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A Parent's Right to Obtain Puberty Blockers for Their Child

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Note

A Parent's Right to Obtain Puberty Blockers for Their Child

MEGAN MEDLICOTT

Since Dobbs v. Jackson Women's Health Organization overturned Roe v. Wade, many scholars have expressed concern over how the Dobbs decision may impact other privacy interests that previously have been recognized as protected rights under the Fourteenth Amendment's Due Process Clause. The substantive due process right associated with a parent's right to the care, control, and custody of their child, however, is situated differently in comparison to those rights presumably displaced by the Dobbs opinion. A parent's right, unlike other rights recognized under the substantive due process doctrine, is objectively deeply rooted in our nation's history and tradition, and is considered fundamental to the American concept of ordered liberty. This Note argues that even after Dobbs, parents continue to possess the right to the care, control, and custody of their child under the Fourteenth Amendment which includes the right to direct their child's medical care. Thus, statutes that criminalize the prescription of GnRH analogue therapy to minors unconstitutionally infringe on that right. GnRH analogue treatment is commonly referred to as "puberty blockers." The statutes criminalizing puberty blockers are not grounded in reliable science. Given that gender-affirming care solely affects the health of the individual receiving the care, the state lacks any compelling or important governmental interest that would justify such intrusion on this fundamental parental right. Further, the statutes are not narrowly tailored because they allow for GnRH analogue therapy to be prescribed to children in other medical contexts. Accordingly, the statutes criminalizing the prescription of puberty blockers to minors are unconstitutional under the Fourteenth Amendment's Due Process Clause.

This Note analyzes the anti-transgender agenda that conservative lawmakers are pursuing from an anti-government perspective. After analyzing the medical science supporting the statutes, it becomes clear that the relied upon data is unreliable and that arguments in support of the statutes are pretextual. Conservative lawmakers are enacting anti-transgender legislation under the guise of "protecting" adolescents, but denying adolescents gender-affirming care is only

harming them. To combat the statutes that criminalize gender-affirming care, with an emphasis on puberty blockers, this Note offers litigation strategies based in principles of constitutional law. This Note is a step towards protecting transgender, non-binary, and gender nonconforming youth from anti-transgender legislation and ensuring access to gender-affirming care.

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MEGAN MEDLICOTT*

INTRODUCTION

The protection of unenumerated privacy rights under the Due Process Clause of the Fourteenth Amendment is one of the most controversial areas of constitutional law. The latest limitation on the implied substantive due process right to privacy occurred when the Supreme Court overturned *Roe v. Wade*¹ in the 2022 landmark case *Dobbs v. Jackson Women's Health Organization*.² The *Dobbs* Court found that implicit substantive rights conferred under the Due Process Clause of the Fourteenth Amendment must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³ Of the many rights that may be displaced by this decision, a parent’s right to the care, control, and custody over their child is less likely at risk⁴ because parental rights are objectively rooted in this nation’s history and tradition as to make it fundamental to the nation’s concept of ordered liberty.⁵

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

³ *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁴ When referring to the security of a parent’s right, this Note does so specifically in the sense as it was previously recognized by the Supreme Court. In other words, this Note argues that a parent’s right to the care, control, and custody over their child is constitutionally protected under substantive due process. This is not to undermine the reality that certain state executive and legislative powers are threatening the security of parental custodial rights. This threat is touched upon *infra* in Part I.C., when discussing the Texas Executive Directive. Due to the quickly changing landscape in this area of law, Florida’s statute that deems gender-affirming care “child abuse” and grants the state emergency jurisdiction and physical custody of a minor is beyond the purview of this Note. FLA. STAT. ANN. § 61.517 (West 2023); S.B. 254, 2023 Leg., (2023); *Doe v. Ladapo*, 2023 WL 3833848, at *1 (N.D. Fla., June 6, 2023) (granting a preliminary injunction).

⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923) (holding that parents have a liberty interest in raising their children, and that a state law prohibiting teaching foreign languages to children in school violated this liberty interest); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming a parent’s liberty interest in raising their children by striking down an Oregon statute that prohibited private school education); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the

In recent years, several state legislatures have enacted statutes that criminalize the prescription of puberty blockers to minors in need of gender-affirming care.⁶ The stated purpose of these statutes is to protect the health and safety of citizens, “especially vulnerable children.”⁷ However the clinical and legislative support for each statute relies on discredited, outdated, and poor-quality information.⁸ The unfounded support for each statute severely weakens any compelling or important government interest that would justify interfering with a parent’s fundamental right.⁹

This Note argues that statutes that criminalize the prescription of puberty blockers to adolescents are unconstitutional. Part I first provides an overview of gender-affirming care including a targeted discussion of puberty blockers. It then describes the different ways in which state officials and lawmakers have sought to restrict access to gender-affirming care, with an emphasis on the earliest state action against this treatment. A focus is placed on Alabama, Arkansas, and Texas. Part I concludes with an in-depth discussion on how the concerns addressed by these statutes, such as sterilization and “off-label” use, are highly exaggerated and entirely pretextual.

Part II fleshes out the complexities surrounding parental rights under the Fourteenth Amendment’s Due Process Clause, including how *Dobbs* affected the doctrine. First, a brief history is given on the development of parental rights under substantive due process. The history and development

family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

⁶ ALA. CODE § 26-26-4 (2022); ARK. CODE §§ 20-9-1501 to 20-9-1504 (West 2021); Letter from Greg Abbott, Governor of Texas, to Jamie Masters, Commissioner, Texas Department of Family and Protective Services, Feb. 22, 2022 (enforcing Tex. Op. Att’y Gen. No. KP-0401 (Feb. 18, 2022)) [hereinafter Letter from Greg Abbott]. In a similar vein, Arizona outlawed gender-affirming surgical treatment for minors without addressing puberty blockers and hormone therapies. ARIZ. REV. STAT. §32-3230. Most recently, the Florida Board of Medicine voted in favor of drafting a rule that will ban surgical treatment, hormone therapies, and puberty blockers for transgender youth. Azeen Ghorayshi, *Florida Restricts Doctors from Providing Gender Treatments to Minors*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/health/florida-gender-care-minors-medical-board.html>. See also *infra* note 58 for a nonexhaustive list of the states that have enacted statutes criminalizing gender-affirming care.

⁷ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

⁸ SUSAN D. BOULWARE, REBECCA KAMODY, LAURA KUPER, MEREDITH McNAMARA, CHRISTY OLEZESKI, NATHALIE SZILAGYI & ANNE ALSTOTT, *BIASED SCIENCE: THE TEXAS AND ALABAMA MEASURES CRIMINALIZING MEDICAL TREATMENT FOR TRANSGENDER CHILDREN AND ADOLESCENTS RELY ON INACCURATE AND MISLEADING SCIENTIFIC CLAIMS 2* (Yale School of Medicine, 2022).

⁹ Although this Note argues from the perspective of the parent, it is also important to address the position of the adolescent. It is unfortunate that litigators must approach this issue from a parental rights standpoint when it is the adolescent’s rights at issue. Adolescents are not afforded the same constitutional protections as adults which can lead to damaging consequences. The issue here—not being able to direct one’s own medical treatment—exists because adolescents are perceived as lacking capacity. However, for transgender, non-binary, and gender nonconforming adolescents, puberty is a critical stage of life and can impact their mental health in tremendous ways. The way the law can benefit from reform is beyond the scope of this Note, but it is important to remain aware that greater autonomy rights for adolescents would be in the child’s best interest.

of parental rights demonstrate that parental discretion is especially strong in the medical context despite various state interests. Part II concludes with a discussion of two reasons why the judiciary should be skeptical about the goals of this legislation.

Part III asserts that the statutes criminalizing puberty blockers are unconstitutional because they violate a parent's right under the Fourteenth Amendment's Due Process Clause. In Alabama and Arkansas there is ongoing litigation about the prescription of puberty blockers to adolescents.¹⁰ In parental rights cases, it remains unclear what standard of judicial scrutiny will be applied.¹¹ This Note will examine the statutes under each standard respectively.¹² Despite not having a clear standard of review, the statutes at issue fail to pass constitutional muster under either strict or intermediate scrutiny.

