GD does not render discriminatory legislation permissible to accommodate discomfort and fear.<sup>300</sup> For these reasons, the proposed legislation fails even rational basis review.

*B. Legislation Banning Transgender Minors' Medical Care Violates the Due Process Clause of the Fourteenth Amendment*

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>301</sup> The Supreme Court

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295. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

296. *Id.* at 430–31.

297. *Id.* at 431.

298. *Id.* at 433.

299. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 627 (4th Cir. 2020) (Wynn, J., concurring).

300. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1224 (2d Cir. 1987) ("The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens.").

301. U.S. CONST. amend. XIV, § 1.

has found that, within the Fourteenth Amendment's "concept of liberty," and within the "penumbras of the Bill of Rights," is a right to personal privacy, within which "personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty are included."<sup>302</sup> Freedom to express gender identity has not yet been deemed a fundamental due process right. In *Planned Parenthood v. Casey*, the Court reiterated that some matters:

involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>303</sup>

The Constitution implicitly provides for an inherent right of individual privacy, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person."<sup>304</sup> However, these fundamental rights are not unlimited: instead, "compelling state interest[s]" must also be considered.<sup>305</sup> That being said, "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."<sup>306</sup>

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302. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citation omitted).

303. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

304. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

305. *See City of Akron v. Akron Ctr. for Repro. Health, Inc.*, 462 U.S. 416, 427-34 (1983).

306. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)).

1. *Gender autonomy should be a fundamental due process right*

Gender autonomy should be considered a fundamental right deserving of full due process protection.<sup>307</sup> The Supreme Court has previously described constitutional liberties as protecting “an autonomy of self” that includes freedom of expression.<sup>308</sup> Critics of expanding fundamental due process to gender autonomy might argue that fundamental due process rights should be described in very narrow terms. For example, in *Washington v. Glucksberg*, the Court narrowly defined the right at issue as the “personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide,” rather than expansively defining a right to self-determination of medical care or a right to privacy within the physician-patient relationship.<sup>309</sup> Defining this narrowly, the Court easily found that this was not a fundamental due process right.<sup>310</sup> However, in *Obergefell v. Hodges*, in affirming marriage as a fundamental right, the majority described fundamental rights in much broader principles.<sup>311</sup> Here, transgender individuals do not choose their gender identity; it is an immutable characteristic. Forcing transgender individuals to stifle their inherent gender identity so as to conform with a binary understanding of gender would absolutely stifle these individuals’ ability to live autonomously, express themselves freely, and define their own concept of existence. It would “diminish their personhood.”<sup>312</sup>

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307. See Jillian T Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WIS. J. L., GENDER & SOC’Y 331, 339–40 (2013).

308. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

309. *Washington v. Glucksberg*, 521 U.S. 702, 708 (1997).

310. See *id.* at 735.

311. *Obergefell v. Hodges*, 576 U.S. 644, 663, 665 (2015) (defining the right to same-sex marriage as part of the broad fundamental liberties of “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).

312. *Id.* at 672.

2. *Parents have a fundamental due process right to direct their children's upbringing*

Although the aforementioned cases only consider adults' due process rights and the legislation addresses minors' ability to receive medical care for GD, there is a separate liberty at play: "the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"<sup>313</sup> which is potentially the Supreme Court's longest established fundamental right.<sup>314</sup> For example, in 1925, an Oregon law requiring children to attend public school was struck down by the Court, which held that the state's attempt to "standardize its children" could not stand in the face of the parents' powerful right to "direct the upbringing" and "direct [the] destiny" of their children.<sup>315</sup> The Supreme Court recognizes a presumption that parents are best-suited to navigate their children's best interests and "possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."<sup>316</sup>

Like the unconstitutional Oregon law, states proposing bans on gender-affirming treatment are similarly attempting to standardize its populace by rejecting the concept of an expanded understanding of gender identity. The Supreme Court has required the constitutional rights of minors to be very sensitively considered and applied because of minors' "peculiar vulnerability, . . . [and] their inability to make critical decisions in an informed, mature manner."<sup>317</sup> In fact, the legislation's proponents routinely use these justifications to support its enactment: that children simply do not have the capacity to make such important, life-altering decisions such as gender

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313. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

314. *Id.* at 65.

315. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

316. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

317. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

transition.<sup>318</sup> This does not reflect transgender minors' reality, who desire gender-affirming treatment with their parents' consent and their physician's recommendation and careful oversight. Here, parents and guardians, in tune with their child's needs far more intimately than the state, are making a joint decision with their child about their upbringing and destiny with the advice of competent medical professionals, often after years of persistent, intense GD. This is no different from medical decisions parents make with their children and physician for a plethora of other medical conditions for which states make no attempt to interfere.

