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Protect Trans Kids: A Call to Action

Suzi Goebel
SMU Dedman School of Law

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PROTECT TRANS KIDS: A CALL TO ACTION

*Suzi Goebel**

ABSTRACT

The last several years have seen an increasing number of attacks on marginalized groups in the United States, including people of color, women, and members of the LGBTQ+ community. Most recently, some state legislatures have focused their efforts on preventing transgender youth from accessing gender-affirming medical care. Despite a virtually unanimous consensus on the importance and benefits of gender-affirming care, many conservative politicians have taken aim at vulnerable children, standing in the way of potentially life-saving treatment and accusing their families and doctors of child abuse. Laws preventing transgender youth from receiving gender-affirming care are just one battle in the larger war on individual liberty interests, bodily autonomy, and health care privacy. Already, anti-trans laws written under the pretext of protecting minors are being expanded to detransition transgender adults and criminalize the very existence of transgender people. At the same time, pregnant people around the country are losing their reproductive rights and access to safe and legal abortions. These are both part of a concerted effort to wedge the unjust influence of oppressive state governments into two of the most intimate social and legal relationships: the relationship between a child and their parent, and the relationship between a patient and their doctor.

This Comment argues that these attacks must be met by political resistance. Litigation before the current Supreme Court and its conservative majority may do more harm than good, and patients in need of medical care deserve

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* J.D. Candidate, SMU Dedman School of Law, 2024; B.A. Government, Spanish, The University of Texas at Austin, 2020. Pronouns: they/them. I am deeply grateful to Erin Reed, the journalist at the heart of the Anti-Trans Legislation Tracking project, for inspiring this comment and enabling my research; to Professor Tom Leatherbury and Professor Peter Steffensen from the First Amendment Clinic at SMU for helping me continue my advocacy in the area of queer legal issues; and most of all to my amazing partner Anastasia Trest-Lewis for supporting me and keeping me sane. This comment is dedicated to the memory of the trans children who will never grow up into trans adults. May we love them, honor them, and build a better world for them.

prospective protections to safeguard their right to privacy. Therefore, comprehensive federal legislation, such as the proposed Equality Act, is the best solution to protect transgender youth and the broader right to privacy in health care.

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I. INTRODUCTION

A. THE IMPORTANCE OF GENDER-AFFIRMING CARE

According to twelve-year-old Kai Shappley's Twitter bio, she identifies as an "activist," "actress," "cat lover," and "Dolly Parton fan."¹ Recently, her Twitter was updated to include the more solemn title of "political refugee."² This is because Kai also identifies as someone her home state of Texas does not welcome: a transgender girl.

Kai is one of 1.6 million transgender people in the United States.³ Nearly one in five transgender Americans are between the ages of thirteen and seventeen,⁴ making transgender youth a substantial population demographic with their own distinct needs and interests. Unfortunately, these interests are directly opposed to the interests of conservative lawmakers who view transgender rights as the latest opportunity to wedge state governments between patients and their doctors, and even between children and their families. Each passing state legislative session creates more and more laws restricting transgender youth's access to gender-affirming health care, and lawsuits involving these statutes are percolating through the pipeline to an inevitable Supreme Court intervention.⁵

Gender-affirming care never should have been a political issue in the first place. At least nine national and international health organizations, including the World Health Organization,⁶ the American Academy of Pediatrics,⁷ the

1. Kai Shappley (@KaiShappley), X, <http://twitter.com/kaishappley> (last visited Mar. 25, 2024), [<https://perma.cc/XDN5-QWLH>].

2. *Id.*

3. Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, 2022 WILLIAMS INST. 1.

4. *Id.* at 13.

5. *See, e.g.,* Brandt v. Rutledge, 551 F. Supp. 3d 882, 887, 894 (E.D. Ark. Aug. 2, 2021).

6. *See* Virginia Macdonald et al., *The World Health Organization's Work and Recommendations for Improving the Health of Trans and Gender Diverse People*, 25 J. INT'L AIDS SOC'Y 99, 101 (2022) (explaining that lack of access to gender-affirming care creates healthcare inequity for transgender people).

7. *See* Moira Szilagyi, *Why We Stand Up for Transgender Children and Teens*, AM. ACAD. PEDIATRICS: AAP VOICES (Aug. 10, 2022), <https://www.aap.org/en/news-room/aap-voices/why-we-stand-up-for-transgender-children-and-teens/> [<https://perma.cc/G3SA-8RR2>]. Dr. Szilagyi, the 2022 President of the American Academy of Pediatrics, described how five of her colleagues at the Academy's Leadership Conference offered a "resolution on transgender youth" disagreeing with the Academy's position, but "[t]hese pediatricians were unable to recruit a sponsor, which meant no one was willing to support their proposal. During our meeting, this resolution did not advance because it did not receive a second vote on the floor." *Id.*; *see also* Lee Savio Beers, *American Academy of Pediatrics Speaks Out Against Bills Harming Transgender Youth*, AM. ACAD. PEDIATRICS (Mar. 16, 2021), <https://www.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-speaks-out-against-bills-harming-transgender-youth/> [<https://perma.cc/X928-FM6P>] ("The American Academy of Pediatrics recommends that youth who identify as transgender have access to comprehensive, gender-affirming, and developmentally appropriate health care that is provided in a safe and inclusive clinical space.").

Endocrine Society,⁸ the American Medical Association,⁹ the American Psychiatric Association,¹⁰ the World Professional Association for Transgender Health,¹¹ the United States Professional Association for Transgender Health,¹² the Pediatric Endocrine Society,¹³ and the American Academy of Child and Adolescent Psychiatry¹⁴ have issued statements against bills seeking to criminalize gender-affirming care and agree that gender-affirming treatment is “safe” and even “lifesaving” for trans children.¹⁵ The clear scientific consensus among health care professionals is that gender-affirming treatment improves

8. See Press Release, Endocrine Society, Endocrine Society Alarmed at Criminalization of Transgender Medicine (Feb. 23, 2022), <https://www.endocrine.org/news-and-advocacy/newsroom/2022/endocrine-society-alarmed-at-criminalization-of-transgender-medicine> [<https://perma.cc/EGT3-GWWL>] (“There is widespread consensus within the medical community about the importance of this care. Other major international medical and scientific organizations such as WPATH, the European Society of Endocrinology, the European Society for Pediatric Endocrinology, the Pediatric Endocrine Society, the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics are in alignment with the Society on the importance of gender-affirming care.”). See also *Endocrine Society Condemns Efforts to Block Access to Medical Care for Transgender Youth*, AM. ASS’N FOR ADVANCEMENT SCI. (Apr. 14, 2021), https://www.eurekalert.org/pub_releases/2021-04/tes-esc041421.php [<https://perma.cc/954W-DT62>]. The Endocrine Society also released a joint statement with the Pediatric Endocrine Society, *infra* note 13.

9. See Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, [J]AMA NETWORK OPEN (Feb. 25, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423> (“[G]ender-affirming medical interventions were associated with lower odds of depression and suicidality over 12 months.”); see also *March 26, 2021: State Advocacy Update*, AM. MED. ASS’N (Mar. 26, 2021), <https://www.ama-assn.org/health-care-advocacy/advocacy-update/march-26-2021-state-advocacy-update> [<https://perma.cc/2B5F-V2UF>].

10. See *Frontline Physicians Oppose Legislation that Interferes in or Criminalizes Patient Care*, AM. PSYCHIATRIC ASS’N (Apr. 2, 2021), <https://www.psychiatry.org/newsroom/news-releases/frontline-physicians-oppose-legislation-that-interferes-in-or-criminalizes-patient-care> [<https://perma.cc/YF44-DEY4>]. The American Psychiatric Association’s statement was a joint statement with the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Physicians, American College of Obstetricians and Gynecologists, and the American Osteopathic Association. See *Medical Association Statements Supporting Trans Youth Healthcare and Against Discriminatory Bills*, GLAAD (Apr. 19, 2021), <https://www.glaad.org/blog/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory> [<https://perma.cc/P4LM-E772>].