Part IV addresses the additional challenges that span beyond the plain reading of the statutes. This Note is a step forward, as it mainly puts forth litigation-centric ideas on how to combat the statutes that criminalize gender-affirming care. This approach unfortunately does not help transgender adolescents in the United States who are without a parent(s), or without a supportive parent(s). Even in states that have not placed prohibitions on care, many transgender adolescents are unable to access care due to parents who are unwilling or unable to secure care. This Note further argues that the Supreme Court's holding in *Carey*¹³ can be used to demonstrate that minors have a privacy right to make intimate decisions that will influence the trajectory of their life. To protect this right, courts should adopt a judicial bypass system that would enable transgender youth to access care without parental consent.

I. THE CRIMINALIZATION OF GENDER-AFFIRMING CARE

In recent years, conservative lawmakers across the United States proposed and passed bills that prohibit, and in some states, criminalize the

¹⁰ Importantly, the Eastern District of Arkansas found that the statute criminalizing gender-affirming care is unconstitutional because it violates parental rights, among other reasons. *Brandt v. Rutledge*, 2023 WL 4073727, at *1, *36 (E.D. Ark. June 20, 2023). *But see Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023) (disagreeing with the Eastern District of Arkansas while staying a preliminary injunction on the Tennessee anti-gender-affirming care statute); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (M.D. Ala. 2022) (issuing a preliminary injunction preventing enforcement of Section 4(a)(1)-(3) of ALA. CODE § 26-26-4); *Abbott v. Doe*, 2022 WL 837956 at *1 (Tex. App. Ct. Mar. 21, 2022) (reinstating the temporary injunction enjoining enforcement of Governor Greg Abbott's Anti-Transgender Directive, see Letter from Greg Abbott, *supra* note 6).

¹¹ Elchanan G. Stern, *Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions?*, 33 J.L. & HEALTH 79, 91 (2019).

¹² If a statute cannot withstand intermediate scrutiny, it would certainly not pass strict scrutiny. For the purposes of discussing the issues, it is more helpful to begin with strict scrutiny and then discuss intermediate scrutiny.

¹³ *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

provision of gender-affirming treatment to minors.¹⁴ Gender-affirming care refers to the different treatment options that individuals can seek out if they are experiencing gender dysphoria.¹⁵ Gender dysphoria is the psychological and emotional distress an individual experiences due to an incongruence between their assigned sex at birth and their gender identity.¹⁶ Medical professionals offer an array of treatment options including mental health care, hormone replacement therapy, and surgical care.¹⁷ Aside from just physical and psychological professional care, transgender, non-binary, and gender nonconforming individuals may also benefit from transitioning socially.¹⁸ A social transition occurs when an individual expresses the gender role that is consistent with their gender identity.¹⁹ Adolescents may choose to undergo a social transition partially or completely.²⁰ A partial social transition may involve an individual “wearing clothing and having a hairstyle” that aligns with their gender identity.²¹ A complete social transition involves the former, but also involves an individual using a name and pronouns that are congruent with their gender identity.²²

Bills prohibiting or punishing the provision of gender-affirming care were introduced and later enacted by the Alabama and Arkansas state legislatures.²³ The Alabama and Arkansas statutes attack gender-affirming care broadly, and both contain similar, if not identical, language.²⁴ Although the criminalization of gender-affirming care is alarming, the criminalization of puberty blockers is especially troubling because of the high rates of suicide among transgender youth.²⁵ Some states, as compared to Alabama and Arkansas, have taken alternative approaches to restrict access to gender-affirming care. For example, Texas utilized executive power to expand the definition of “child abuse” to include gender-affirming care.²⁶ Other states

¹⁴ *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021) [hereinafter *Outlawing Trans Youth*].

¹⁵ OFFICE OF POPULATION AFFAIRS, GENDER-AFFIRMING CARE AND YOUNG PEOPLE (2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

¹⁶ *What is Gender Dysphoria?*, AM. PSYCH. ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited July 30, 2023).

