
CHAPTER ONE

OUTLAWING TRANS YOUTH: STATE LEGISLATURES AND THE BATTLE OVER GENDER-AFFIRMING HEALTHCARE FOR MINORS

As soon as I realized that I was not happy in my body, I went up to my parents to fix it. And it felt as natural as going up and being like, “Hey, I’m hungry.” I was just kind of like, “Hey, when’s the girl thing happening?”

— Nicole Maines, actress and transgender activist, on coming out as transgender as a child¹

More than one-third of transgender high school students attempt suicide in a given year.² This alarming statistic underscores the importance of providing transgender youth³ with access to medically necessary healthcare to bring their bodies into alignment with their gender identities.⁴ Fortunately, medical science and understanding have advanced such that trans youth can safely and effectively transition under the supervision of medical professionals.⁵ Obstacles remain, to be sure.⁶ But information about, and access to, gender-affirming care for trans youth is more widespread than ever before.⁷

¹ Pam O’Brien, *How Nicole Maines Is Paving the Way for the Next Generation of LGBTQ Youth*, SHAPE (Aug. 15, 2019), <https://www.shape.com/celebrities/interviews/nicole-maines-transgender-activist-supergirl> [<https://perma.cc/5QET-8948>].

² See Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts*, 2017, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 70 (2019).

³ Hereinafter “trans youth,” which this Chapter defines as transgender children and adolescents between roughly twelve and eighteen years of age.

⁴ This Chapter assumes basic familiarity with terms like “transgender” and “cisgender” and with the difference between assigned sex at birth and gender identity. For an introductory explanation of these concepts, see *Understanding Gender*, GENDER SPECTRUM, <https://genderspectrum.org/articles/understanding-gender> [<https://perma.cc/U635-823E>].

⁵ See Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, PEDIATRICS, Oct. 2018, at 1, 4–5.

⁶ See generally, e.g., Emily Ikuta, Note, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179 (2016) (describing the problems that arise when the parent of a trans youth refuses to provide consent to gender-affirming treatment for their child, and how minors can argue for the right to consent).

⁷ See, e.g., Diane Ehrensaft, *Gender Nonconforming Youth: Current Perspectives*, 8 ADOLESCENT HEALTH MED. & THERAPEUTICS 57, 57–58 (2017). This increased research and attention has largely centered on the experiences of youth who transition from one binary gender to the other, and has neglected the experiences of nonbinary youth. Abbie E. Goldberg et al., *Health Care Experiences of Transgender Binary and Nonbinary University Students*, 47 COUNSELING PSYCH. 59, 86 (2019). For more on the experiences of nonbinary youth in transgender healthcare, see, for example, Gary E. Butler, *Child and Adolescent Endocrinology*, in GENDERQUEER AND

Over the last few years, however, a growing political tide has threatened to reverse this progress. Gender-affirming healthcare⁸ for minors has become a new frontier in the culture war. In the first months of 2020 alone, legislators in at least fifteen states introduced bills that would have prohibited and, in many cases, criminalized providing gender-affirming healthcare services to minors.⁹ None of these bills became law.¹⁰ But the fight over gender-affirming healthcare for minors is far from over; as of January 2021, at least nine states were considering gender-affirming care bans,¹¹ with more sure to follow, and a recent court decision in the United Kingdom effectively banning hormone treatments for trans youth under sixteen is likely to embolden the state-side opposition even further.¹² This Chapter shines light on attempts to outlaw necessary gender-affirming medical treatment for minors, drawing on scientific evidence and legal doctrine to show why such legislative efforts are harmful, prejudiced, and unconstitutional. Section A will outline the current medical standard of care for trans youth and argue that access to gender-affirming care provides critical and empirically demonstrable psychological, social, and legal benefits for trans youth. Section B will describe the 2020 bills,¹³ critique their foundational premises, and analyze how their paternalistic narratives represent new rhetorical strategies of opposition to trans youth. Section C will offer two constitutional arguments against the bans, one based in the Equal Protection Clause and one based in parental due process rights.

NON-BINARY GENDERS 171, 177–79 (Christina Richards, Walter Pierre Bouman & Meg-John Barker eds., 2017); and Goldberg et al., *supra*, at 86–90.

⁸ This Chapter uses the umbrella term “gender-affirming healthcare” to describe the range of medical services that trans youth use to bring their bodies and lived experiences into alignment with their gender identities (“transition”).

⁹ See *Past Legislation Affecting LGBT Rights Across the Country*, ACLU (Mar. 20, 2020), <https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020> [https://perma.cc/KQ6T-KDR2] [hereinafter *ACLU Legislation Tracker*]; H.B. 3515, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). The Illinois bill was originally introduced in 2019, but changed sponsors in 2020. See *Bill Status of HB 3515*, ILL. GEN. ASSEMBLY, <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3515&GAID=15&DocTypeID=HB&SessionID=108&GA=101> [https://perma.cc/6S5R-6SX9].

¹⁰ See *ACLU Legislation Tracker*, *supra* note 9; *Bill Status of HB 3515*, *supra* note 9.

¹¹ See H.B. 1, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 224, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H. File 193, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.B. 33, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 113, 67th Leg., Reg. Sess. (Mont. 2021); H.B. 68, 167th Gen. Ct., Reg. Sess. (N.H. 2021); S.B. 676, 58th Leg., 1st Reg. Sess. (Okla. 2021); H.B. 92, 64th Leg., Gen. Sess. (Utah 2021); H.B. 68, 87th Leg., Reg. Sess. (Tex. 2020). For an up-to-date list of gender-affirming care bans filed in 2021, see *Legislative Tracker: Anti-transgender Medical Care Bans*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/medical-care-bans> [https://perma.cc/JX3V-J3US].

¹² See *Bell v. Tavistock* [2020] EWHC (Admin) 3274 [151] (Eng.).

¹³ Because the rationales and legal errors underlying the 2021 bills were substantially the same as the 2020 bills, and because the 2021 bills were rapidly evolving and changing at the time of publication, this Chapter focuses its critique on the 2020 bills rather than the 2021 bills.

A. *The Importance of Gender-Affirming Healthcare for Trans Youth*

The prevalence and availability of gender-affirming healthcare for trans youth have increased considerably since the 1990s, when transitioning before adulthood was quite rare.¹⁴ A 2017 survey found that almost two percent of American public high school students in ten states and nine large urban school districts identified as transgender,¹⁵ and although not all trans youth seek out gender-affirming healthcare, exponentially greater numbers of trans youth are pursuing this care.¹⁶ This section describes the current medical standard of gender-affirming healthcare for trans youth and explains the importance of gender-affirming healthcare to the mental and social well-being and legal recognition of trans youth.

1. *The Current Standard of Care.* — The purpose of gender-affirming healthcare is usually to treat gender dysphoria (“dysphoria”), or “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.”¹⁷ Physical and social transition through the use of gender-affirming healthcare is clinically shown to reduce dysphoria by aligning a transgender person’s physical body and gender presentation with their gender identity.¹⁸ Thus, every major U.S. medical association recognizes that gender-affirming healthcare is medically necessary treatment for dysphoria.¹⁹

Gender-affirming healthcare for trans youth is typically administered pursuant to Standards of Care published by the World

¹⁴ See, e.g., Hallie Horowitz, *Introduction to JUST EVELYN, MOM, I NEED TO BE A GIRL* 4, 4 (1998), https://ai.eecs.umich.edu/people/conway/TS/Evelyn/Mom_I_need_to_be_a_girl.pdf [<https://perma.cc/LD34-7MYX>] (describing “one of the first” adolescent transitions in the mid-1990s).

¹⁵ Johns et al., *supra* note 2, at 68. 1.6 percent said they were “not sure.” *Id.*

¹⁶ See Ehrensaft, *supra* note 7, at 57–58.

¹⁷ WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 5 (7th ed. 2012) [hereinafter WPATH SOC]. Importantly, dysphoria is a psychological condition that *results from* a difference between gender identity and assigned sex at birth; transgender identity is not itself a psychological condition or mental illness. See *id.* at 5–6.

¹⁸ See *id.* at 8.

¹⁹ Kellan E. Baker, *The Future of Transgender Coverage*, 376 NEW ENG. J. MED. 1801, 1801 (2017); see *Professional Organization Statements Supporting Transgender People in Health Care*, LAMBDA LEGAL (Sept. 17, 2018), https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf [<https://perma.cc/5HTA-PUHR>] (collecting statements of medical necessity). “Medically necessary” — and the closely related term “medical necessity” — is a term of art used to describe “[h]ealth care services or supplies needed to diagnose or treat an illness, injury, condition, disease or its symptoms and that meet accepted standards of medicine.” *Medically Necessary*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/medically-necessary> [<https://perma.cc/Y6K7-HAKL>].