11. See *WPATH/USPATH Statement on the Bills Barring Trans Girls from Sports*, WORLD PRO. ASS’N TRANSGENDER HEALTH (Mar. 31, 2021), https://www.wpath.org/media/cms/Documents/Public%20Policies/2021/WPATH%20_%20USPATH%20Statement%20on%20the%20Bills%20Barring%20Trans%20Girls%20from%20Sports.pdf [<https://perma.cc/XHJ8-YZA8>].

12. See *id.*

13. See *Discriminatory Policies Threaten Care for Transgender, Gender Diverse Individuals*, ENDOCRINE SOC’Y (Dec. 16, 2020), <https://www.endocrine.org/news-and-advocacy/newsroom/2020/discriminatory-policies-threaten-care-for-transgender-gender-diverse-individuals> [<https://perma.cc/6GZ3-3AKN>].

14. See *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/QL4X-WWJ3>].

15. *Medical Association Statements Supporting Trans Youth Healthcare and Against Discriminatory Bills*, *supra* note 10.

health outcomes for transgender people and drastically decreases rates of suicide in the transgender community.¹⁶

Gender affirmation takes many forms and is a deeply personal choice best made by the transgender person and their doctors.¹⁷ The first stage of gender-affirming care is typically social transitioning, which involves changes to gender presentation (such as wearing clothes or hairstyles associated with a certain gender), names and pronouns, and participation in other social activities like gender-segregated sports.¹⁸ Because there is no actual medical treatment involved, social transitioning is completely reversible in case the patient realizes that they identify with their assigned sex at birth.¹⁹ Some transgender individuals find that their gender dysphoria²⁰ is alleviated by social transitioning alone, while others seek additional medical treatment.²¹ This additional treatment can include “puberty blockers,” which are hormones that give children more time to explore their gender identity by delaying the onset of puberty.²² Like social transitioning, puberty blockers are also reversible by simply discontinuing treatment.²³ Other options include hormone replacement therapy, a partially reversible treatment in which patients take testosterone or estrogen to suppress the secondary sex characteristics of their gender assigned at birth and encourage the development of desired masculinizing or feminizing features.²⁴ Some transgender people opt to undergo gender-affirming surgeries, although it is very rare for children to receive these operations due in part to strict age limits set by

16. See Eliza Chung, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY L. REV. 145, 160 (2021) (“According to the UCLA School of Law Williams Institute’s interpretation of the 2015 U.S. Transgender Survey, 97.7% of respondents who experienced ‘being fired or forced to resign from a job, eviction, experiencing homelessness, and physical attack’ in the past year because of their transgender status had thought about suicide, with 51.2% having attempted suicide. All respondents with health insurance who sought gender-affirming care were refused such by their doctors; 14.4% attempted suicide, compared to 6.5% of those whose doctors did provide such care. These statistics show that transgender people who wanted gender-affirming care but were unable to obtain it have an increased rate of attempted suicide and that the ability to receive gender-affirming health care makes a difference.”).

17. See Szilagyi, *supra* note 7.

18. See Nicole Scott, *Trans Rights Are Human Rights: Protecting Trans Minors’ Right to Gender-Affirming Care*, 14 DREXEL L. REV. 685, 695 (2022).

19. See *id.*

20. Gender dysphoria is “[a] marked incongruence between one’s experienced/expressed gender and assigned gender, of at least six months’ duration, as manifested by at least two or more” symptoms, such as “[a] strong desire to be of the other gender (or some alternative gender different from one’s assigned gender)” and “[a] strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender) . . .” *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> [<https://perma.cc/9XQL-NAA5>]. The full list of symptoms is available on the American Psychiatric Association’s website. See *id.*

21. See Scott, *supra* note 18, at 694.

22. See *id.* at 695; see also Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, Feb. 2020, at 1 (“Gonadotropin-releasing hormone analogues are commonly prescribed to suppress endogenous puberty for transgender adolescents.”).

23. The author explains that this is especially beneficial given that the “biological changes of puberty are irreversible and may hinder future transition[.]” Scott, *supra* note 18, at 696.

24. See Cécile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY & UROLOGY 877, 877 (2016).

the hospitals themselves.²⁵ At the time of writing, there exist state laws and legislative proposals that seek to limit access to every level of gender-affirming care, including both social and medical transitioning.²⁶

The exact type of gender-affirming care that is recommended varies from patient to patient and is dependent upon factors including the person's age.²⁷ According to the World Professional Association for Transgender Health and the Endocrine Society's clinical practice guidelines, most young children should only transition socially and adopt a "wait-and-see" approach in the event that their gender dysphoria dissipates upon reaching adolescence.²⁸ If gender dysphoria persists, then puberty blockers may be appropriate for patients between eight and fifteen years old.²⁹ Further hormonal treatments are generally not recommended in prepubertal children, and experts instead recommend that patients wait until age sixteen, "when most adolescents are deemed competent to provide informed consent and make medical decisions in their own best interest."³⁰ More invasive treatments, such as surgical interventions, are only recommended for minors after appropriate medical clearance and physician approval.³¹ Even then, many hospitals impose their own additional age limitations to ensure that only sufficiently mature patients undergo surgical

25. See Scott, *supra* note 18, at 700–01 ("These surgeries often have set age limitations; for example, Boston Children's Hospital sets minimum age limits for chest reconstruction (fifteen), phalloplasty (eighteen), and vaginoplasty (seventeen).").

26. See, e.g., Tex. H.B. 672, 88th Leg., R.S. (2023) (proposing an amendment to § 261.001 of the Texas Family Code that would classify "administering or supplying, or consenting to or assisting in the administration or supply of, a puberty suppression prescription drug or cross-sex hormone to a child . . . for the purpose of gender transitioning or gender reassignment" and "performing or consenting to the performance of surgery or another medical procedure on a child . . . for the purpose of gender transitioning or gender reassignment" as "abuse"); Tex. H.B. 643, 88th Leg., R.S. (2023) (broadly defining "drag performance" as "a performance in which a performer exhibits a gender identity that is different than the performer's gender assigned at birth" and imposing criminal charges against venues that permit minors to attend such "performances").

27. See Scott, *supra* note 18, at 694–701.

28. See Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3877 (2017).

29. See *id.* at 3870 ("We recommend treating gender-dysphoric/gender-incongruent adolescents who have entered puberty at Tanner Stage G2/B2 by suppression with gonadotropin-releasing hormone agonists."). Tanner staging is the metric by which sexual maturity is measured; most females enter stage two between eight and fifteen years old, while most males enter stage two between ten and fifteen years old. See WORLD HEALTH ORG., ANTIRETROVIRAL THERAPY FOR HIV INFECTION IN INFANTS AND CHILDREN: TOWARDS UNIVERSAL ACCESS 162 (2010).

30. Scott, *supra* note 18, at 699; see also Hembree et al., *supra* note 28, at 3869, 3872. However, there are some cases where "there may be compelling reasons to initiate sex hormone treatment prior to age 16 years," so this guideline is relatively flexible and best determined on a patient-by-patient basis. Hembree et al., *supra* note 28, at 3870.