¹⁷ WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 1 (7th ed. 2012) [hereinafter WPATH STANDARDS OF CARE].

¹⁸ *Id.* at 16. This list of individuals who may benefit from gender-affirming care is not exhaustive and not intended to be exclusionary.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

²⁴ *Outlawing Trans Youth*, *supra* note 14, at 2172–73. In 2019, The Heritage Foundation hosted events to discuss “the ‘medical risks’ of gender affirming care” where conservative lobbying groups would “distribute ‘model’ gender affirming care bans” to legislators for them to introduce at the 2020 legislative sessions. *Id.*

²⁵ JAY GREENE, PUBERTY BLOCKERS, CROSS-SEX HORMONES, AND YOUTH SUICIDE 2–3 (2022), <https://www.heritage.org/node/25066647/print-display>.

²⁶ Letter from Greg Abbott, *supra* note 6.

have focused on expanding the reach of proposed bills to include the criminalization of gender-affirming care for individuals into adulthood.²⁷

This Note focuses on the importance of ensuring adolescent access to puberty blockers because of the unique timing concerns that accompany its use. The onset of puberty can worsen the distress associated with gender dysphoria.²⁸ Adolescents in need of gender-affirming care may experience detrimental, long-term consequences if they are denied access to puberty blockers and forced to undergo puberty.²⁹

A. Puberty Blockers

Puberty is a stage of life when an individual undergoes cognitive, psychological, and social changes.³⁰ Puberty blockers, or gonadotropin-releasing hormone (GnRH) analogues, are a form of treatment for gender dysphoria.³¹ After puberty begins, GnRH activates in cells in the body that contribute to regulating sex steroids and gamete development.³² GnRH analogues are used to postpone puberty.³³ The hormone analogues halt the production of gonadal sex steroids, commonly known as testosterone and estrogen.³⁴

Puberty blockers are unique because of their time sensitive character, as they help delay the onset of puberty, which is an especially critical stage in life for transgender, non-binary, and gender nonconforming adolescents. By suppressing the onset of puberty, adolescents experiencing gender dysphoria are provided with additional time to explore their gender identity. Gender affirming care has been found to significantly reduce mental health issues.³⁵

²⁷ H.B. 1011, 59th Leg., 1st Sess. (Okla. 2023); S.B. 129, 59th Leg., 1st Sess. (Okla. 2023).

²⁸ RUSSELL M. VINER, NICHOLAS B. ALLEN, & GEORGE C. PATTON, *Pubertal, Developmental Processes, and Health Interventions*, in CHILD AND ADOLESCENT HEALTH AND DEVELOPMENT 107, 107 (2017).

²⁹ WPATH STANDARDS OF CARE, *supra* note 17, at 20.

³⁰ Risa M. Wolf & Dominique Long, *Pubertal Development*, 37 PEDIATRICS REV. 7th ed., at 292 (2016).

³¹ WPATH STANDARDS OF CARE, *supra* note 17, at 14; Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 PEDIATRICS 89, 90 (2020).

³² Wolf & Long, *supra* note 30, at 292.

³³ WPATH STANDARDS OF CARE, *supra* note 17, at 18.

³⁴ Turban et al., *supra* note 31, at 2.

³⁵ See Maureen D. Connolly, Marcus J. Zervos, Charles J. Barrone II, Christine C. Johnson & Christine L. M. Joseph, *The Mental Health of Transgender Youth: Advances in Understanding*, 59 J. ADOLESCENT HEALTH 489, 494 (2016) (“[S]ignificant data have emerged related to improved mental health outcomes after gender-affirming medical therapy and supported social transition in childhood.”); Gemma L. Witcomb, Walter Pierre Bouman, Laurence Claes, Nicola Brewin, John R. Crawford & Jon Arcelus, *Levels of Depression in Transgender People and its Predictors: Results of a Large Matched Control Study with Transgender People Accessing Clinical Services*, 235 J. AFFECTIVE DISORDERS 308, 313 (2018) (finding that gender-affirming care and additional interventions to improve social support may reduce depressive disorder); Rosalia Costa, Michael Dunsford, Elin Skagerberg, Victoria Holt, Polly Carmicahel & Marco Colizzi, *Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria*, 12 J. SEXUAL MED. 2206, 2213 (2015) (concluding that puberty suppressants and psychological support increases the mental wellbeing of transgender minors).