Professional Association for Transgender Health (WPATH SOC), an international body of experts in transgender healthcare.²⁰ The WPATH SOC represent the authoritative medical consensus on treatment for dysphoria in transgender people.²¹

The first step in gender-affirming treatment for trans youth is therapy and counseling. The WPATH SOC recommend that trans youth be diagnosed with gender dysphoria and referred by a gender therapist before they begin physical transition.²² After the initial diagnosis, gender-affirming therapists help trans youth process their gender identities and cope with distress associated with dysphoria and coexisting sources of stress, and support them in taking future steps in physical and social transition.²³

Trans youth who are diagnosed with dysphoria sometimes begin hormone treatments, depending on their age and stage of physical development. Trans youth who have reached the early stages of puberty may be prescribed puberty blockers, which prevent the further progression of assigned-sex puberty and the development of associated secondary sex characteristics.²⁴ Halting puberty is typically done to give trans youth more time to process their identity and decide whether to pursue further steps in transition,²⁵ and to prevent irreversible physical changes that conflict with their desired gender presentation and increase dysphoria.²⁶

Beginning at around age sixteen,²⁷ trans youth can be prescribed hormone replacement therapy (HRT), which causes development of secondary sex characteristics associated with the trans youth's identified

²⁰ See WPATH SOC, *supra* note 17, at 1–2; Rafferty, *supra* note 5, at 6. Other medical associations also provide guidance to clinicians in specific areas of care such as hormone treatment. See, e.g., Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLOGY 3869, 3874 (2017).

²¹ See AM. MED. ASS'N HOUSE OF DELEGATES, RESOLUTION: 122, SUBJECT: REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1 (2008), <https://www.imatyfa.org/assets/ama122.pdf> [<https://perma.cc/T6RY-7LZN>]; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019) (citing case law and medical authority recognizing the WPATH SOC as the prevailing medical standard).

²² See WPATH SOC, *supra* note 17, at 14, 18–19.

²³ See Johanna Olson, Catherine Forbes & Marvin Belzer, *Management of the Transgender Adolescent*, 165 ARCHIVES PEDIATRIC & ADOLESCENT MED. 171, 174 (2011) (stating that the majority of gender specialists follow this affirming approach); Leigh A. Spivey & Laura Edwards-Leeper, *Future Directions in Affirmative Psychological Interventions with Transgender Children and Adolescents*, 48 J. CLINICAL CHILD & ADOLESCENT PSYCH. 343, 347–48 (2019).

²⁴ See Simone Mahfouda et al., Review, *Puberty Suppression in Transgender Children and Adolescents*, 5 LANCET DIABETES & ENDOCRINOLOGY 816, 817–18 (2017).

²⁵ *Id.* at 816; see WPATH SOC, *supra* note 17, at 19.

²⁶ See WPATH SOC, *supra* note 17, at 19; Mahfouda et al., *supra* note 24, at 817–18.

²⁷ See Hembree et al., *supra* note 20, at 3884–85.

gender.²⁸ For trans girls, HRT involves suppressing endogenous testosterone and taking estrogen,²⁹ a regimen that typically causes breast growth, softer skin, and reduction in body hair,³⁰ while for trans boys, it involves taking testosterone,³¹ which typically causes muscle growth, an increase in body and facial hair, and a deeper voice.³² Some nonbinary youth also seek HRT, but there are currently no formal standards of care for nonbinary people and there is little research as to clinical outcomes outside the binary context.³³ The WPATH SOC and Endocrine Society typically require parental consent before doctors may prescribe HRT to minors.³⁴

Gender confirmation surgery (GCS), which involves changing a transgender person's reproductive anatomy to the anatomy usually associated with their identified gender, is rarely performed for trans youth because the WPATH SOC require the patient to have attained the age of majority to be eligible for surgery.³⁵ Additionally, insurance coverage usually requires GCS patients to be eighteen or older.³⁶ However, GCS is not the only type of gender-affirming surgery. Transgender men may undergo surgery to remove breast tissue ("top surgery"), and the WPATH SOC allow this surgery to be performed on patients under eighteen on a case-by-case basis.³⁷

2. *Why Trans Youth Need Access to Gender-Affirming Healthcare.* — Access to these gender-affirming healthcare services is essential — even lifesaving — for trans youth. There is a vast disparity in traditional measures of quality of life between trans youth with untreated dysphoria and their cisgender peers. A wealth of empirical research confirms that, although it does not erase this gap, medical transition narrows it considerably. This section summarizes the benefits of gender-affirming care for trans youth in three spheres: mental health, social acceptance, and legal rights. Although they are categorized separately for organizational

²⁸ See WPATH SOC, *supra* note 17, at 33–34.

²⁹ *Id.* at 48.

³⁰ *Id.* at 38 tbl.1B.

³¹ *Id.* at 49.

³² *Id.* at 37 tbl.1A.

³³ See Butler, *supra* note 7, at 179; Anna Martha Vaites Fontanari et al., *Gender Affirmation Is Associated with Transgender and Gender Nonbinary Youth Mental Health Improvement*, 7 LGBT HEALTH 237, 243 (2020).

³⁴ See WPATH SOC, *supra* note 17, at 20; Hembree et al., *supra* note 20, at 3878 tbl.5. *But see generally* Ikuta, *supra* note 6 (describing a strategy for minors in the United States to obtain HRT without parental consent).

³⁵ See WPATH SOC, *supra* note 17, at 21, 54–55; *see also* Olson, Forbes & Belzer, *supra* note 23, at 176.

³⁶ See, e.g., Clinical Policy Bulletin, *Gender Affirming Surgery*, AETNA (Jan. 12, 2021), https://www.aetna.com/cpb/medical/data/600_699/0615.html [<https://perma.cc/C5ZK-VZAR>].

³⁷ WPATH SOC, *supra* note 17, at 21; *see also* *Masculinizing Chest Reconstruction ("Top Surgery")*, UCSF TRANSGENDER CARE, <https://transcare.ucsf.edu/masculinizing-chest-reconstruction-top-surgery> [<https://perma.cc/6HM2-UV5W>].

purposes, these spheres often intersect and complement one another in practice.

(a) *Mental Health.* — Untreated dysphoria in trans youth is associated with severe mental health problems, including depression, social anxiety, and suicidal thoughts and behavior.³⁸ A study of baseline (pre-transition) psychological characteristics of trans youth revealed that twenty percent had “moderate to extreme” depressive symptoms, and that their reported rate of suicidal thoughts and attempts was at least three times higher than that of the general youth population.³⁹ Over half reported having thought about suicide, and a third reported at least one attempt.⁴⁰

Conversely, a large body of research demonstrates that trans youth who receive gender-affirming healthcare to treat their dysphoria show decreased anxiety, depression, suicidal behavior, and psychological distress,⁴¹ and increased quality of life.⁴² Trans children who are allowed to socially transition before puberty have relatively normal rates of depression and anxiety, “in striking contrast” with nontransitioned trans children.⁴³ A longitudinal study of trans adolescents before and after they received gender-affirming care found that psychological functioning steadily improved throughout treatment and that overall well-being

³⁸ See, e.g., TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020, at 3 (2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf> [<https://perma.cc/WXM5-JVG6>]; Johanna Olson et al., *Baseline Physiologic and Psychosocial Characteristics of Transgender Youth Seeking Care for Gender Dysphoria*, 57 J. ADOLESCENT HEALTH 374, 375, 378 tbl.5 (2015).

³⁹ Olson et al., *supra* note 38, at 379.

⁴⁰ *Id.*; see also Johns et al., *supra* note 2, at 69 tbl.2 (finding that 43.9% of transgender high school students considered attempting and 34.6% attempted).

⁴¹ See, e.g., Rosalia Costa et al., *Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria*, 12 J. SEXUAL MED. 2206, 2212 (2015); Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, PEDIATRICS, Oct. 2014, at 1, 6–7; Fontanari et al., *supra* note 33, at 243; Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, PEDIATRICS, Mar. 2016, at 1, 5; Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, Feb. 2020, at 1, 5; Anna I.R. van der Miesen et al., *Psychological Functioning in Transgender Adolescents Before and After Gender-Affirmative Care Compared with Cisgender General Population Peers*, 66 J. ADOLESCENT HEALTH 699, 703 (2020).

⁴² See de Vries et al., *supra* note 41, at 7. See generally *What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?*, CORNELL UNIV.: WHAT WE KNOW PROJECT, <https://whatwewknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people> [<https://perma.cc/RZ6H-4JC8>] [hereinafter WHAT WE KNOW PROJECT] (collecting over fifty studies showing improvements in quality of life for transgender people after gender-affirming care).