Courts' rejection of parents' due process right to send their children to conversion therapy is inapposite in the context of gender-affirming therapy. Many states and municipalities have banned conversion therapy, a practice discredited within the medical mainstream, that aims to "cure" non-heterosexual orientation or non-cisgender identity.<sup>319</sup> Conversion therapy attempts to force individuals to deny their sexual orientation and gender identity and causes similar symptoms to GD, including "depression, anxiety, drug use, homelessness, and suicide."<sup>320</sup> Some parents have attempted to challenge conversion therapy prohibitions on due process grounds in protection of their parental rights.<sup>321</sup> Courts have rejected this assertion of parental rights, stating that parental due process rights are subject to limitation.<sup>322</sup> In *Pickup v. Brown*, the Ninth Circuit ultimately held that parents did not have the right to subject their child to specific mental health treatment, such as

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318. Thomas, *supra* note 178 ("Children aren't mature enough to make these decisions on surgeries and drugs. The whole point is to protect kids.").

319. *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (Jan. 3, 2021).

320. *Id.*

321. See, e.g., *Doe v. Christie*, 33 F. Supp. 3d 518, 528 (D.N.J. 2014). Conversion therapy prohibitions have primarily been challenged by therapists on First Amendment grounds. See, e.g., *King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014).

322. *Christie*, 33 F. Supp. 3d at 530.

conversion therapy, deemed harmful by the state.<sup>323</sup> The court reviewed the state's basis for prohibiting conversion therapy, citing the medical community's broad consensus in denouncing conversion therapy, and medical literature suggesting that conversion therapy was an unsafe practice.<sup>324</sup> Here, the opposite is true: the broad consensus of the medical community overwhelmingly supports gender-affirming care; legislators' statements to the contrary are a mixture of mistruths and conflation.<sup>325</sup> In light of this overwhelming scientific evidence and the medical community's support, in no way could a prohibition on gender-affirming care be "reasonable;" thus, parental rights would likely prevail in cases challenging the proposed prohibitions. Because of the documented harm of conversion therapy and its lack of efficacy,<sup>326</sup> and because, unlike gender transitioning, conversion therapy is often conducted against minors' will,<sup>327</sup> support for parental rights in choosing gender-affirming care with their transgender children cannot be read as an endorsement of parental rights to force their children to undergo harmful "therapy."

3. *The proposed legislation fails strict scrutiny as it is not narrowly tailored to further compelling state interests*

Laws or regulations infringing upon fundamental due process rights will only be upheld if they are narrowly tailored and further "compelling state interest[s]."<sup>328</sup> In *Bellotti v. Baird*, the Supreme Court considered a statute requiring pregnant

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323. *Pickup v. Brown*, 740 F.3d 1208, 1235–36 (9th Cir. 2014).

324. *Id.* at 1223–24.

325. See discussion *infra* Part III.

326. See generally Amy Przeworski, Emily Peterson & Alexandra Piedra, *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, CLINICAL PSYCH. SCI. & PRAC., July 2020 (providing empirical evidence that reflects both the ineffectiveness of conversion therapy and the harm that such treatments can have on participants).

327. KORI CORDERO & VANESSA CARLISLE, AM. BAR ASS'N: COMMISSION ON SEXUAL ORIENTATION & GENDER IDENTITY, BANNING CONVERSION THERAPY ON MINORS: A GUIDE FOR CREATING TRIBAL AND STATE LEGISLATION 3, 111 (2019).

328. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

minors to obtain parental consent for abortion.<sup>329</sup> The Court discussed the uniquely grave decision teenage girls must face when pregnant and considering abortion, noting the decision's permanency and the "potentially severe detriment" facing pregnant teens, stating that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."<sup>330</sup> Ultimately, the Court decided that because of the unique considerations and consequences associated with teen pregnancy, the state could not require the teen to obtain parental consent from both parents to obtain an abortion as it would "give a third party an absolute, and possibly arbitrary, veto over the decision of the physician."<sup>331</sup>

Cutting transgender minors off from access to gender-affirming care would have similar grave, indelible consequences. First, without access to puberty blockers, transgender minors will be forced to undergo the puberty changes associated with their sex assigned at birth: these physiological changes will permanently interfere with their ability to ever attain a gender presentation that they identify and feel comfortable with. Furthermore, the onset of these physical changes will likely cause severe distress, affect emotional well-being, and contribute to increased levels of anxiety, depression, low self-esteem, suicidal ideation, and self-harm.

In *Bellotti*, the Court took the grave effects of forced pregnancy of minors so seriously that they refused to let a teen's parents interfere with the patient-physician relationship.<sup>332</sup> Here, it is the state that is interfering with the patient-physician relationship, a relationship that is far more individualized and long-term than that of abortion providers and their patients. It is not the parents—entrusted with managing their children's

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329. *Bellotti v. Baird*, 443 U.S. 622, 624–25 (1979).