31. See Hembree et al., *supra* note 28, at 3872 ("We recommend that a patient pursue genital gender-affirming surgery only after the [mental health professional] and the clinician responsible for endocrine transition therapy both agree that surgery is medically necessary and would benefit the patient's overall health and/or well-being. . . . We advise that clinicians approve genital gender-affirming surgery only after completion of at least 1 year of consistent and compliant hormone treatment, unless hormone therapy is not desired or medically contraindicated.").

operations.³² For example, Boston Children’s Hospital, renowned³³ for its pediatric and adolescent transgender health program, limits chest reconstruction surgery (colloquially referred to as “top surgery”) to patients fifteen years or older, phalloplasty to patients eighteen years or older, and vaginoplasty (collectively, “bottom surgery”) to patients seventeen years or older.³⁴

Based on the industry’s own best practices, there is virtually no possibility of transgender youth making irreversible changes or receiving invasive treatments that they are not mature enough to receive. Indeed, gender-affirming care is already hard enough to come by,³⁵ and detransitioning is an “extraordinarily rare” occurrence.³⁶ Therefore, it is vital that access to gender-affirming care be protected at all costs.

B. HEALTH CARE PRIVACY

Limitations on gender-affirming care are just one part of a concerted political effort to drive a wedge into the personal relationship between patients and their doctors. Perhaps most notably, the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Org.* reversed *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey*, stripping tens of millions of Americans of their right to abortion.³⁷ Intrusions into medical privacy certainly did not begin with attacks on minors receiving gender-affirming care, and it is clear that they will not end there, either. Already, states are expanding their bans on gender-affirming care to prevent transgender adults from accessing treatment as well.³⁸ For example, Oklahoma recently introduced a bill that would forbid “a physician or other healthcare professional” from referring or providing “gender transition procedures to any individual under twenty-six (26) years of age.”³⁹

Access to gender-affirming care cannot be analyzed in a vacuum. Because many of the same politicians behind anti-trans laws also support laws limiting

32. See Scott, *supra* note 18, at 700.

33. See *Boston Children’s Hospital*, U.S. NEWS & WORLD REPORT, <https://health.usnews.com/best-hospitals/area/ma/boston-childrens-hospital-6140270> [<https://perma.cc/5833-EEDE>] (ranking Boston Children’s Hospital first on the Best Children’s Honor Roll and nationally ranking the hospital in ten children’s specialties).

34. See Scott, *supra* note 18, at 700–01.

35. See *id.* at 713 (“Despite conservative panic to the contrary, doctors do not allow just anyone to initiate hormone treatment therapy; . . . 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. 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.”).

36. *Id.* at 711. (“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. . . . In 2015, only fifteen of 6,793 patients, or 0.22%, treated with gender-affirming hormones expressed regret.”)

37. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

38. See, e.g., S.B. 129, 59th Leg., 1st Reg. Sess. (Okla. 2023). The Oklahoma bill, which declares a state of “emergency,” would deny state funding to health care professionals and facilities that provide gender-affirming care to Oklahomans under the age of twenty-six. The bill would also make the provision of or referral for such care a felony with a forty-year statute of limitations for prosecution.

39. *Id.*

access to abortion (and some anti-trans laws even contain anti-abortion provisions),⁴⁰ full consideration of the legal and political avenues available to protect transgender youth requires acknowledgement of these similarities. Both transgender youth's right to gender-affirming care and pregnant people's right to abortion care are rooted in the broader right to privacy, which is under siege in battlefields ranging from state legislatures to the Supreme Court.

C. OVERVIEW

Part II will conduct a state-by-state survey of the present legal framework governing transgender youth's access to medical treatment. It will specifically focus on two states of interest: Arkansas and California. Arkansas is of special importance because the state's ironically entitled SAFE Act lies at the heart of the controversy in *Brandt v. Rutledge*, a case that has the potential to be ultimately decided by the United States Supreme Court. Laws like the SAFE Act have led transgender youth and their families to flee unfriendly states in search of a new home where their children can receive the medical treatment they need without the threat of civil penalties or criminal prosecution.⁴¹ California is a popular destination for such families, thanks in part to the state's "safe haven" laws that prohibit the apprehension of people who have left another state to avoid prosecution related to that state's criminalization of fundamental rights, such as access to abortions and gender-affirming care.⁴²

Part III will delve into the broader legal context surrounding the issue of transgender rights and examine how laws limiting transgender youth's access to gender-affirming care fit within the larger scheme of attacks on health care and privacy, namely those limiting abortion access. It will use the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* as a legal turning point and look to both pre- and post-*Dobbs* legislation as examples of political intrusions into individual liberty interests and the right to privacy.

Finally, Part IV will analyze two potential avenues to protect transgender rights: litigation and legislation. While some cases over anti-trans laws are already in the judicial pipeline, the safety of transgender youth cannot be left open for the courts' interpretation. This Comment will demonstrate the benefits of a federal legislative solution as well as the dangers of impact litigation before the current Supreme Court and ultimately make the case for the passage of a law similar to the proposed Equality Act.

40. See, e.g., H.B. 576, 2023 Leg., Reg. Sess. (Miss. 2023) (prohibiting medical professionals from administering gender-affirming care to minors and from performing abortions).

41. See, e.g., Jordan Vonderhaar, *Photos: "We Don't Feel Safe Here." A Transgender Teen and Their Family Flee Texas.*, TEX. TRIB. (Dec. 2, 2022, 5:00 AM), <https://www.texastribune.org/2022/12/02/trans-kids-leave-texas/> [https://perma.cc/SXE8-TTWQ].

42. See Press Release, Nancy Skinner, Cal. State Sen., Skinner to Introduce Bill to Strengthen California's Status as a 'Safe Haven' for Abortion and Gender-Affirming Care (Dec. 1, 2022), <https://sd09.senate.ca.gov/news/20221201-skinner-introduce-bill-strengthen-california%E2%80%99s-status-%E2%80%98safe-haven%E2%80%99-abortion-and-gender> [https://perma.cc/G5H8-D7HS].

II. SURVEY

A. THE STATE OF TRANS RIGHTS

In the absence of federal legislative action, the states have taken it upon themselves to create their own laws governing transgender rights, including the right for trans youth to receive gender-affirming care.⁴³ The result is a complicated hodgepodge of different state laws restricting access to social and medical transitions for transgender Americans of all ages.

During the 2023 legislative session, state legislatures in forty-eight states introduced 517 anti-trans bills; Congress also saw twenty-three anti-trans bills at the federal level.⁴⁴ Ultimately, 258 of these bills failed, eighty-one were enacted, and 200 rolled over to the following legislative session.⁴⁵ The substance of these bills includes restrictions on transgender participation in sports;⁴⁶ “Don’t Say Gay” laws;⁴⁷ drag bans;⁴⁸ bathroom restrictions;⁴⁹ birth certificate

43. See generally Daniel Choma et al., *Transgender Rights Under Siege in Many State Legislatures—Including Minnesota’s*, 78 BENCH & B. MINN. 18, 20 (Nov. 2021).

44. See Allison Chapman et al., *LGBTQ+ Legislative Tracking 2023*, <https://docs.google.com/spreadsheets/d/1fTxHLjBa86GA7WCT-V6AbEMGRFPMJndnaVGoZZX4PMw/edit#gid=0> [https://perma.cc/ZX2V-MJK4]. The spreadsheet, which was updated every fifteen minutes throughout 2023, is the most comprehensive record of the various bills and laws governing transgender rights across the fifty states. The authors made their data free and accessible to the public, but interested readers should strongly consider a paid subscription to Reed’s Substack newsletter to support their research! See Erin Reed, *Erin In The Morning*, SUBSTACK, <https://erininthemorn.substack.com/> [https://perma.cc/MZ3Z-4YPA].