⁴³ Lily Durwood, Katie A. McLaughlin & Kristina R. Olson, *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 116, 116 (2017).

after treatment was “comparable to [that of] same-age peers.”⁴⁴ And a study of transgender adults found that subjects who had received puberty blockers in childhood had a significantly lower incidence of suicidal ideation than did those who had wanted puberty blockers but did not receive them.⁴⁵ Of course, gender dysphoria is not the sole cause of psychological distress and mental health problems in trans youth, nor is access to gender-affirming healthcare a panacea. But, in the words of the preeminent professional association of pediatric psychiatry in the United States, “[r]esearch consistently demonstrates that gender diverse youth . . . have better mental health outcomes” when they have access to gender-affirming healthcare.⁴⁶

(b) *Social Integration.* — Middle school and high school are stressful for many young people, but they are often particularly difficult social environments for trans youth. Not only are trans students disproportionately bullied and alienated by their peers,⁴⁷ but they may also have problems fitting in due to the frequent mental health issues associated with untreated dysphoria⁴⁸ and feelings of not “belonging” with cisgender students.⁴⁹ This trauma only intensifies with the onset of assigned-sex puberty, which causes trans youth to develop secondary sex characteristics (such as breasts in trans boys and facial hair in trans girls) that are inconsistent with their gender identities.⁵⁰ Because of this process, trans youth who undergo assigned-sex puberty often experience decreased self-esteem and increased body image issues, which can cause further social and educational impairment.⁵¹ Physical changes from puberty may also make it harder for trans youth to “pass” as the gender

⁴⁴ de Vries et al., *supra* note 41, at 7 (finding that transitioned youth exhibited “quality of life, satisfaction with life, and subjective happiness” scores similar to those of cisgender youth).

⁴⁵ See Turban et al., *supra* note 41, at 5.

⁴⁶ 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://perma.cc/WXH9-5AKY>] [hereinafter *AACAP Statement*]; see also ENDOCRINE SOC’Y & PEDIATRIC ENDOCRINE SOC’Y, TRANSGENDER HEALTH POSITION STATEMENT (2020), https://www.endocrine.org/-/media/endocrine/files/advocacy/position-statement/position_statement_transgender_health_pes.pdf [<https://perma.cc/JQ9S-TAQ2>].

⁴⁷ See, e.g., Johns et al., *supra* note 2, at 69 tbl.2 (showing significantly higher rates of in-person and online bullying and feelings of unsafety at school compared to cisgender students); cf. TREVOR PROJECT, *supra* note 38, at 7 (showing high levels of violence and discrimination against transgender youth).

⁴⁸ See sources cited *supra* notes 38–40 and accompanying text.

⁴⁹ See Goldberg et al., *supra* note 7, at 7.

⁵⁰ See Hembree et al., *supra* note 20, at 3880–81 (listing various “[i]rreversible and . . . undesirable sex characteristics” that develop during assigned-sex puberty, *id.* at 3881); Turban et al., *supra* note 41, at 6.

⁵¹ See Jenifer K. McGuire et al., *Body Image in Transgender Young People: Findings from a Qualitative, Community Based Study*, 18 BODY IMAGE 96, 103 (2016) (noting that transgender

with which they identify,⁵² meaning they are more likely to experience psychological problems⁵³ and to face discrimination and abuse.⁵⁴

Puberty blockers and HRT allow trans youth to avoid many of these challenges. Trans youth who start puberty blockers or HRT in childhood or adolescence are spared the hardships of navigating school and peer relationships while presenting as a gender with which they do not identify. Because of this relief, medically transitioned trans youth are often more confident and socially well-adjusted than their nontransitioned peers.⁵⁵ Undergoing medical transition at an earlier age also allows many trans youth to “pass” more easily as their identified gender,⁵⁶ and avoid many of the challenges associated with being visibly transgender.⁵⁷

(c) *Legal Status.* — Gender-affirming medical care often mediates the availability of legal rights and protections for trans youth. Most notably, many states require medical evidence like a diagnosis of gender dysphoria, HRT, or GCS to change a transgender person’s gender on identity documents such as driver’s licenses and birth certificates.⁵⁸

young people feel social stress when they exhibit physical characteristics associated with their assigned sexes); *Developments in the Law — Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680, 1726 (2014) (noting the “severe negative impact” of discrimination on trans students’ educational outcomes and that socially transitioned trans youth “report a healthier sense of belonging than their peers who are not able to express and embrace their transgender identities”).

⁵² See, e.g., LAURA KUPER, IMPACT LGBT HEALTH & DEV. PROGRAM, PUBERTY BLOCKING MEDICATIONS 8 (2014), <https://www.impactprogram.org/wp-content/uploads/2014/12/Kuper-2014-Puberty-Blockers-Clinical-Research-Review.pdf> [<https://perma.cc/78G8-PAZW>] (“[I]t is more difficult to align the body with one’s affirmed gender once physical changes in [puberty] occur . . .”). It should be noted, however, that the concept of “passing” as one’s identified gender may not apply to nonbinary individuals, whose gender identities may not align with a binary mode of gender presentation. Cf. Christina Richards, *Psychology, in GENDER-QUEER AND NON-BINARY GENDERS*, *supra* note 7, at 141, 147 (noting that the genders of non-binary people may be “socially unintelligible” such that they “find themselves in the trap of either seeming to be what they aren’t and so being accepted, or seeming to be what they are and so facing opprobrium”).

⁵³ See Margaret To et al., *Visual Conformity with Affirmed Gender or “Passing”: Its Distribution and Association with Depression and Anxiety in a Cohort of Transgender People*, 17 J. SEXUAL MED. 2084, 2088 (2020).

⁵⁴ See *id.* at 2089; Brynn Tannehill, *For Many Trans People, Not Passing Is Not an Option*, SLATE (June 27, 2018, 11:54 AM), <https://slate.com/human-interest/2018/06/not-passing-or-blending-is-dangerous-for-many-trans-people.html> [<https://perma.cc/3EPP-6ZNS>].

⁵⁵ See Costa et al., *supra* note 41, at 2212 (stating that use of puberty blockers results in “improvement in many aspects of . . . psychosocial functioning, such as mood improvement and school integration”); McGuire et al., *supra* note 51, at 105 (reporting increased confidence, self-acceptance, and social adjustment in trans youth who transition).

⁵⁶ See, e.g., KUPER, *supra* note 52, at 8; Ikuta, *supra* note 6, at 213.

⁵⁷ See To et al., *supra* note 53, at 2089; Tannehill, *supra* note 54.

⁵⁸ See NAT’L CTR. FOR TRANSGENDER EQUAL., SUMMARY OF STATE BIRTH CERTIFICATE GENDER CHANGE LAWS (2020), <https://transequality.org/sites/default/files/docs/resources/Summary%20of%20State%20Birth%20Certificate%20Laws%20Jan%202020.pdf> [<https://perma.cc/PP39-SYZ2>]; *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT

Misalignment between a trans youth's gender presentation and their gender on identity documents is not an isolated indignity; it can have serious collateral consequences. For example, many colleges and universities do not allow students to use their preferred names or genders in school records if they have not legally changed them on identity documents.⁵⁹

Access to gender-affirming care is also critical for many trans youth to participate in competitive school sports. The National Collegiate Athletic Association and some state high school athletic associations allow trans girls to play on girls' sports teams only after they have taken HRT for a certain period, out of concern that their assigned sex gives them an "unfair" advantage.⁶⁰ Trans boys typically do not have to meet specific medical criteria in order to play on boys' teams,⁶¹ but in practice it will often be difficult for trans boys to compete with other boys without the physiological benefits of testosterone.⁶²

Finally, lack of access to gender-affirming care continues to mitigate trans youths' access to sex-segregated school bathrooms and locker rooms. The Biden Administration is expected to reinstate the Obama Administration's 2016 Title IX guidance that required schools to allow students to use facilities consistent with their gender identities.⁶³ Even so, there are reasons to think access to gender-affirming medical care is

PROJECT (Feb. 11, 2021), https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/E2BP-4HB7>].

⁵⁹ See Abbie E. Goldberg, Genny Beemyn & JuliAnna Z. Smith, *What Is Needed, What Is Valued: Trans Students' Perspectives on Trans-Inclusive Policies and Practices in Higher Education*, 29 J. EDUC. & PSYCH. CONSULTATION 27, 31–32 (2019).

⁶⁰ Jacob Gershman, *States Weigh Measures to Stop Transgender Athletes from Competing in Women's Sports*, WALL ST. J. (Jan. 7, 2020, 5:30 AM), <https://www.wsj.com/articles/states-weigh-measures-to-stop-transgender-athletes-from-competing-in-womens-sports-11578393001> [<https://perma.cc/SX58-6ERN>]; see NCAA OFF. OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [<https://perma.cc/RG7X-HHJ2>]. Along with their campaigns against gender-affirming healthcare, see *infra* section B.1, pp. 2172–75, state legislatures have launched a parallel nationwide offensive against trans girls' participation in women's sports, see Gershman, *supra*; see also, e.g., *Hecox v. Little*, No. 20-cv-00184, 2020 WL 4760138, at *15, *39 (D. Idaho Aug. 17, 2020) (granting preliminary injunction against one such athletics ban on trans girls).

⁶¹ See, e.g., NCAA OFF. OF INCLUSION, *supra* note 60, at 13 ("A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.")