More specifically, studies reveal that puberty blockers are known to decrease suicidality in adulthood as well as improve affect functioning,³⁶ psychological functioning,³⁷ and social life.³⁸ Puberty blockers can alleviate the “near-term distress” adolescents may experience as the threat of their incongruent development looms.³⁹ Access to puberty blockers provide long-term benefits to adolescents who decide to transition later in life. By delaying, or entirely preventing, the development of those sex characteristics that prove to be difficult or impossible to reverse, puberty blockers may aid in facilitating transition.⁴⁰ Access to puberty blockers at an early age can prevent an onslaught of emotional trauma from the effects of worsening gender dysphoria.⁴¹

In the United States, puberty blockers did not become accessible until relatively recently.⁴² However, medical research on pubertal suppression hormones has been developing since the 1980s.⁴³ During the late 1980s and early 1990s, medical doctors in the Netherlands began prescribing suppression hormones to teenage patients experiencing “confusion” about their gender identity.⁴⁴ Medical communities in the United States modeled and adapted their gender-affirming care treatment protocol after the Dutch model.⁴⁵ Medical associations specializing in gender-affirming care have created strict diagnostic criteria when determining whether an adolescent minor should be prescribed puberty blockers.⁴⁶

The use of puberty blockers as a treatment for gender dysphoria is widely accepted by professional medical associations across the globe as being a fully reversible form of care.⁴⁷ Being fully reversible, however, does not mean that taking puberty blockers lacks any risks. For example, using

³⁶ Affective functioning relates to the “motivational, behavioral, and subjective aspects of emotions.” Dana L. McMakin, Katie L. Burkhouse, Thomas M. Olino, Greg L. Siegle, Ronald E. Dahl & Jennifer S. Silk, *Affective Functioning Among Early Adolescents at High and Low Familial Risk for Depression and Their Mothers: A Focus on Individual and Transactional Processes Across Contexts*, 39 J. ABNORMAL CHILD PSYCH. 1, 2 (2011).

³⁷ Connolly et al., *supra* note 35, at 489.

³⁸ BOULWARE ET AL., *supra* note 8, at 15.

³⁹ Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 137 (2021).

⁴⁰ WPATH STANDARDS OF CARE, *supra* note 17, at 19. See Eliza Chung, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY L. REV. 145, 158–59 (2021).

⁴¹ TURBAN ET AL., *supra* note 31, at 2.

⁴² GREENE, *supra* note 25, at 2–3.

⁴³ Florence Comite, Gordon B. Cutler Jr., Jean Rivier, Wylie W. Vale, D. Lynn Loriaux & William F. Crowley Jr., *Short-term Treatment of Idiopathic Precocious Puberty with a Long-Acting Analogue of Luteinizing Hormone-releasing Hormone: A Preliminary Report*, 305 NEW ENGL. J. MED. 1546 (1981).

⁴⁴ GREENE, *supra* note 25, at 2.

⁴⁵ Amy C. Tishelman, Randi Kaufman, Laura Edwards-Leeper, Francie H. Mandel, Daniel E. Shumer & Norman P. Spack, *Serving Transgender Youth: Challenges, Dilemmas, and Clinical Examples*, 46 PRO. PSYCH. RSCH. PRAC. 1, 2 (2015).

⁴⁶ *Id.* at 3–8.