45. See Chapman et al., *supra* note 44.

46. Sports bans are laws that require athletes, especially student-athletes participating in school-sponsored sports, to play on gender-segregated teams in accordance with their assigned sex at birth. See, e.g., H.B. 27, 33rd Leg., 1st Sess. (Alaska 2023) (“A student who participates in an athletic team or sport designated female, women, or girls must be female, based on the participant’s biological sex.”).

47. “Don’t Say Gay” laws prevent public schools from discussing gender identity and sexual orientation. See, e.g., S.B. 294, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (prohibiting public school teachers from instructing students on “(1) Sexually explicit materials; (2) Sexual reproduction; (3) Sexual intercourse; (4) Gender identity; or (5) Sexual orientation” before the fifth grade).

48. Drag bans restrict performances where the performer wears clothing associated with the opposite gender, in some cases imposing criminal penalties for performing in the presence of children. See, e.g., Tex. H.B. 1266, 88th Leg., R.S. (2023) (defining “drag performance” as “a performance in which a performer exhibits a gender identity that is different than the performer’s gender assigned at birth using clothing, makeup, or other physical markers and sings, lip syncs, dances, or otherwise performs before an audience for entertainment” and classifying establishments that put on such performances as “[s]exually oriented business[es]”). Some activists have expressed concern that drag bans are unconstitutionally vague and could be enforced against any transgender individual in any context. See Erin Reed (@ErinInTheMorn), TWITTER (Jan. 19, 2023, 11:21 AM), <https://twitter.com/ErinInTheMorn/status/1616123784016310273> [https://perma.cc/7TVN-DGUB].

49. Bathroom restrictions are laws that would require people to use the bathroom associated with their assigned gender at birth. See, e.g., S.B. 1100, 76th Leg., Reg. Sess. (Idaho 2023) (creating a civil cause of action against public school defendants for “[a]ny student who, while accessing a public school restroom, changing facility, or sleeping quarters designated for use by the student’s sex, encounters a person of the opposite sex” punishable by damages of \$5,000 as well as “monetary damages from the defendant public school for all psychological, emotional, and physical harm suffered” in addition to the recovery of “reasonable attorney’s fees and costs”).

change restrictions;⁵⁰ forced misgendering;⁵¹ forced outing by schools;⁵² bans on public investment in environmental, social, and governance (ESG) funds;⁵³ and anti-boycott acts.⁵⁴

One hundred seventeen of these proposed laws specifically target gender-affirming medical care.⁵⁵ While the first gender-affirming care proposals to be introduced were aimed only at transgender youth, some bills have a more general reach and now also restrict the ability of transgender adults to receive care.⁵⁶ Even bills that do not directly address care for adults can produce a chilling effect⁵⁷ that limits access to care in general. This is indicative of a broader encroachment into the right to privacy and bodily autonomy in medical decision-making.

On the other end of the spectrum, thirty-four states have introduced 114 pro-LGBTQ+ bills, including fifteen “safe state” bills.⁵⁸ These bills pledge that the state will protect transgender youth’s access to gender-affirming care.⁵⁹ While

50. Birth certificate change restrictions make it more difficult (or even impossible) to change the sex marker on one’s birth certificate from male to female, female to male, or to the nonbinary gender marker “X.” *See, e.g.*, H.B. 585, 2023 Reg. Sess. (Ky. 2023) (requiring that “the biological sex designation on a birth certificate . . . shall be either male or female and shall not be nonbinary or any symbol representing a nonbinary designation”).

51. Forced misgendering bills require public school teachers and other state employees or contractors to use a student’s legal name and the pronouns associated with their assigned gender at birth. *See, e.g.*, H.B. 1258, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023) (“No employee or independent contractor shall knowingly address, identify, or refer to a student by pronouns that are different from the pronouns that align with such student’s biological sex unless the public school or school board receives written permission from the student’s parent.”).

52. Similar to forced misgendering bills, forced outing bills require schools to “out”—or openly declare—transgender students’ gender identity to their parents, even in instances where it is unsafe for the student to come out to their family. Many forced misgendering bills contain forced outing provisions, so there is some overlap between the two categories. *See, e.g.*, H.B. 3551, 125th Gen. Assemb., Reg. Sess. (S.C. 2023) (prohibiting “[a] nurse, counselor, teacher, principal, or other administrative official at a public or private school attended by a minor [from] . . . withholding from a minor’s parent or legal guardian information related to a minor’s perception that the minor’s gender or sex is inconsistent with the minor’s sex” and creating a civil cause of action punishable by damages of at least \$5,000 plus attorney’s fees for parents and guardians from whom such information is withheld).

53. ESG is a form of investment that prioritizes environmental, social, and corporate governance factors. *See, e.g.*, L.B. 743, 108th Leg., 1st Sess. (Neb. 2023) (restricting fiduciaries from investing in corporations that promote “[a]ccess to abortion, sex or gender change, or transgender surgery”).

54. Anti-boycott bills are similar to ESG bans, but while ESG bans penalize the promotion of social issues (including transgender rights), anti-boycott bills penalize the termination of relationships with businesses that do not support ESG causes. *See, e.g.*, H.B. 1947, 59th Leg., 1st Sess. (Okla. 2023) (prohibiting governmental entities from contracting with companies without “written verification from the company that it . . . does not engage in economic boycotts [related to access to abortion, sex or gender change, or transgender surgery]; and . . . will not engage in economic boycotts during the term of the contract”).

55. *See* Chapman et al., *supra* note 44. As previously mentioned, even non-medical forms of care, such as social transitioning, are encompassed by other laws and proposals.

56. *See, e.g.*, S.B. 129, 59th Reg. Sess. (Okla. 2023).

57. This is similar to the way pre-*Dobbs* abortion restrictions served as a deterrent even against procedures that were still legal at the time. *See* Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in part and dissenting in part).

58. *See* Chapman et al., *supra* note 44.

59. *See, e.g.*, S.B. 36, 2023 Reg. Sess. (Cal. 2023).

this is a good idea in theory, it could in practice lead to unnecessary interstate conflicts that could be avoided altogether if there were a more cohesive federal law to secure transgender youth's right to gender-affirming care.

B. CASE STUDY: ARKANSAS

i. The SAFE Act

On February 25, 2021, Arkansas State Representative Robin Lundstrum introduced Arkansas House Bill 1570.⁶⁰ Ironically dubbed the Save Adolescents from Experimentation (SAFE) Act,⁶¹ the law banned all gender-affirming procedures for transgender people under the age of eighteen, including puberty blockers, hormone replacement therapy, and gender-affirming surgery.⁶² The Arkansas State Senate passed the SAFE Act on March 29, 2021,⁶³ but Governor Asa Hutchinson surprisingly vetoed the bill.⁶⁴ Governor Hutchinson, a traditional Republican, explained his decision in a Washington Post opinion piece:

I vetoed this bill because it creates new standards of legislative interference with physicians and parents as they deal with some of the most complex and sensitive matters concerning our youths. [¶] It is undisputed that the number of minors who struggle with gender incongruity or gender dysphoria is extremely small. But they, too, deserve the guiding hand of their parents and the counseling of medical specialists in making the best decisions for their individual needs. [¶] H.B. 1570 [the SAFE Act] puts the state as the definitive oracle of medical care, overriding parents, patients and health-care experts. While in some instances the state must act to protect life, the state should not presume to jump into the middle of every medical, human and ethical issue. This would be—and is—a vast government overreach.⁶⁵

Despite Governor Hutchinson's heartfelt doctrinal plea, the state legislature overrode his veto less than twenty-four hours later.⁶⁶ With that, the SAFE Act

60. H. J., 93rd Gen. Assemb., 2021 Reg. Sess., at 1365 (Ark. 2021).

61. See *Brandt v. Rutledge*, 2023 WL 4073727, at *1 n.2 (E.D. Ark. June 20, 2023) (“The Arkansas Legislature titled the Act as ‘Arkansas Save Adolescents from Experimentation (Safe) Act.’ Because the title is misleading, the Court will refer to the Act as ‘Act 626’ in this order.”).