⁶² Cf. David J. Handelsman, Angelica L. Hirschberg & Stephanie Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVS. 803, 823 (2018) (finding that higher testosterone explains "most, if not all, the sex differences in sporting performance").

⁶³ See *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, BIDEN FOR PRESIDENT, <https://joebiden.com/lgbtq-policy> [<https://perma.cc/8TDP-C4UD>]; Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just. 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/85P9-GFHP>].

still relevant to determining trans youths' access to such facilities. First, trans youth may be less comfortable coming out as transgender to their peers and school officials if they have not started medical transition. Second, school districts and courts may be more willing to accept in practice a trans student's use of facilities consistent with their identified gender if they have provided evidence of being diagnosed with dysphoria or undergoing gender-affirming medical treatment.⁶⁴

*B. Proposed State Legislation Banning Gender-Affirming
Healthcare for Trans Youth*

1. *Background and Legislative Context.* — A custody battle in a Dallas suburb is an unlikely spark for a political brushfire. But in October 2019, a dispute in Texas family court over parental rights for a seven-year-old transgender girl ignited outrage in conservative circles.⁶⁵ The girl's father, Jeffrey Younger, petitioned for full custody based on his disagreement with her mother's gender-affirming parenting approach, accusing the mother of "emotional abuse" for allowing the girl to express her gender identity.⁶⁶ Unfolding amid a frenzy of media coverage and vocal opposition to the mother's gender-affirming stance from conservatives,⁶⁷ the Younger case shined a national spotlight on the issue of gender-affirming medical care for minors and prompted calls for legislative action from Texas Republicans.⁶⁸

In truth, the Younger case and the ensuing media controversy did not begin the political movement against gender-affirming healthcare for minors so much as add fuel to a campaign already broiling within conservative lobbying groups. The Heritage Foundation, one of the most influential conservative think tanks in the United States,⁶⁹ hosted a series of events on the "medical risks" of gender-affirming healthcare

⁶⁴ Cf., e.g., *Adams ex rel. Kasper v. Sch. Bd.*, 318 F. Supp. 3d 1293, 1326 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020) (crediting evidence of the plaintiff's "social, medical, and legal transitions" in determining he had a right to use the boys' restroom at school).

⁶⁵ See Teo Armus, *A Texas Man Says His 7-Year-Old Isn't Transgender. Now His Custody Fight Has Reached the Governor's Office.*, WASH. POST (Oct. 24, 2019, 6:13 AM), <https://www.washingtonpost.com/nation/2019/10/24/james-younger-luna-transgender-greg-abbott> [<https://perma.cc/WSH8-BDJF>].

⁶⁶ *Id.*

⁶⁷ See, e.g., Senator Ted Cruz (@SenTedCruz), TWITTER (Oct. 23, 2019, 7:01 PM), <https://twitter.com/sentedcruz/status/1187157024888496128> [<https://perma.cc/X67V-3LQZ>] (accusing the mother of "child abuse").

⁶⁸ María Méndez, *Could Transgender Kids' Care Be Next "Bathroom Bill" for Texas Republicans?*, DALL. MORNING NEWS (Oct. 25, 2019, 11:57 AM), <https://www.dallasnews.com/news/politics/2019/10/25/could-transgender-kids-care-be-next-bathroom-bill-for-texas-republicans> [<https://perma.cc/7MCJ-DWYA>].

⁶⁹ See *About Heritage*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/impact> [<https://perma.cc/TPW2-KYPQ>].

for trans youth at its DC headquarters throughout 2019.⁷⁰ These events proved foundational to later legislative efforts; attendees at the conferences authored several of the bans,⁷¹ and a policy manager at Family Policy Alliance, a Christian conservative lobbying group that cohosted one of the Heritage events, confirmed that her organization “work[ed] with legislators all over the country” to distribute “model” gender-affirming care bans to be introduced during states’ 2020 legislative sessions.⁷²

With help from these groups, legislators in fifteen states introduced bills between January and March 2020 banning medical professionals from providing gender-affirming healthcare to minors.⁷³ The bills are tellingly similar in substance and language.⁷⁴ Almost every bill (with some minor deviations⁷⁵) bans all medical professionals in the state from

⁷⁰ See, e.g., *Summit on Protecting Children from Sexualization*, HERITAGE FOUND., at 2:12:28 (Oct. 9, 2019), <https://www.heritage.org/marriage-and-family/event/summit-protecting-children-sexualization> [<https://perma.cc/DN2P-RRXZ>] [hereinafter *Summit*]; see also Brianna January, *Anti-LGBTQ Group Heritage Foundation Has Hosted Four Anti-trans Panels So Far in 2019*, MEDIA MATTERS FOR AM. (Apr. 18, 2019, 9:18 AM), <https://www.mediamatters.org/heritage-foundation/anti-lgbtq-group-heritage-foundation-has-hosted-four-anti-trans-panels-so-far> [<https://perma.cc/Q7SK-D5DT>].

⁷¹ See Sydney Bauer, *The New Anti-trans Culture War Hiding in Plain Sight*, NEW REPUBLIC (Feb. 11, 2020), <https://newrepublic.com/article/156539/new-anti-trans-culture-war-hiding-plain-sight> [<https://perma.cc/ZC7X-JK3E>]; Chris Johnson, *Advocates Prepare for Fight as Anti-trans Youth Legislation Advances in S.D.*, WASH. BLADE (Jan. 31, 2020, 2:22 PM), <https://www.washingtonblade.com/2020/01/31/advocates-prepare-for-fight-as-anti-trans-youth-legislation-advances-in-s-d> [<https://perma.cc/85YF-JHX3>].

⁷² See Bauer, *supra* note 71; *Summit*, *supra* note 70. Model legislation is often a symptom of pervasive interest group influence in state legislatures. See Rob O’Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They’re Letting Corporations Do It Instead.*, USA TODAY (June 19, 2019, 5:56 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/> 3162173002 [<https://perma.cc/3ACT-WP3W>].

⁷³ See sources cited *supra* note 9. Although a Utah Representative was considering a bill to ban HRT and GCS, he changed course and drafted a bill geared toward exploratory research into gender-affirming healthcare. See Connor Richards, *Utah House Rejects Bill to Study Effects of Hormone Therapy on Transgender Minors*, DAILY HERALD (Mar. 10, 2020), https://www.heraldextra.com/news/local/govt-and-politics/legislature/utah-house-rejects-bill-to-study-effects-of-hormone-therapy-on-transgender-minors/article_2fc144a0-9573-50fc-a6e7-60841a6d8632.html [<https://perma.cc/M4CH-44DC>]. The fifteen-state count thus does not include the Utah bill.

⁷⁴ For a database containing links to the text, sponsors, and status of the 2020 bills, see *ACLU Legislation Tracker*, *supra* note 9. For the bills introduced so far in 2021, see sources cited *supra* note 11; *Legislation Affecting LGBT Rights Across the Country*, ACLU (Feb. 11, 2021), <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> [<https://perma.cc/RD96-UXDP>].

⁷⁵ Tennessee’s bill banned all gender-affirming care for minors who have not started puberty, but allowed minors who have begun puberty to receive gender-affirming care upon the recommendation of three physicians. See H.B. 2576, 111th Gen. Assemb., Reg. Sess. § 1(b) (Tenn. 2020). In addition, Missouri’s, Oklahoma’s, and South Carolina’s bills did not contain a “medically verifiable” exception, see H.B. 1721, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); S.B. 1819, 57th Leg., 2d Reg. Sess. (Okla. 2020); H.B. 4716, 123d Gen. Assemb., Reg. Sess. (S.C. 2020), and Mississippi’s and South Dakota’s bills did not follow the eighteen-year cutoff, see S.B. 2490, 2020 Leg., Reg. Sess.

administering puberty blockers or HRT to, or performing gender-affirming surgery on, anyone under the age of eighteen, with notable exceptions for minors with “medically verifiable” developmental disorders or intersex conditions.⁷⁶ Most of the proposals make providing gender-affirming care a crime; on the extreme end, violation of Idaho’s prohibition is a felony punishable by a life sentence.⁷⁷ Because they would prevent any state-licensed medical providers from administering gender-affirming care, the bans would effectively prohibit trans youth from accessing that care unless they were able to travel out of state. Thus, they would disproportionately burden trans youth from disadvantaged socioeconomic backgrounds and communities of color, who are less likely to have the resources to travel across state lines or to relocate for care.⁷⁸

None of the fifteen bills introduced in early 2020 became law,⁷⁹ although bills in Alabama and South Dakota passed by large margins in individual state houses.⁸⁰ But the fact that no bills passed during the 2020 legislative session may not be a meaningful indication of whether they will pass in the future. The COVID-19 lockdowns in the United States in March 2020 forced many state legislatures to adjourn regular sessions before important committee votes on the bills.⁸¹ Additionally, a wave of early failures does not necessarily rule out future success; “bathroom bills” banning trans people from using public bathrooms and changing facilities consistent with their identified genders failed in at

§ 3(b) (Miss. 2020) (defining minors as below age twenty-one); H.B. 1057, 95th Gen. Assemb., Reg. Sess. (S.D. 2020) (defining minors as below age sixteen).