⁴⁷ WPATH STANDARDS OF CARE, *supra* note 17, at 18–19; Wylie C. Hembree, Peggy T. Cohen-Kettenis, Louis Gooren, Sabine E. Hannema, Walter J. Meyer, M. Hassan Murad, Stephen M. Rosenthal, Joshua D. Safer, Vin Tangpricha & Guy G. T’Sjoen, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3880 (2017).

puberty blockers may cause changes in bone mineral density and may complicate physical transition later in life.⁴⁸ Like most prescription drugs, there are side effects, but oftentimes, the benefit outweighs the risk.⁴⁹ Conservative lawmakers are concerned with certain effects of the drug, and some of their concerns are legitimate, but many are scientifically incorrect or extremely exaggerated.⁵⁰ Three main areas of controversy surrounding GnRH analogue therapy are: (1) sterilization; (2) “off label” use; and (3) bone mineral density.⁵¹

Unlike other forms of gender-affirming care, there is a substantial body of scientific research that tracks the long-term effects of GnRH analogue therapy. GnRH analogues are used for adolescents experiencing precocious puberty.⁵² Precocious puberty occurs when there is a premature activation of GnRH neurons which signals a premature development of secondary sex characteristics.⁵³ After physicians began using GnRH for precocious puberty in the 1980s, a significant body of research developed to review its effects on adolescents.⁵⁴ The studies show that pubertal development will stop when treatment begins but will resume after the discontinuation of the medication.⁵⁵ While an adolescent is taking puberty blockers, data reveals that long-term use of GnRH analogues causes minimal negative effects, if

⁴⁸ Giulia Giacomelli & Maria Cristina Meriggiola, *Bone Health in Transgender People: A Narrative Review*, 13 THERAPEUTIC ADVS. ENDOCRINOLOGY & METABOLISM 1, 3–4, 11 (2022); Sebastian E. E. Schagen, Femke W. Wouters, Peggy T. Cohen-Kettenis, Louis J. Gooren & Sabine E. Hannema, *Bone Development in Transgender Adolescents Treated with GnRH Analogues and Subsequent Gender-Affirming Hormones*, 105 J. CLINICAL ENDOCRINOLOGY & METABOLISM e4245, e4262 (2020); Annelou L. C. de Vries, Peggy T. Cohen-Kettenis & Henriette Delemarre-van de Waal, *Clinical Management of Gender Dysphoria in Adolescents*, 9 INT’L J. TRANSGENDERISM 83, 92 (2006). *But see* Sabine Heger, Marina Müller, Michael Ranke, Hans-Peter Schwarz, Franz Waldhauser, Carl-Joachim Partsch & Wolfgang G. Sippell, *Long-Term GnRH Agonist Treatment for Female Central Precocious Puberty Does Not Impair Reproductive Function*, 254 MOLECULAR & CELLULAR ENDOCRINOLOGY 217, 220 (2006) (“[L]ong-term treatment with depot GnRH does not impair reproductive function.”); Anna Maria Pasquino, Ida Pucarelli, Fabiana Accardo, Vitan Demiraj, Maria Segni & Raffaella Di Nardo, *Long-Term Observation of 87 Girls with Idiopathic Central Precocious Puberty Treated with Gonadotropin-Releasing Hormone Analogs: Impact on Adult Height, Body Mass Index, Bone Mineral Content, and Reproductive Function*, 93 J. CLINICAL ENDOCRINOLOGY & METABOLISM 190, 194 (2008) (concluding that GnRH treatment is safe and reversible for the reproductive system, bone mineral density, and body mass index); Silvano Bertelloni, Giampiero I. Baroncelli, Marco Ferdeghini, Fabrizio Menchini-Fabris & Giuseppe Saggese, *Final Height, Gonadal Function and Bone Mineral Density of Adolescent Males with Central Precocious Puberty After Therapy with Gonadotropin-Releasing Hormone Analogues*, 159 EUR. J. PEDIATRICS 369, 373 (2000) (finding that bone mineral density in late adolescence is not impaired in young men who underwent long term GnRH analogue treatment in childhood).

⁴⁹ *Think it Through: Managing the Benefits and Risks of Medicines*, FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/think-it-through-managing-benefits-and-risks-medicines> (last visited July 30, 2023).

⁵⁰ BOULWARE ET AL., *supra* note 8, at 22.

⁵¹ *Id.*; Helen Santoro, *Gender-Affirming Care for Trans Youth: Separating Medical Facts from Misinformation*, CBS NEWS, (June 28, 2023, 6:09 PM), <https://www.cbsnews.com/news/trans-youth-gender-affirming-care-misinformation/>.