62. See Ark. Code Ann. § 20-9-1502 (West 2021).

63. S. J., 93rd Gen. Assemb., 2021 Reg. Sess., at 2661 (Ark. 2021).

64. See Arthur S. Leonard, *8th Circuit Panel Affirms Preliminary Injunction Against Arkansas Law Banning Gender Transition Treatment for Minors*, LGBT L. NOTES, Sept. 2022, at 6, 6.

65. Asa Hutchinson, *Why I Vetoed My Party's Bill Restricting Health Care for Transgender Youth*, WASH. POST (Apr. 8, 2021, 4:10 PM), https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78e1d8228819_story.html [https://perma.cc/4NS6-9YTU].

66. See Hayes Brown, *Why Arkansas's Anti-Trans Rights Law Isn't Just a Trans Rights Issue*, MSNBC (Apr. 8, 2021, 4:30 AM), <https://www.msnbc.com/opinion/why-arkansas-s-anti-trans-rights-law-isn-t-just-n1263391> [https://perma.cc/Q7GB-NVXM].

became the first state law in the country to ban doctors from providing gender-affirming care to transgender youth.⁶⁷

ii. Brandt v. Rutledge

Pro-trans rights groups were quick to challenge the SAFE Act. On May 25, 2021—before the SAFE Act was able to be enforced⁶⁸—the American Civil Liberties Union (ACLU), on behalf of several medical professionals and transgender youths, filed suit against the Attorney General of Arkansas to enjoin implementation of the law.⁶⁹ The ACLU’s complaint alleged that the SAFE Act had already produced disastrous consequences for the LGBTQ+ community in Arkansas, noting that “[i]n the weeks after the bill passed, at least six transgender adolescents in Arkansas attempted suicide.”⁷⁰ The ACLU argued that the SAFE Act was unconstitutional on the ground that the law

violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates on the basis of sex and transgender status by prohibiting certain medical treatments only for transgender patients and only when the care is “related to gender transition.” This discrimination cannot be justified under heightened scrutiny or any level of equal protection scrutiny. In addition, by preventing parents from seeking appropriate medical care for their children when the course of treatment is supported by the child and their doctor, the Health Care Ban [the SAFE Act] interferes with the right to parental autonomy guaranteed by the Due Process Clause of the Fourteenth Amendment. Lastly, the Health Care Ban violates the First Amendment by prohibiting healthcare providers from referring their patients for medical treatments that are in accordance with the accepted medical standards of care to treat gender dysphoria.⁷¹

On July 21, 2021, the district court granted the ACLU’s motion for a preliminary injunction and denied the defendants’ motion to dismiss.⁷² The court “[found] that Plaintiffs [would] suffer irreparable harm if Act 626 [the SAFE Act] [were] not enjoined,” including “irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment.”⁷³

In its analysis, the Court applied heightened scrutiny to the Equal Protection claim “because Act 626 [the SAFE Act] rests on sex-based classifications and

67. See Leonard, *supra* note 64, at 6.

68. After the SAFE Act’s April 6, 2021, passage, the law could have been enforced as early as July 28, 2021. See Complaint at 2 n.1, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 21 Civ. 450).

69. See generally *id.* The Executive Director and board members of the Arkansas State Medical Board, an agency charged with disciplining and revoking the licenses of physicians who violated the SAFE Act, were also named as defendants and sued in their official capacity. See *id.* at 8.

70. *Id.* at 3.

71. *Id.* at 4.

72. See generally *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. Aug. 2, 2021).

73. *Id.* at 892. The Court wrote in dicta that “[b]ased on these findings, the State could not withstand either heightened scrutiny or rational basis review.” *Id.* at 893.

because ‘transgender people constitute at least a quasi-suspect class.’⁷⁴ The Court determined that the state’s supposed objective of “protecting vulnerable children from experimental treatment and regulating the ethics of the medical profession” was mere pretext and that the SAFE Act was not substantially related to the government’s interests.⁷⁵

Regarding the Due Process claim, the Court applied a strict scrutiny analysis and held that the defendants did not meet “their burden of showing that Arkansas has a compelling state interest in infringing upon parents’ fundamental right to seek medical care for their children, or that Act 626 [the SAFE Act] is narrowly tailored to serve that interest.”⁷⁶

The Court also applied strict scrutiny to the First Amendment claim and found that the SAFE Act constituted “a content and viewpoint-based regulation because it restricts healthcare professionals only from making referrals for ‘gender transition procedures,’ not for other purposes. As such, it is ‘presumptively unconstitutional’⁷⁷ The state could “not have a legitimate interest in protecting against the ‘fear that people [will] make bad decisions if given truthful information,’”⁷⁸ and, at any rate, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁷⁹

The state officials appealed the injunction to the Eighth Circuit, which affirmed the district court’s order.⁸⁰ The Circuit Court agreed that the SAFE Act discriminated on the basis of sex because “under the Act, medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex. . . . [T]he minor’s sex at birth determines whether or not the minor can receive certain types of medical care”⁸¹ Accordingly, heightened scrutiny was the appropriate analysis to apply to the Equal Protection claim, and “the district court did not abuse its discretion in granting a preliminary injunction” based on the facts thus far.⁸² Because the Court found that the injunction was appropriate based on the Equal Protection argument alone, it declined to address the Due Process and First Amendment issues.⁸³

Arkansas, along with twenty other conservative states,⁸⁴ was outraged at the Eighth Circuit’s decision and appealed once more to petition for a rehearing en

74. *Id.* at 889 (quoting *Grimm v. Gloucester Ct. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020)).

75. *Id.* at 889, 891.

76. *Id.* at 893.

77. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Similar to its analysis of the Equal Protection claim, the Court also “[found] that Act 626 [the SAFE Act] cannot survive strict scrutiny or even rational scrutiny.” *Id.* at 894.

78. *Id.* at 893 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

79. *Id.* at 894 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

80. *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022).

81. *Id.* at 669.

82. *Id.* at 670, 672.

83. *See id.* at 672.

84. Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia filed a joint amicus brief in support of Arkansas’s petition for a rehearing. Their brief, which mischaracterized gender-affirming care as “sterilizing treatments for

banc and a panel rehearing.⁸⁵ The Eighth Circuit stood its ground again and denied a rehearing, stating that “[w]hatever the merits of the panel opinion, this case is not appropriate for rehearing en banc in its current procedural posture” because the case was presently in trial back at the district court and “[t]he present interlocutory appeal will be moot when the district court enters a final judgment after the trial.”⁸⁶

The opinion of several circuit judges dissenting from the Eighth Circuit’s order created cause for concern. The dissent would have blatantly rejected the procedural posture of the case to advance its own agenda, admitting that while “this case is not the perfect vehicle for answering these ‘momentous’ questions,” it would be “worth the risk” to “frame the debate in the future, if not effectively decide any later appeal.”⁸⁷ The dissent drew directly from the conservative states’ amicus brief,⁸⁸ rejecting the application of *Bostock v. Clayton County* as creating a suspect class of transgender individuals outside of the Title VII context and borrowing the same language from *Dobbs* to conclude that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny”⁸⁹