⁷⁶ See, e.g., S. File 2213, 88th Gen. Assemb., Reg. Sess. § 1 (3) (Iowa 2020); H.B. 513, 133d Gen. Assemb., Reg. Sess. § 1, sec. 5128.03(C)(1) (Ohio 2020).

⁷⁷ See H.B. 465, 65th Leg., 2d Reg. Sess. (Idaho 2020). The law would have defined gender-affirming care as “genital mutilation of a child,” which carries a maximum life sentence under the state criminal code. See *id.*; IDAHO CODE § 18-1506B(6) (2020).

⁷⁸ Cf. Annamarie Forestiere, *America’s War on Black Trans Women*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Sept. 23, 2020), <https://harvardcrcl.org/americas-war-on-black-trans-women> [<https://perma.cc/DRD4-RHXY>] (noting that high poverty and homelessness rates among Black trans women affect their ability to travel); La’Tasha D. Mayes, *Black Women Are Dying from a Lack of Access to Reproductive Health Services*, TIME (Jan. 19, 2018, 11:53 AM), <https://time.com/5109797/black-women-dying-reproductive-health> [<https://perma.cc/LY33-M8JL>] (showing how similar laws restricting reproductive healthcare access disparately affect people of color).

⁷⁹ See *ACLU Legislation Tracker*, *supra* note 9.

⁸⁰ See Bauer, *supra* note 71; Nico Lang, *Alabama Moves Closer to Transgender Health Care Ban for Minors*, NBC NEWS (Mar. 10, 2020, 4:21 PM), <https://www.nbcnews.com/feature/nbc-out/alabama-moves-closer-transgender-health-care-ban-minors-n1154791> [<https://perma.cc/3KDX-HYYE>].

⁸¹ See *Changes to State Legislative Session Dates in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEdia (Jan. 21, 2021), [https://ballotpedia.org/Changes_to_state_legislative_session_dates_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020](https://ballotpedia.org/Changes_to_state_legislative_session_dates_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020) [<https://perma.cc/JK26-WYNM>]; *ACLU Legislation Tracker*, *supra* note 9 (showing that several bills died in committee in mid-March).

least ten states between 2013 and 2015⁸² before North Carolina infamously passed House Bill 2 in March 2016.⁸³ Finally, a recent High Court decision in the United Kingdom severely inhibiting administration of puberty blockers to trans youth under age sixteen is likely to invigorate opponents of gender-affirming care for trans youth in the United States.⁸⁴

2. *Explaining Gender-Affirming Healthcare Bans.* — Legal and political battles over gender-affirming healthcare have persisted for decades,⁸⁵ and are somewhat ubiquitous today.⁸⁶ Nevertheless, the gender-affirming care bans deserve particular attention because they mark a subtle yet important rhetorical pivot in the broader political opposition to trans youth. To understand the larger sociopolitical significance of the gender-affirming care bans, as well as to lay the foundation for constitutional arguments against them, this section deconstructs the bans' underlying purposes and rationales.

Some of the bills included statements of legislative purpose that provide useful starting points. For example, the Mississippi Senate bill's "Legislative findings and intent" section states in part that "the decision to pursue [gender-affirming care] should not be presented to or determined for minors who are incapable of comprehending the negative implications and life-altering difficulties attending to these interventions."⁸⁷ Similar language subsists throughout the proposals, revealing a consistent, surface-level legislative intent to "protect" trans youth from gender-affirming medical interventions.⁸⁸

⁸² See Joellen Kralik, "Bathroom Bill" Legislative Tracking, NAT'L CONF. OF STATE LEGISLATURES (Oct. 24, 2019), <https://www.ncsl.org/research/education/bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/5JH4-QPZA>] (listing the states).

⁸³ See Elena Schneider, *The Bathroom Bill that Ate North Carolina*, POLITICO MAG. (Mar. 23, 2017), <https://www.politico.com/magazine/story/2017/03/the-bathroom-bill-that-ate-north-carolina-214944> [<https://perma.cc/5E4M-VHQC>]; see also N.C. GEN. STAT. § 143-760(b), (d) (repealed 2017).

⁸⁴ See *Bell v. Tavistock* [2020] EWHC (Admin) 3274 (Eng.). The court ruled that puberty blockers are presumptively inappropriate for adolescents under sixteen, *id.* at [151], and that court authorization may be necessary for sixteen- and seventeen-year-olds, *id.* at [152].

⁸⁵ See, e.g., *G.B. v. Lackner*, 145 Cal. Rptr. 555, 556, 559 (Ct. App. 1978) (reversing state health department's denial of insurance coverage for GCS).

⁸⁶ See, e.g., *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. CV 20-1630, 2020 WL 5232076, at *1 (D.D.C. Sept. 2, 2020) (challenging the Trump Administration's rescission of an Obama Administration policy banning discrimination against transgender people in healthcare). For an overview of other legal battles surrounding gender-affirming healthcare, see generally Judson Adams et al., *Transgender Rights and Issues*, 21 GEO. J. GENDER & L. 479, 494-507 (2020).

⁸⁷ S.B. 2490, 2020 Leg., Reg. Sess. § 2(1)(a) (Miss. 2020).

⁸⁸ See, e.g., *id.* § 2(2); H.B. 3515, 101st Gen. Assemb., Reg. Sess. § 10 (Ill. 2019). Indeed, many of the bills even share a version of the same title: "Vulnerable Child Protection Act." See, e.g., H.B. 303, 2020 Leg., Reg. Sess. § 1 (Ala. 2020); H.B. 1365, 2020 Leg., Reg. Sess. (Fla. 2020); H.B. 513, 133d Gen. Assemb., Reg. Sess. § 2 (Ohio 2020).

This paternalistic rhetoric represents a narrative shift that has surfaced in the wake of widespread rejection of preexisting justifications for discrimination against trans youth. The most prominent political crusade against trans youth, the bathroom scare of the mid-to-late 2010s, portrayed trans youth as predatory, deviant, and mentally unstable,⁸⁹ and their rights to use sex-segregated spaces as intrusions on the privacy and safety of cisgender children.⁹⁰ These strategies have largely failed both in courts of law⁹¹ and in the court of public opinion.⁹² Even many conservatives have cautioned that overt fearmongering about trans people intruding on others in public spaces is not a winning political strategy.⁹³

But prejudice dies hard. When one justification for negative treatment of a disfavored group falls out of favor with the public or the legal system, opponents of that group often translate their prejudice into new rhetorical forms that are more palatable.⁹⁴ The shift from the stigmatization and vilification of trans youth in the bathroom bills to the victimization narrative embodied in the gender-affirming care bans illustrates how opponents of trans identity are adapting their rhetoric in response to changing legal and social attitudes towards transgender children. Courts, media, and the public should not be fooled. The paternalistic arguments underlying gender-affirming care bans reflect the same underlying prejudices arising from the same individuals and groups,⁹⁵ and are directed towards the same ends — erasing trans

⁸⁹ See Amy L. Stone, *Gender Panics About Transgender Children in Religious Right Discourse*, 15 J. LGBT YOUTH 1, 1–3 (2018).

⁹⁰ See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613–14 (4th Cir. 2020); *id.* at 626 (Wynn, J., concurring); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526 (3d Cir. 2018); see also Note, *Constitutional Privacy and the Fight Over Access to Sex-Segregated Spaces*, 133 HARV. L. REV. 1684, 1685 (2020).

⁹¹ See, e.g., *Grimm*, 972 F.3d at 620; *Doe*, 897 F.3d at 538.

⁹² See Gabby Orr, *The Wedge Issue That's Dividing Trumpworld*, POLITICO MAG. (Aug. 7, 2020, 7:08 AM), <https://www.politico.com/news/magazine/2020/08/07/wedge-issue-dividing-trumpworld-392323#> [<https://perma.cc/M2H2-JTBL>] (noting that “public opinion [is] moving dramatically in favor” of transgender rights); Schneider, *supra* note 83 (detailing the backlash to House Bill 2 in North Carolina).

⁹³ See, e.g., Orr, *supra* note 92 (detailing a sharply divided opinion within the Trump reelection campaign concerning whether to embrace an explicitly antitransgender platform).

⁹⁴ Professor Reva Siegel has termed this phenomenon “preservation-through-transformation.” Reva B. Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2180 (1996); see *id.* at 2179 (“[T]he manner in which a legal system enforces social stratification . . . evolve[s] over time, changing shape as it is contested.”).