⁵² *See* Heger et al., *supra* note 48, at 254; Pasquino et al., *supra* note 48, at 190; Bertelloni et al., *supra* note 48, at 370.

⁵³ Heger et al., *supra* note 48, at 217.

⁵⁴ *See* Comite et al., *supra* note 43.

⁵⁵ BOULWARE ET AL., *supra* note 8, at 22.

any.⁵⁶ Some of these negative effects correct themselves when adolescents cease taking GnRH analogues or begin estrogen or testosterone treatments.⁵⁷

Despite extensive scientific research regarding the effectiveness of puberty blockers, many state legislatures are attempting to pass, or have passed, legislation that criminalizes a minor's use of puberty blockers.

B. *Legislation Criminalizing & Disciplining Physician Conduct*

The Alabama and Arkansas state legislatures⁵⁸ successfully enacted statutes that threaten either criminal prosecution or disciplinary action against medical professionals if they administer gender-affirming care to a minor.⁵⁹ In both states, LGBTQ+ activists and individual families challenged the newly enacted statutes almost immediately on several grounds.⁶⁰ Each statute has the primary goal of eliminating access to gender-affirming care for minors.⁶¹ Legislators justify the statutes by claiming that it is proper to ban gender-affirming care because the “series of [treatment] interventions” are “unproven, poorly studied,”⁶² and “experimental.”⁶³ These blanket justifications run contrary to scientific data from highly accredited medical associations and academic research.⁶⁴ Though the statutes focus exclusively on minors, there appears to be an ultimate agenda.⁶⁵ Each Act shares the same primary goal, but the Arkansas Act may hold broader implications for constituents. Each Act will be described in turn:

⁵⁶ *Id.* at 21–24.

⁵⁷ *Id.* at 22; Schagen et al., *supra* note 48, at e4257–e4262.

⁵⁸ As this project developed, several states enacted similar bills. These additional bills are beyond the scope of this Note, but the litigation strategy discussed here can be effectively utilized to combat these bills as well. For a statute that prohibits gender reassignment surgery for minors, see ARIZ. REV. STAT. § 32-3230. For statutes that restrict access to hormone treatment, pubertal suppression, and/or surgery see UTAH CODE § 58-1-603 (West 2023); TENN. CODE § 63-1-169 (West 2023); MISS. CODE § -(-)-(-)- (prohibiting a person from “knowingly provide gender transition procedures”) (2023 Appendix: Undesignated 2023 Legis.. Enactments); KY. REV. STAT. § 311.372 (West 2023); S.D. CODIFIED LAWS § 34-24-34 (2023); S.B. 140, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023) (enacted); L.B. 574, 108th Leg., (Neb. 2023) (enacted, but portions of the statute concerning gender-affirming care become effective Oct. 1, 2023); FLA. STAT. § 61.517 (West 2023); IND. CODE § 25-1-22-13 (West 2023).

⁵⁹ ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504 (West 2021).

⁶⁰ Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1151 (M.D. Ala. 2022) (issuing a preliminary injunction preventing enforcement of Section 4(a)(1)-(3) of ALA. CODE § 26-26-4); Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (enjoining ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504, § 23-79-166).

⁶¹ ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504 (West 2021).

⁶² S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

⁶³ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

⁶⁴ BOULWARE ET AL., *supra* note 8, at 7. See WPATH STANDARDS OF CARE, *supra* note 17; Hembree et al., *supra* note 47; American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AMERICAN PSYCHOLOGIST 832 (2015).

⁶⁵ See H.B. 1011, 59th Leg., 1st Sess. (Okla. 2023); S.B. 129, 59th Leg., 1st Sess. (Okla. 2023); Alex Seitz-Wald & Jo Yurcaba, *Trump Vows to ‘Stop’ Gender-Affirming Care for Minors if Re-Elected President*, NBC NEWS (Jan. 31, 2023, 3:27 PM), <https://www.nbcnews.com/politics/2024-election/trump-vows-stop-gender-affirming-care-minors-re-elected-president-rcna68461>.