On June 20, 2023, the district court held that the Act was unconstitutional and permanently enjoined its enforcement.⁹⁰ The Court found that the Act’s discrimination on the basis of sex at birth necessitated heightened scrutiny, and the state had not shown that the Act advanced its purported interest in protecting children.⁹¹ By discriminating against transgender people, the Act not only violated the Fourteenth Amendment Equal Protection Clause, but also the Due Process Clause.⁹² The Act’s infringement upon the parent plaintiffs’ “fundamental right to seek medical care for their children and, in conjunction with their adolescent child’s consent and their doctor’s recommendation, make a judgment that medical care is necessary” did not pass heightened scrutiny, much less the more appropriate strict scrutiny standard.⁹³ Additionally, the Court

minors,” argued that the SAFE Act did not discriminate on the basis of sex merely because it used sex “to ‘distinguish[] between those who may receive certain types of medical care and those who may not’” Brief of Amici Curiae States of Alabama et al. in Support of Appellants’ Petition for Rehearing En Banc at 2, 3, *Brandt v. Rutledge*, No. 21-2875, 2022 WL 16957734 (8th Cir. 2022) (quoting *Brandt ex rel. Brandt*, 47 F.4th at 670). The states analogized the SAFE Act’s ban on gender-affirming care to state bans on abortion, noting that “the Supreme Court recently reaffirmed [that] ‘[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’” *Id.* at 3 (quoting *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2245–46 (2022)).

85. See generally Defendants-Appellants’ Petition for Rehearing En Banc, *Brandt*, 2022 WL 16957734.

86. *Brandt*, 2022 WL 16957734, at *1.

87. *Id.* (Stras, C.J., dissenting).

88. See Brief of Amici Curiae States of Alabama et al. in Support of Appellants’ Petition for Rehearing En Banc, *supra* note 84, at *1.

89. *Brandt*, 2022 WL 16957734, at *1 n.1 (Stras, C.J., dissenting).

90. See *Brandt v. Rutledge*, 2023 WL 4073727, at *1 (E.D. Ark. June 20, 2023).

91. See *id.* at *35 (“the prohibited medical care improves the mental health and well-being of patients . . . by prohibiting it, the State undermined the interests it claim[ed] to be advancing.”).

92. See *id.* at *36.

93. *Id.* at *36.

held that the Act violated the physician plaintiffs' First Amendment freedom of speech by "prevent[ing] doctors from informing their patients where gender transition treatment may be available" and "effectively ban[ning] their ability to speak to patients about these treatments."⁹⁴ This content- and viewpoint-based regulation was not "compelling, genuine, or even rational."⁹⁵

It is difficult to overstate the importance of this legal victory for transgender people and allies. Naturally, however, the state immediately filed a notice of appeal.⁹⁶ Though the permanent injunction is still in effect in Arkansas, the Sixth Circuit Court of Appeals reinstated a similar law in Tennessee.⁹⁷ The Sixth Circuit's ruling marked the first time a federal court allowed a ban on gender-affirming care to take effect, setting up a circuit split that can only be resolved at the United States Supreme Court.⁹⁸

C. CASE STUDY: CALIFORNIA

i. Senate Bill 107

While some states have become more hostile towards transgender youth, others have established themselves as sanctuary states. For example, California recently passed Senate Bill 107, which prohibits

a provider of health care, a health care service plan, or a contractor from releasing medical information related to a person or entity allowing a child to receive gender-affirming health care or gender-affirming mental health care in response to a criminal or civil action, including a foreign subpoena, based on another state's law that authorizes a person to bring a civil or criminal action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care. The bill additionally . . . prohibit[s] law enforcement agencies from knowingly making or participating in the arrest or extradition of an individual pursuant to an out-of-state arrest warrant based on another state's law against providing, receiving, or allowing a child to receive gender-affirming health care or gender-affirming mental health care in this state.⁹⁹

California State Senator Scott Wiener, the author of Senate Bill 107, said the law represents how "California is forcefully pushing back against the anti-LGBTQ hatred spreading across parts of our nation. The rainbow wave is real, and it's coming."¹⁰⁰

94. *Id.* at *37.

95. *Id.* at *38.

96. See Notice of Appeal, Dylan Brandt, et al. v. Tim Griffin, et al., No. 4:21-CV-00450-JM (8th Cir. July 20, 2023).

97. See *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 422 (6th Cir. 2023).

98. See Press Release, ACLU of Tenn., Sixth Circuit Allows Tennessee's Ban on Care for Transgender Youth to Take Effect (July 8, 2023), <https://www.aclu.org/press-releases/sixth-circuit-allows-tennessees-ban-on-care-for-transgender-youth-to-take-effect> [<https://perma.cc/Q3G8-Z5PC>].

99. S.B. 107, 2022 Reg. Sess. (Cal. 2022).

100. Press Release, Scott Wiener, Cal. State Sen., Senator Wiener's Historic Bill to Provide Refuge for Trans Kids and Their Families Signed into Law (Sept. 30, 2022),

Senate Bill 107 presents an interesting legal question under the Full Faith and Credit Clause, which requires states to give “Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State.”¹⁰¹ As a practical matter, however, the benefits of Senate Bill 107 are still inaccessible for many transgender youths and their families. California has a notoriously high cost of living,¹⁰² and even people who can afford to move may not want to uproot their lives and leave behind their social safety nets.

ii. Assembly Bill 1666

Senate Bill 107 was not California’s first foray into safe haven laws. The state enacted a similar statute to protect pregnant people crossing state lines to seek an abortion. The law, Assembly Bill 1666, declares other states’ laws “authorizing a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions, to be contrary to the public policy of this state.”¹⁰³ Assembly Bill 1666 also prohibits the application of such laws “to a case or controversy heard in state court,” as well as “the enforcement or satisfaction of a civil judgment received under that law.”¹⁰⁴ This shows that, while some of the same mechanisms used to ban abortions can also be used against gender-affirming care, so too can similar mechanisms be used to protect access to both abortions and gender-affirming care.

III. LEGAL CONTEXT

A. ATTACKS ON REPRODUCTIVE RIGHTS

i. *Dobbs v. Jackson Women’s Health Org.*

There is no denying the impact the Supreme Court’s recent decision in *Dobbs* has had on the right to privacy. While *Dobbs* had the immediate effect of overturning *Roe* and rejecting the notion of a constitutional right to abortion,¹⁰⁵ it also jeopardized decades of substantive due process jurisprudence.¹⁰⁶ Justice Thomas’s concurrence in *Dobbs* specifically highlighted several landmark decisions decided on the basis of substantive due process, including *Griswold v.*

<https://sd11.senate.ca.gov/news/20220930-senator-wiener%E2%80%99s-historic-bill-provide-refuge-trans-kids-and-their-families-signed-law> [<https://perma.cc/2EM7-RJ7P>].

101. U.S. CONST. art. IV, § 1, cl. 1.

102. See Erica Muñoz, *Raising the California Minimum Wage is Not Enough: Creating a Sustainable Wage by Accounting for Inflation Through Indexing*, 16 S. CAL. INTERDISCIPLINARY L. J. 423, 445 (2007) (“The cost of living in California is among the highest of any state in the nation.”). While California is not the only state to pass a sanctuary law or introduce a safe state bill, trans rights activists have expressed a general frustration that “the zipcodes [sic] in the USA that are the safest for transgender people are THE MOST EXPENSIVE in the country.” Kai Shappley (@KaiShappley), TWITTER (Jan. 21, 2023, 9:07 AM), <https://twitter.com/KaiShappley/status/1616814808149667842> [<https://perma.cc/G6EE-4X4T>].