⁹⁵ See Editorial, *Lawmakers Reach New Low with Latest Transgender Bill*, ARGUS LEADER (Jan. 27, 2020, 10:14 AM), <https://www.argusleader.com/story/opinion/editorials/2020/01/23/south-dakota-legislature-transgender-bill-fred-deutsch/4551350002> [<https://perma.cc/EHA6-QVMU>] (noting that the chief sponsor of the 2020 South Dakota gender-affirming care ban also introduced the state’s failed bathroom bill in 2016); Chase Strangio, *Conservative Legislators Want Transgender Kids’ Lives as the New Battlefield in Their Culture War*, NBC NEWS (Jan. 17, 2021, 3:30 AM),

youth by stigmatizing transgender identity and fortifying the gender binary⁹⁶ — as bathroom bills and similar transparently vindictive campaigns. In translating their hostility to trans youth into a more socially acceptable language of “protecting” trans youth from the supposedly fraught choice of whether to transition,⁹⁷ cultural conservatives play both sides of the ball. They moderate their image by appealing to fundamental paternalistic impulses while continuing to work toward eradication of transgender identity in children by blocking access to medical services that make transition possible.⁹⁸

Their pretextual nature does not — as the UK case illustrated⁹⁹ — mean the paternalistic justifications can be ignored. The argument that trans youth should not receive gender-affirming medical care must be vigorously discredited on its own terms as a fallacious rationalization of ingrained prejudices that contradicts both empirical data and the experiences of thousands of children. For one thing, the bills’ central justification, that trans youth lack the capacity for self-reflection necessary to accurately perceive their gender identities,¹⁰⁰ is flatly untrue. Trans youth are quite secure in their gender identities by the time hormonal interventions become physiologically appropriate.¹⁰¹ A related claim, that trans youth should have to wait until adulthood to transition be-

<https://www.nbcnews.com/think/opinion/conservative-legislators-want-transgender-kids-lives-new-battlefield-their-culture-ncna1254483> [<https://perma.cc/8AXG-39EJ>].

⁹⁶ See Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 655 (2020); Strangio, *supra* note 95.

⁹⁷ See Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 638–39 (2013) (noting that paternalistic justifications for opposing LGBTQ youth are “more appealing to a wide audience and more challenging for LGBT advocates to rebut,” *id.* at 639).

⁹⁸ See Strangio, *supra* note 95; see also Knauer, *supra* note 96, at 637 (“By focusing on the element of choice and the ability to change, anti-LGBT advocates . . . attempt to not only destabilize LGBT identities, but to eradicate them completely because they believe that being LGBT is not a choice that anyone should make.”).

⁹⁹ See *Bell v. Tavistock* [2020] EWHC (Admin) 3274 (Eng.). Immediately after the High Court upheld a challenge to the National Health Service (NHS) gender-affirming treatment protocol for minors, framing the decision as an exercise of “the protective role of the court,” *id.* at [149], the defendant NHS trust announced a moratorium on new referrals for puberty blockers, see Owen Bowcott, *Puberty Blockers: Under-16s “Unlikely to Be Able to Give Informed Consent,”* THE GUARDIAN (Dec. 1, 2020, 12:18 AM), <https://www.theguardian.com/world/2020/dec/01/children-who-want-puberty-blockers-must-understand-effects-high-court-rules> [<https://perma.cc/L4CR-4KJ7>].

¹⁰⁰ See *supra* p. 2175.

¹⁰¹ See Rafferty, *supra* note 5, at 4 (“[C]hildren who are prepubertal and assert [a trans identity] know their gender as clearly and as consistently as their developmentally equivalent peers who identify as cisgender . . .”); see also Anne A. Fast & Kristina R. Olson, *Gender Development in Transgender Preschool Children*, 89 CHILD DEV. 620, 631–32 (2018) (finding that “[a]cross all measures of preference, behavior, stereotyping, and identity . . . preschool-age socially transitioned transgender children never significantly differed from their [cisgender] peers,” *id.* at 631).

cause many young children who display gender nonconforming behavior “desist,” or do not grow up to be transgender,¹⁰² has questionable empirical support¹⁰³ and, more fundamentally, equivocates gender expression with gender identity. There is a meaningful difference between a child who exhibits gender-atypical behavior and a child who persistently identifies as another gender, and the fact that the former child may not be transgender does nothing to invalidate the latter child’s entitlement to access medically necessary gender-affirming care. And gender nonconforming children who later “desist” from expressing the binary gender opposite to their assigned sex may not necessarily identify as cisgender; they may be nonbinary or possess another gender identity. Presuming that all of these persons are cisgender thus erases nonbinary experiences.¹⁰⁴ Second, the implied premise that trans youth have unilateral control over whether and when they transition is empirically untrue because the current standards of care recommend both parental consent and a medical diagnosis of gender dysphoria before a minor can receive puberty blockers or HRT.¹⁰⁵ This “gatekeeping” model, far from uncritically acceding to trans youths’ wishes, privileges caution and deliberation over ease of access.¹⁰⁶ Finally, even if one accepts that a certain number of cisgender youth will mistakenly transition if gender-affirming healthcare is available (which is itself a dubious proposition), that number is likely dwarfed by the number of trans youth who will suffer the opposite, equivalent harm — being unable to transition even though transition is right for them — if gender-affirming healthcare is not available.

C. Constitutional Arguments Against Gender-Affirming Care Bans

Gender-affirming care bans are not only harmful and founded on false premises, they are also unconstitutional. This section sketches two constitutional arguments against these proposed bans: one based in the

¹⁰² See Jesse Singal, *When Children Say They’re Trans*, THE ATLANTIC (July/Aug. 2018), <https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749> [<https://perma.cc/P7RZ-CH57>].

¹⁰³ See Julia Temple Newhook et al., *A Critical Commentary on Follow-Up Studies and “Desistance” Theories About Transgender and Gender-Nonconforming Children*, 19 INT’L J. TRANSGENDERISM 212, 212–13 (2018) (claiming that the studies showing “desistance” of gender dysphoria are methodologically flawed).

¹⁰⁴ See *id.* at 218 (noting that “desistance” arguments concerning gender nonconforming youth “reinforce [a] limited binary perspective on gender and sexuality” and that “if we find that people do not fit our categories, then it is the categories that must change”); see also Goldberg et al., *supra* note 7, at 92.

¹⁰⁵ See WPATH SOC, *supra* note 17, at 14, 18–19.

¹⁰⁶ See Singal, *supra* note 102; see also WPATH SOC, *supra* note 17, at 18 (“Before any physical interventions are considered for adolescents, extensive exploration of psychological, family, and social issues should be undertaken . . .”).

Equal Protection Clause of the Fourteenth Amendment, and one based in the parental rights strand of substantive due process jurisprudence.

I. Equal Protection. — The Equal Protection Clause ensures the right of all citizens to enjoy “the equal protection of the laws,”¹⁰⁷ or to be free from unjustified, government-imposed discrimination.¹⁰⁸ An equal protection challenge against a facially discriminatory law usually proceeds in two stages: First, the plaintiff must show that the law discriminates or classifies based on the plaintiff’s membership in a protected class.¹⁰⁹ Second, the burden shifts to the government to show that the classification is justified by an adequate government interest, and the extent of the government’s burden depends on the tier of scrutiny applied to the type of classification at issue.¹¹⁰

(a) Protected Class. — In the last few years, a growing number of courts of appeals have found that discrimination against transgender people violates equal protection.¹¹¹ Some courts have held that transgender status is a protected class in its own right,¹¹² while others have found that antitransgender discrimination is sex discrimination.¹¹³ Across-the-board bans on gender-affirming healthcare for trans youth would likely receive heightened scrutiny under either framing. Gender-affirming care bans discriminate based on transgender status because they prohibit providing HRT and GCS to minors for the specific purpose of affirming a trans youth’s gender identity, thus facially discriminating against transgender identity, and because in most cases they include exceptions allowing that same care to be provided to cisgender minors for the purpose of treating intersex conditions or “disorder[s] of sexual development.”¹¹⁴ It may be argued that the bans do not *facially*

¹⁰⁷ U.S. CONST. amend. XIV, § 1.

¹⁰⁸ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985).

¹⁰⁹ See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020).

¹¹⁰ See, e.g., *Cleburne*, 473 U.S. at 440–42; *Grimm*, 972 F.3d at 608; see also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 303–04 (1997).

¹¹¹ See, e.g., *Grimm*, 972 F.3d at 607; *Adams ex rel. Kasper v. Sch. Bd.*, 968 F.3d 1286, 1296, 1304 (11th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051–52 (7th Cir. 2017).

¹¹² See, e.g., *Grimm*, 972 F.3d at 610; *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019); see also Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551–67 (2016) (arguing that transgender status satisfies the four-factor test for whether a group should receive protected status).

¹¹³ See, e.g., *Whitaker*, 858 F.3d at 1051; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 568, 577 (6th Cir. 2004).