330. *Id.* at 642.

331. *Id.* at 642–43.

332. *Id.* at 643.

best interests—who wish to interfere with this medical care, but the state that is arbitrarily declaring a blanket ban of this gender-affirming care without regard to the individual needs of minors suffering from intense GD. As such, states' attempts to completely prohibit gender-affirming care is arbitrary and is not narrowly tailored to any compelling state interest; thus, it is a violation of transgender minors' due process rights.

4. *The proposed legislation fails rational basis review under a due process analysis*

Even without the heightened scrutiny afforded to fundamental liberties, the proposed legislation does not withstand scrutiny under rational basis review. In *Washington v. Glucksberg*, the Supreme Court held that Washington state's interference with the physician-patient relationship with regard to assisted suicide had a rational relation to legitimate government interests, including "preservation of human life . . . preventing suicide . . . protecting the integrity and ethics of the medical profession . . . [and] protecting vulnerable groups."<sup>333</sup> Here, the proposed legislation does not relate to any legitimate interests: it would prevent transgender minors from accessing medical care known to greatly reduce anxiety, depression, and suicidal ideation. The legislation also fails to protect the integrity and ethics of the medical profession. Instead, it interferes with physicians' professional expertise and forces them to violate the Hippocratic oath by prohibiting their ability to provide the best available medical care and forcing practitioners to provide substandard medical care for fear of disciplinary action, fines, license revocation, or criminal charges. Instead of protecting vulnerable groups, as was the case in *Washington*, here, the legislation targets a vulnerable group and takes away their ability to access necessary medical care.

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333. *Washington v. Glucksberg*, 521 U.S. 702, 728–31 (1997).

Some conservative organizations refer to a transgender and LGBTQ “agenda” that seeks to destroy the nuclear family and nefariously indoctrinate children into believing they can choose whatever gender they want.<sup>334</sup> Thus, the underlying discomfort of many conservatives against gender-affirming treatment is based in differences in morality. However, in striking down a state law criminalizing homosexual conduct in *Lawrence v. Texas*, the Supreme Court rejected morality enforcement as a legitimate basis for legislation.<sup>335</sup> Additionally, the Supreme Court has stated that “affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.”<sup>336</sup> The Court recognized that states cannot enact arbitrary laws and “regulate private conduct not harmful to others.”<sup>337</sup> Here, transgender minors are harming no one; they merely wish to obtain medical care that will enable them to express their true gender identity. Thus, this legislation should not withstand even rational basis review under a due process analysis.

#### CONCLUSION

Transgender existence is not a new phenomenon.<sup>338</sup> The transgender community, whose collective goal has been to simply live their truths free from discrimination or government interference have instead faced pushback at every turn and in all areas of life.<sup>339</sup> This latest Republican attack on transgender

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334. See Michelle Malkin, *Nuking of the Nuclear Family*, NORFOLK DAILY NEWS (March 24, 2021), [https://norfolkdailynews.com/commentary/nuking-of-the-nuclear-family/article\\_76346ac0-8cab-11eb-a43d-f733cdbc4356.html](https://norfolkdailynews.com/commentary/nuking-of-the-nuclear-family/article_76346ac0-8cab-11eb-a43d-f733cdbc4356.html); Iowa School ‘Committed to Disrupting Nuclear Family,’ FAM. LEADER Jan. 28, 2021), <https://www.thefamilyleader.com/iowa-school-committed-to-disrupting-nuclear-family/>; Emilie Kao, *Promise to America’s Children Warns of Destructive Equality Act LGBT Agenda*, HERITAGE FOUND. (Feb 19, 2021), <https://www.heritage.org/gender/commentary/promise-americas-children-warns-destructive-equality-act-lgbt-agenda>.

335. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

336. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).

337. *Lawrence*, 539 U.S. at 572.

338. See generally STRYKER, *supra* note 214.

339. *Id.*

rights has already come to fruition in one state and the resulting harm to transgender children will be swift and severe. Gender-affirming medical care for transgender children alleviates suffering. Supporting transgender children's need to externally express their true gender identity drastically reduces depression, suicidal ideation, and self-harm while increasing self-worth.<sup>340</sup> These laws *must* be struck down as unconstitutional for violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. My fervent hope is that the need to strike down the proposed legislation remains limited to Arkansas and the proposed legislation in other states never become law; whether because the laws' co-sponsors and proponents take the time to learn about the transgender community and come to understand the harms that would result from their passage or because the laws are blocked by the tireless advocacy of transgender activists.

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340. Olson et al., *supra* note 142, at 5.