103. Assemb. B. 1666, 2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

104. *Id.*

105. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

106. See *id.* at 2247–48.

Connecticut, Lawrence v. Texas, and Obergefell v. Hodges, that he believed should be “reconsider[ed.]”¹⁰⁷ Despite the *Dobbs*’s majority’s hollow insistence that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,” it is clear that the conservative wing of the Supreme Court views such a guarantee as nothing more than an empty promise.¹⁰⁸ If one aspect of the “broader right to autonomy” can be extinguished just because it is politically prudent to do so, then there is no “right to autonomy” at all.¹⁰⁹

As noted in the dissent of Eighth Circuit’s order denying the rehearing in *Brandt*, the Court in *Dobbs* held that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny”¹¹⁰ However, the dissent failed to include the Supreme Court’s pertinent exception that heightened scrutiny would be triggered if “the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”¹¹¹ This is especially relevant given that the district court in *Brandt* found that Arkansas’s justification for the SAFE Act was pretextual.¹¹² Still, it remains to be seen how expansively the Court will interpret the pretext exception in gender-affirming care cases in light of the broader umbrella of “sex” outlined in *Bostock*, which expanded discrimination on the basis of sex to encompass also sexual orientation and gender identity.¹¹³

ii. Pre-*Dobbs* State Legislation

Even before *Dobbs*, many conservative states had already waged war on abortion access.¹¹⁴ These early anti-abortion laws had similar effects as current anti-transgender legislation. For example, the Texas Heartbeat Act,¹¹⁵ which

107. *Id.* at 2301 (Thomas, J., concurring) (“[N]o party has asked us to decide ‘whether our entire Fourteenth Amendment jurisprudence must be preserved or revised[.]’ . . . Thus, I agree that ‘[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.’ . . . For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. . . . [W]e have a duty to ‘correct the error’ established in those precedents”).

108. *Id.* at 2277–78.

109. *Id.* at 2258.

110. *Brandt v. Rutledge*, 2022 WL 16957734, at *2 n.1 (8th Cir. 2022) (Stras, J., dissenting) (citing *Dobbs*, 142 S. Ct. at 2245–46).

111. *Dobbs*, 142 S. Ct. at 2246 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

112. *See Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. Aug. 2, 2021) (“If the State’s health concerns were genuine, the State would prohibit these procedures for all patients under 18 regardless of gender identity.”).

113. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). Though the issue has not yet returned to the Supreme Court, other federal courts have adopted a narrow interpretation of *Bostock*. *See, e.g., Tex. v. Equal Emp. Opportunity Comm’n*, 633 F. Supp. 3d 824, 829–30 (N.D. Tex. Oct. 1, 2022) (limiting *Bostock* to “homosexuality or transgender status” and declining to extend *Bostock*’s protections to “correlated conduct—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices”); *Neese v. Becerra*, 640 F. Supp. 3d 668, 683–84 (N.D. Tex. Nov. 11, 2022) (declining to extend *Bostock*’s sex discrimination protections to the health care context and adopting a narrow interpretation of “on the basis of sex” to expressly exclude “‘sexual orientation’ and ‘gender identity’”).

114. *See Michele Goodwin, Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 216 (2022).

115. TEX. HEALTH & SAFETY CODE ANN. §§ 171.203–204 (2021).

outlawed abortions after six weeks of pregnancy, “effectively chill[ed] the provision of abortions in Texas” months before *Roe* was officially reversed.¹¹⁶ Although there was a recognized right to abortion at the time that the Texas Heartbeat Act was passed, the statute circumvented precedent by creating a private cause of action for enforcement¹¹⁷ that did not technically interfere with the Supreme Court’s then-valid holdings in *Roe* and *Casey*, which prohibited states from imposing undue burdens upon abortion access.¹¹⁸ Though the point is now moot, as the Supreme Court no longer recognizes a constitutional right to abortion,¹¹⁹ perhaps congressional codification of *Roe* could have preempted the Texas Heartbeat Act (and its various copycat laws in other states) in the first place. In the abortion context—and arguably the broader privacy context—federal legislation trumps the Supreme Court as the tool of choice for the protection of fundamental rights.

IV. SOLUTIONS

A. IMPACT LITIGATION

i. General Concerns

Impact litigation, also known as strategic litigation,¹²⁰ is a valuable but inherently risky strategy. In any lawsuit, there is the obvious possibility that the court might not grant the desired outcome. This threat is amplified when the litigation concerns the fundamental rights of a large group of people. A loss “not only affects the rights holder, who may be denied a remedy for the harm they have suffered[,] but may also hamper the legal change being sought through the judicial process.”¹²¹ While “the goals of impact litigation are broader than just serving an individual client[,] . . . the lawyer-client relationship dictates that the interests of the individual rights holder must be placed above all else.”¹²² This inherent conflict lies at the heart of every impact litigation case and fundamentally shapes its arc.¹²³

116. *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 59 (2021) (Sotomayor, J., concurring in part and dissenting in part).

117. *Id.* § 171.208.

118. *See Roe v. Wade*, 410 U.S. 113, 163 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

119. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

120. “Strategic litigation, sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society.” *What is Strategic Litigation?*, CHILD RIGHTS INT’L NETWORK, <https://archive.crin.org/en/guides/legal/guide-strategic-litigation/what-strategic-litigation.html> [<https://perma.cc/59C8-CKQH>].

121. Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation*, 31 FL. J. INT’L L. 121, 121–22 (2019).

122. *Id.* at 123, 134.

123. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 472 (1976) (“The potential for ethical problems in these constitutionally protected lawyer-client relationships was recognized by the American Bar Association *Code of Professional Responsibility*, but it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the

In the health privacy context, the potential benefits of litigation are also limited by the tension between immediate biological realities and the slow pace at which the courts function. For example, Norma McCorvey, the plaintiff in *Roe*, never received the abortion that the Supreme Court ultimately decided that she was entitled to¹²⁴ because “by the time the lower court heard the case, she had given birth . . .”¹²⁵ Unless the trial court grants a preliminary injunction, patient plaintiffs will suffer from lack of medical treatment. In abortion cases, this means that pregnant people will be forced to give birth,¹²⁶ and in gender-affirming care cases, transgender individuals will be forced to medically detransition.¹²⁷ While patient plaintiffs can—and do¹²⁸—turn to dangerous back-alley abortions or underground “black market hormones,” these are not suitable substitutes for the safe and legal treatment to which they are entitled.¹²⁹ Impact litigation is simply too risky,¹³⁰ especially if the same Supreme Court that overturned *Roe* and *Casey* has any say in the matter.¹³¹

ii. Back to *Brandt*

If *Brandt* (or a similar case challenging a similar state law)¹³² makes its way up to the Supreme Court, the results could be disastrous. The underlying issue for patient plaintiffs is the constitutionality of a law that discriminates on the basis of sex and gender identity, so the law should at the very least be subject to intermediate scrutiny.¹³³ However, the Supreme Court is poised to follow its reasoning in *Dobbs* that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’”¹³⁴ In *Dobbs*, “the ‘goal of preventing

attorney’s ideals. The magnitude of the difficulty is more accurately gauged in a much older code that warns: ‘No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.’”

124. See *Roe v. Wade*, 410 U.S. 113, 166 (1973).

125. Margaret G. Farrell, *Revisiting Roe v. Wade: Substance and Process in the Abortion Debate*, 68 IND. L. J. 269, 283 (1993). To further contextualize how long it took for *Roe* to reach the Supreme Court, “by the time the U.S. Supreme Court decided the case, [McCorvey’s] baby was three years old and living with adoptive parents.” *Id.*

126. See *id.*

127. See Alex Bollinger, *Tennessee’s Legislature Gives Trans Youth 1 Year to Detransition*, LGBTQ NATION (Feb. 23, 2023), <https://www.lgbtqnation.com/2023/02/tennessees-legislature-gives-trans-youth-1-year-to-detransition/> [<https://perma.cc/86ZM-QZF9>].