¹¹⁴ H.B. 321, 2020 Gen. Assemb., Reg. Sess. § 1(3) (Ky. 2020); see, e.g., *id.* § 1(2); H.B. 303, 2020 Leg., Reg. Sess. § 4 (Ala. 2020). Even the bills that do not specifically except treatment of intersex or developmental conditions from the prohibitions imply through their language that the bans only apply to use of the prohibited services as gender-affirming medical treatment. See, e.g., H.B. 2210, 100th Gen. Assemb., 2d Reg. Sess. § A(1) (Mo. 2020) (prohibiting medical providers from “administering any hormonal treatment or performing any surgical treatment for the purpose of gender re-assignment” (emphasis added)); see also S.B. 1819, 57th Leg., 2d Reg. Sess. § 1(C) (Okla. 2020).

discriminate based on transgender status, because they simply bar *conduct associated with being transgender*. But this formalistic status/conduct distinction was hardly convincing in the context of sexual orientation discrimination and is similarly unpersuasive in the context of antitransgender discrimination.¹¹⁵

The per se transgender status argument may no longer be necessary, however, in light of the Supreme Court's recent decision in *Bostock v. Clayton County*,¹¹⁶ which held that discrimination against transgender people is sex discrimination under Title VII.¹¹⁷ Justice Gorsuch's majority opinion applied a but-for causation standard to find that "discrimination based on . . . transgender status necessarily entails discrimination based on sex."¹¹⁸ Although *Bostock's* holding formally reached only Title VII, Justice Alito's dissent and several courts of appeals recognized that its analysis applies just as clearly to equal protection claims.¹¹⁹ Just as an employer discriminates "because of sex" when it "intentionally penalizes a person [assigned] male at birth for traits or actions that it tolerates in an employee [assigned] female at birth,"¹²⁰ bans on gender-affirming care for minors discriminate because of sex when they deny minors assigned one sex at birth access to certain medical procedures for gender-affirming purposes, but allow those same procedures to be performed for minors assigned the other sex at birth for non-gender-affirming purposes.¹²¹

(b) *Government Interest*. — To survive heightened scrutiny, the government's interest must at least be "important" and the law must be "substantially related" to the advancement of the interest.¹²² Gender-affirming care bans fail this means-ends inquiry along both dimensions.

¹¹⁵ See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 689 (2010) ("A tax on wearing yarmulkes is a tax on Jews." (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993))).

¹¹⁶ 140 S. Ct. 1731 (2020).

¹¹⁷ See *id.* at 1754.

¹¹⁸ *Id.* at 1747.

¹¹⁹ See *id.* at 1783 (Alito, J., dissenting) ("By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to [heightened scrutiny]."); see also, e.g., *Adams ex rel. Kasper v. Sch. Bd.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (applying *Bostock* to find that a school board policy discriminating against transgender students was sex discrimination warranting heightened scrutiny).

¹²⁰ *Bostock*, 140 S. Ct. at 1741.

¹²¹ See *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018) (observing that a Medicaid exclusion for gender-affirming healthcare was "a straightforward case of sex discrimination" because "if plaintiffs' natively assigned sexes had *matched* their gender identities, their requested, medically necessary surgeries to reconstruct their genitalia or breasts would be covered").

¹²² *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citations omitted); see Bhagwat, *supra* note 110, at 304. While this test for "intermediate scrutiny" has been used for gender-based classifications, courts apply a more searching "strict scrutiny" test for certain other classifications. See *id.*

First, the alleged purpose of the bans — to protect children from receiving gender-affirming healthcare — is fundamentally inconsistent with the empirical evidence and the lived experiences of many trans youth showing the efficacy and safety of these treatments,¹²³ and is based in faulty logic.¹²⁴ It is hard to argue that “protecting” children from medically necessary healthcare that is endorsed by nearly every professional medical association in the country¹²⁵ and validated by a near-unanimous consensus in peer-reviewed literature¹²⁶ is an interest sufficiently “legitimate” to pass rational basis review, much less one “important” enough to satisfy heightened scrutiny.¹²⁷ Second, the bans fail the “substantially related” test because they are considerably under-inclusive: even as they identify gender-affirming medical interventions as “dangerous and uncontrolled human medical experiment[s],”¹²⁸ they allow the same procedures to be performed on children who have “medically verifiable disorder[s] of sex development.”¹²⁹ If the bans are *actually* motivated by concern over the supposed dangers of puberty blockers, HRT, and GCS, providing an exception allowing those treatments to be performed for practically *any medical condition other than gender dysphoria*¹³⁰ is hardly “substantially related” to abating these alleged harms.

If their purposes are taken at face value, the gender-affirming care bans cannot survive heightened scrutiny. But they also fail under rational basis review, since, as section A explained, their real purpose is preventing transgender children from expressing their transgender identity,¹³¹ an expression of animus against transgender people that cannot be a legitimate government interest in the first place.¹³² Animus can be

¹²³ See *supra* section A.2, pp. 2167–72.

¹²⁴ See *supra* section B.2, pp. 2175–78.

¹²⁵ See sources cited *supra* note 19.

¹²⁶ See, e.g., WHAT WE KNOW PROJECT, *supra* note 42 (stating that, of more than fifty studies published between 1991 and 2017, ninety-three percent “found that gender transition improves the overall well-being of transgender people,” and that there were “no studies concluding that gender transition causes overall harm”); see also sources cited *supra* notes 41–42. But see *infra* pp. 2184–85 (describing concerns with judicial analysis of scientific evidence).

¹²⁷ See Bhagwat, *supra* note 110, at 303 (discussing rational basis review).

¹²⁸ H.B. 303, 2020 Leg., Reg. Sess. § 2(1) (Ala. 2020).

¹²⁹ *Id.* § 4(b). The Alabama bill defines “medically verifiable” conditions to include “external biological sex characteristics that are irresolvably ambiguous . . . , [such as] having both ovarian and testicular tissue,” and “[ab]normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action.” *Id.*

¹³⁰ See *id.*

¹³¹ See *supra* section B.2, pp. 2175–78.

¹³² See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996) (explaining that “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest” (citation omitted)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985); *Susannah W. Pollvogt, Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 888 (2012).

demonstrated in a number of ways: based on inference from the structure of the law and through direct evidence that the law was motivated by prejudice.¹³³ As the Supreme Court held in *City of Cleburne v. Cleburne Living Center, Inc.*,¹³⁴ the structure of a classification can provide inferential evidence of animus when the alleged government interest does not support targeting the particular group over and above other similarly situated groups.¹³⁵ Thus, when state governments profess that bans on gender-affirming medical treatments are meant to protect children from invasive and life-changing medical procedures, but only ban procedures that are performed for the purpose of affirming a trans youth's gender identity, the arbitrariness of the classification suggests the stated interests are pretext for animus.¹³⁶

Ultimately, however, this structural analysis is probably unneeded because there is abundant *direct* evidence of animus against transgender people surrounding the bans.¹³⁷ For example, during a private meeting, the Florida bill's sponsor told a nonbinary opponent of the bill that transgender people "manufacture" their identities.¹³⁸ The author of the South Dakota legislation labeled medical transition in minors a "crime against humanity" and analogized it to medical experimentation at Auschwitz.¹³⁹ The lead sponsor of the Colorado bill admitted he was "not concerned" about the potential impact of the bill on the mental health of trans youth in the state, but was disturbed by "a progression of acceptance of young kids being sterilized."¹⁴⁰ The organizations that promoted these bills also demonstrate clear animus towards transgender identity. YouTube removed the video of the October 2019 Heritage

¹³³ See Pollvogt, *supra* note 132, at 926–27.

¹³⁴ 473 U.S. 432.

¹³⁵ See *id.* at 447–50. In *Cleburne*, the Court held that a city's denial of a special zoning permit to a group home for people with intellectual disabilities violated equal protection because it was founded on "irrational prejudice" against such people. *Id.* at 450. The Court inferred prejudice in part because the city imposed special permitting requirements on the group home for reasons such as density, traffic congestion, and exposure to litigation risk that applied equally to other high-density residential uses, such as nursing homes and dormitories, for which special permits were not required. See *id.* at 447–50.

¹³⁶ Cf. *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 450.

¹³⁷ See Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 511 (2018) (defending the probative value of explicit statements of bias as evidence of discriminatory intent); Pollvogt, *supra* note 132, at 927.

¹³⁸ Jeff Taylor, *Florida Lawmaker Told Nonbinary Candidate He's "Manufacturing" His Identity*, NEWNOWNEXT (Feb. 4, 2020), <https://www.newnownext.com/florida-republican-sabatini-gender-nonbinary-manufacturing-identity/02/2020> [<https://perma.cc/3NTT-LSBB>].

¹³⁹ Katie Shepherd, *A GOP Lawmaker, the Son of an Auschwitz Survivor, Compared Doctors Treating Transgender Children to Nazis. He Regrets It.*, WASH. POST (Jan. 28, 2020, 11:45 AM), <https://www.washingtonpost.com/nation/2020/01/28/deutsch-transgender-doctors-nazi> [<https://perma.cc/7AJH-AMJX>]. To his credit, Rep. Deutsch later apologized. *Id.*

¹⁴⁰ John Herrick, *Anti-LGBTQ Bills Doomed to Die. Advocates Say They Still Take a Toll.*, COLO. INDEP. (Feb. 13, 2020), <https://www.coloradoindependent.com/2020/02/13/gop-anti-lgbtq-transgender-youth> [<https://perma.cc/GQP4-8AJP>].