128. See Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1030, 1090 (2023).

129. Scott, *supra* note 18, at 732 (“Rather than preventing transgender minors from transitioning, [legislation prohibiting gender-affirming care] would instead force them underground in search of black market hormones to find relief for their [gender dysphoria].”).

130. I must stress that my critique of impact litigation in this specific context is not intended as a broad rejection of impact litigation in general. Many well-intentioned and effective organizations have brought about positive change through strategic litigation, and I commend their efforts—I just do not recommend that we apply them here.

131. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

132. See, e.g., *Boe v. Marshall*, No. 2:22-cv-184-LCB, 2022 WL 14049505, at *1 (M.D. Ala. Oct. 24, 2022).

133. See *Craig v. Boren*, 429 U.S. 190, 218 (1976).

134. *Dobbs*, 142 S. Ct. at 2245–46 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

abortion’ [did] not constitute ‘invidiously discriminatory animus’ against women,” so the state law at issue was “not subject to heightened scrutiny.”¹³⁵ It was instead “governed by the same standard of review as other health and safety measures”—evidently, a much lower bar to clear.¹³⁶ If the Supreme Court believes that restrictions on abortion are not pretextual discrimination, then it is unlikely that it will view prohibitions on gender-affirming care any differently.

B. FEDERAL LEGISLATION

i. Federalist Concerns

As previously mentioned, sanctuary laws present a potential Full Faith and Credit Clause problem.¹³⁷ On their face, state laws rendering other states’ civil and criminal judgments unenforceable¹³⁸ appear to directly contradict the Full Faith and Credit Clause. Sanctuary laws have also inspired other states to attempt to limit pregnant people’s ability to leave the state for abortions,¹³⁹ although at the time of writing none of these state bills have passed.¹⁴⁰ Justice Kavanaugh’s concurrence in *Dobbs* suggested that a state cannot “bar a resident of that State from traveling to another State to obtain an abortion . . . based on the constitutional right to interstate travel,”¹⁴¹ but the right to travel (like the right to obtain health care) is not explicitly mentioned in the Constitution.¹⁴² As a practical matter, “the only difference between the right to privacy and the right to travel is how many current Supreme Court justices still support it.”¹⁴³ If states continue to promulgate their own laws regarding access to abortions and gender-

135. *Id.* at 2246 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273–74 (1993)).

136. *Id.*

137. *See supra* Part II.d.i.

138. *See, e.g.*, S.B. 107, 2022 Reg. Sess. (Cal. 2022).

139. *See* Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions out of State*, WASH. POST (Mar. 8, 2022, 2:21 PM), <https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/> [<https://perma.cc/26TT-BCAL>]. The proposed Missouri law was criticized for attempting to extend the state’s power beyond “its own citizens and its own geographical boundaries,” though its opponents recognized that “[l]ike the Texas law [the Texas Heartbeat Act], the proposal itself could have a chilling effect, where doctors in surrounding states stop performing abortions before courts have an opportunity to intervene . . .” *Id.* The proposal’s sponsor aptly summarized the legal climate when she defended her law by saying, “That’s what they said about the Texas law, and every bill passed to protect the unborn for the last 49 years . . .” *Id.*

140. *See* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023). Congress attempted to preempt state laws like the Missouri proposal with the Ensuring Access to Abortion Act of 2022, though the legislation did not survive in the Senate. *See* H.R. 8297, 117th Cong. (2022).

141. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (Kavanaugh, J., concurring).

142. *See* Naomi Cahn et al., *Is It Legal to Travel for Abortion After Dobbs?*, BLOOMBERG L. (July 11, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/is-it-legal-to-travel-for-abortion-after-dobbs> [<https://perma.cc/9UJD-QM6R>].

143. *Id.*

affirming care, they will inevitably beget litigation until federal law fills the void.¹⁴⁴

Laws like California’s Senate Bill 107 are a step in the right direction, but they are a step that should not be necessary in the first place. While “[o]ne of federalism’s chief virtues . . . is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country,’”¹⁴⁵ it is degrading to let states pick and choose which fundamental rights—if any—they will honor. The idea that a state can “experiment” with laws that drive children to suicide¹⁴⁶ without creating a “risk to the rest of the country”¹⁴⁷ is patently absurd and pretending that this is just the cost of doing democracy is an affront to human dignity.

ii. A Comprehensive Solution

The current state of affairs is woefully inadequate. While transgender youth in some states are safe for now,¹⁴⁸ their peers across the nation need federal intervention to protect themselves from their local governments. The Supreme Court’s hostility towards bodily autonomy and the right to privacy, as seen through abortion jurisprudence,¹⁴⁹ indicates that another branch of government is best suited to protect these liberties in the broader health care context.¹⁵⁰ Congress must act to protect trans youth.

Enter the Equality Act. Most recently¹⁵¹ introduced in the 117th Congress in 2021, the Equality Act is a federal law that would broadly prohibit discrimination on the basis of sex, sexual orientation, and gender identity.¹⁵² This would build on the momentum from *Bostock*¹⁵³ and prevent discrimination

144. Aside from the aforementioned risks of letting a transgender rights case reach the Supreme Court, this will also needlessly clog up the courts.

145. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

146. See Kinzi Sparks, *New Data Illuminates Mental Health Concerns Among Texas’ Transgender Youth Amid Record Number of Anti-Trans Bills*, TREVOR PROJECT (Sept. 27, 2021), <https://www.thetrevorproject.org/blog/new-data-illuminates-mental-health-concerns-among-texas-transgender-youth-amid-record-number-of-anti-trans-bills/> [https://perma.cc/GJC8-SDCN] (“Transgender and nonbinary youth in Texas have directly stated that they are feeling stressed, using self-harm, and considering suicide due to anti-LGBTQ laws being debated in their state.”).

147. *Gonzales*, 545 U.S. at 42 (O’Connor, J., dissenting).

148. See Erin Reed, *First Period Anti-Trans Legislative Risk Assessment Map*, ERIN IN THE MORNING (Feb. 12, 2023), <https://erinthemorn.substack.com/p/first-period-anti-trans-legislative> [https://perma.cc/7HNF-TELC].

149. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

150. While it would be a stretch to claim that the Supreme Court has called for the passage of the Equality Act, the Court has previously signaled that it would defer to Congress in expanding antidiscrimination protections for the LGBTQ+ community. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020).

151. The earliest iteration of the Equality Act was introduced in 1974. See generally H.R. 14572, 93rd Cong. (1974).

152. See H.R. 5, 117th Cong. § 2 (2021).

153. See *Bostock*, 140 S. Ct. at 1737.

against LGBTQ+ people in housing, education, and, most importantly for the purposes of this Comment, health care.¹⁵⁴

Aside from its substantive benefits of protecting transgender youth and other LGBTQ+ individuals, what are the other advantages of the Equality Act? For one, the Supremacy Clause dictates that federal law trumps state law.¹⁵⁵ This means that the Equality Act would preempt¹⁵⁶ conflicting state laws that deny transgender youth access to gender-affirming care and instead provide a uniform national landscape for LGBTQ+ rights.¹⁵⁷ Additionally, the Equality Act would also promote judicial economy by preventing lawsuits between states that have passed anti-trans laws and sanctuary states that refuse to enforce those laws.¹⁵⁸

At the end of the day, transgender youth's access to gender-affirming care is more than just a complicated constitutional issue—it is a matter of life and death. More important than any legal argument is a simpler reason why we should protect trans kids: they need help, and we have the power to help them.

154. See H.R. 5, 117th Cong. § (3)(a) (2021).

155. See U.S. CONST. art. VI, para. 2.

156. *Id.*

157. See *supra* Part II.a.

158. See *supra* note 144.