Foundation event that inspired many of the bills after determining that the Heritage panelists' incendiary comments violated the YouTube hate speech policy.¹⁴¹ And the Family Policy Alliance, which helped draft many of the bills, declares prominently on its website that it “oppose[s] . . . attempts to normalize” being transgender, “especially amongst impressionable children.”¹⁴²

2. *Due Process and Parental Rights.* — The gender-affirming care bans also arguably violate the Fourteenth Amendment's due process guarantee of *parents'* rights to make decisions about the upbringing of their children. The due process right to freedom in child rearing is one of the foundational rights protected under substantive due process doctrine, dating back to the early twentieth century¹⁴³ and consistently reaffirmed since then.¹⁴⁴ It protects parents' ability to make important decisions about “the care, custody, and control of their children” free from government interference,¹⁴⁵ based on the presumption that a parent, not the state, is in the best position to determine their child's best interests.¹⁴⁶ The Supreme Court has never explicitly held that the due process right to freedom in child rearing encompasses the right to direct a child's medical care, but has implied as much in at least one case.¹⁴⁷ Many other courts and commentators have presumed that parents' common law right to supervise their children's healthcare is constitutionally protected.¹⁴⁸ Gender-affirming care bans would likely violate this right. Prohibiting parents from authorizing medically necessary treatment for their children when they believe this care is in their children's best interests is just the kind of

¹⁴¹ See Emily Jashinsky, *Exclusive: Man Tried to Share His Regrets About Transgender Life. YouTube Censored It*, FEDERALIST (June 19, 2020), <https://thefederalist.com/2020/06/19/exclusive-man-trying-to-share-his-regrets-about-transgender-life-youtube-censored-it> [<https://perma.cc/9JEM-M7NJ>]; see also, e.g., *Summit*, *supra* note 70, at 2:15:20 (panelist describing the pioneers of gender-affirming treatment for minors as “pedophile activist[s]”).

¹⁴² *Transgenderism & Gender Dysphoria*, FAM. POL'Y ALL. (internal quotation marks omitted), <https://familypolicyalliance.com/issues/sexuality/transgender> [<https://perma.cc/77QD-7FMA>]; see Bauer, *supra* note 71.

¹⁴³ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁴⁴ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹⁴⁵ *Troxel*, 530 U.S. at 65.

¹⁴⁶ See *id.* at 69–70.

¹⁴⁷ See *Parham v. J.R.*, 442 U.S. 584, 603–04 (1979) (recognizing “parents' authority to decide what is best for the[ir] child” in the medical context, *id.* at 604); see also *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418–19 (6th Cir. 2019).

¹⁴⁸ See, e.g., *Kanuszewski*, 927 F.3d at 418–19; *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010); RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.30 (AM. L. INST., Tentative Draft No. 1, 2018); Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955, 966–68 (2010).

intrusive government conduct that parental due process rights guard against.

Of course, parental rights are not absolute. The state can limit parental autonomy in medical decisionmaking in order to prevent injury to children's health and well-being.¹⁴⁹ For example, many states have passed bans on conversion therapy for minors based on the nearly unanimous medical consensus that such treatment is harmful and dangerous.¹⁵⁰ Courts have upheld these bans against due process challenges on the ground that "the fundamental rights of parents do not include the right to choose . . . a specific medical or mental health treatment that the state has reasonably deemed harmful."¹⁵¹

The test is whether the treatment is *actually* harmful or reasonably believed to be harmful, which depends on the weight of scientific evidence for the legislature's judgment. Conversion therapy bans do not violate due process because a considerable scientific consensus views conversion therapy as harmful and senseless.¹⁵² The crucial difference in the case of gender-affirming care bans is that the weight of the scientific supermajority,¹⁵³ along with a growing canon of empirical research¹⁵⁴ and the lived experiences of thousands of trans youth who benefit from gender-affirming care, is *against* the legislatures' judgments that gender-affirming care is harmful.

None of this is to say that challenges to gender-affirming healthcare bans on due process grounds are certain to prevail. Courts often fail to interrogate the factual underpinnings of a legislature's judgment because their focus is more directly trained on rooting out the motivations of the legislature than on checking the lawmakers' work in an empirical sense,¹⁵⁵

¹⁴⁹ See *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

¹⁵⁰ See, e.g., CAL. BUS. & PROF. CODE § 865.1 (West 2021); Editorial, *A Nationwide Ban Is Needed for "Anti-gay Therapy,"* SCI. AM. (Jan. 1, 2020), <https://www.scientificamerican.com/article/a-nationwide-ban-is-needed-for-anti-gay-therapy> [<https://perma.cc/BV37-ZYVH>].

¹⁵¹ *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014); see also, e.g., *Doe ex rel. Doe v. Governor of N.J.*, 783 F.3d 150, 156 (3d Cir. 2015) (same).

¹⁵² See *Doe*, 783 F.3d at 152–53; *Pickup*, 740 F.3d at 1231–32.

¹⁵³ Compare, e.g., Policy Statement, *Conversion Therapy*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx [<https://perma.cc/LV4U-SV3P>] (confirming that conversion therapy "lack[s] scientific credibility and clinical utility"), and Editorial, *supra* note 150 (noting that various medical associations characterize conversion therapy as "useless and injurious"), with, e.g., *AACAP Statement*, *supra* note 46 (stating that "AACAP strongly opposes any efforts . . . to block access" to "evidence-based [gender-affirming] care"), and ENDOCRINE SOC'Y & PEDIATRIC ENDOCRINE SOC'Y, *supra* note 46, at 2 (describing gender-affirming care for minors as "effective, relatively safe when appropriately monitored, and . . . the standard of care" (parentheses omitted)).

¹⁵⁴ See *supra* section A.2, pp. 2167–72.

¹⁵⁵ See Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 443–44 (2020) (noting that the doctrinal framework for judicial review of legislative purposes is ill-equipped to protect marginalized groups from "distorted legislative records" based on "alternative facts," *id.* at 443).

or because they are distracted by their moral preconceptions of an issue.¹⁵⁶ This failure is unfortunately commonplace in transgender rights cases,¹⁵⁷ though recent decisions have shown improvement in this regard.¹⁵⁸ There is also a risk that parental due process arguments could be turned against trans youth who seek to use state resources to obtain access to gender-affirming care against the wishes of unaccepting parents. Detailed exploration of this question is not possible here, but it is doubtful that the best-interests presumption applies if the parent's decision not to accept their child's transgender identity or desire to transition is motivated by prejudice, to which "the law cannot, directly or indirectly, give . . . effect."¹⁵⁹

Conclusion

Anxiety about gender-affirming medical interventions for trans youth is understandable in many respects. Puberty blockers, HRT, and GCS are dramatic and life-changing decisions. However, a *failure* to intervene can be equally consequential. In other words, foregoing gender-affirming care "is not a neutral option"¹⁶⁰ for trans youth: it is a choice that imposes significant risks of physical, mental, social, and legal harms. Even so, this Chapter does not argue that every trans youth *must* transition before adulthood. Although evidence suggests this is the best option in many cases, every trans youth is different, and many transgender people live happy and healthy lives after transitioning as adults. Nor does this Chapter have the scope to opine on the ideal distribution of agency in these decisions between doctors, parents, and trans youth, beyond the observation that parents' animus or prejudice against transgender people should not inhibit a youth's access to care.¹⁶¹ Ultimately, "protecting" trans youth requires allowing them to access medical care that permits them to live according to their own definitions of themselves, rather than the definitions ascribed to them by politicians whose goal is not protection, but suppression of children whose identities threaten their worldview. Perhaps lawmakers will one day realize this. But for now, the issue of gender-affirming healthcare for trans youth remains a heated battleground in the culture war, with the rights of thousands of children once again subject to political will.

¹⁵⁶ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 179–82 (2007) (Ginsburg, J., dissenting) (describing the majority's "bewildering," *id.* at 179, rejection of the "significant medical authority," *id.* at 180 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000)), supporting the use of a late-term abortion procedure to protect the patient's health in some circumstances); *id.* at 182 ("Ultimately, the Court admits that moral concerns are at work . . ." (quotation marks omitted)).

¹⁵⁷ See, e.g., *Gibson v. Collier*, 920 F.3d 212, 223 (5th Cir. 2019) ("There is no medical consensus that sex reassignment surgery is a necessary or even effective treatment for gender dysphoria.").

¹⁵⁸ See, e.g., *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019) (holding that prison officials' denial of medically necessary gender-affirming medical care violated the Eighth Amendment).

¹⁵⁹ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

¹⁶⁰ *WPATh SOC*, *supra* note 17, at 21.

¹⁶¹ See *Ikuta*, *supra* note 6, at 227–28.