1. *Alabama*

The Alabama Vulnerable Child Compassion and Protection Act (V-CAP) makes it a Class C Felony for any person, namely physicians and medical providers, to provide minors with treatments for gender dysphoria.⁶⁶ The ban prohibits the prescription and administration of puberty blockers, hormone replacement therapies, and gender-affirming surgical care to minors.⁶⁷ As stated above, legislators justify these bans by claiming that the state needs to protect the health, safety, and welfare of minors from treatment that supposedly has long-lasting negative effects.⁶⁸

One prominent survey of medical professionals details the criticism surrounding the legislative attacks on gender-affirming care.⁶⁹ In this survey, numerous medical professionals and a Yale Law professor argue that the Alabama legislature made “exaggerated and unsupported claims” about gender-affirming care.⁷⁰ For example, the legislative findings include that “standard medical care” for minors includes surgery on “genitals and reproductive organs.”⁷¹ The standard medical protocol for treating transgender, non-binary, and gender nonconforming patients does not advise for such treatment.⁷² Additionally, the findings inaccurately claim that puberty blockers create a risk of sterility.⁷³

2. *Arkansas*

The Arkansas Save Adolescents from Experimentation (SAFE) Act does not put physicians at risk for criminal prosecutions for referring or providing gender-affirming care to a minor.⁷⁴ The SAFE Act, however, subjects physicians to disciplinary action by a licensing entity or disciplinary review board if they provide a minor with gender-affirming care.⁷⁵ A physician could also face civil liability if they provide gender-affirming care to a minor.⁷⁶

⁶⁶ ALA. CODE § 26-26-4(c). In Alabama, Class C felonies carry a sentence of imprisonment ranging from one to ten years. ALA. CODE § 13A-5-6(a)(3).

⁶⁷ ALA. CODE § 26-26-4(a)(1)-(6); WPATH STANDARDS OF CARE, *supra* note 17, at 21.

⁶⁸ ALA. CODE § 26-26-4 (2022); ARK. CODE §§ 20-9-1501 to 20-9-1504 (West 2021).

⁶⁹ BOULWARE ET AL., *supra* note 8.

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² WPATH STANDARDS OF CARE, *supra* note 17, at 21.

⁷³ *See infra* Section I.D.1.

⁷⁴ ARK. CODE ANN. § 20-9-1504(a).

⁷⁵ *Id.*

⁷⁶ *Id.* § 20-9-1504(b). Legal scholars have been calling on legislators to create a civil liability cause of action for individuals who were *denied* gender-affirming care during their youth. *See Chung, supra* note 40. Instead, by enacting § 20-9-1504, the Arkansas legislature decided to create a civil liability cause of action for individuals who were *provided with* gender-affirming care under the age of eighteen.

The Act defines “gender transition procedures”⁷⁷ as “any medical or surgical service . . . or prescribed drugs” that relate to gender transition.⁷⁸ The Act does not prohibit mental health counseling as it relates to gender dysphoria.⁷⁹ Like the Alabama statute, the SAFE Act creates exceptions allowing physicians to provide the otherwise prohibited treatments for diagnoses relating to sexual development such as being born with ambiguous genitalia.⁸⁰ In other words, the legislators only found that the use of the prohibited procedures and medication is a “grave concern” when it is used to treat individuals experiencing gender dysphoria.⁸¹

Not only does the SAFE Act prevent access to gender-affirming care to patients in Arkansas, but it carries with it *private* insurance implications that may restrict access to care beyond state bounds.⁸² Like many other states, the Arkansas legislature prohibits the use of public funds to cover gender-affirming procedures for an individual under eighteen years old.⁸³ Excluding coverage for gender-affirming treatment under the state Medicaid program creates insurmountable barriers for many populations that try to access care.⁸⁴ Yet the Arkansas legislature takes it even further. The Arkansas policy restricting coverage for gender-affirming care by private insurance is the first policy of its kind.⁸⁵ The statute prohibits *any* health benefit plan under an insurance policy within the state from providing coverage for gender-affirming procedures for a person under the age of eighteen.⁸⁶ Notably, the statute clarifies that any healthcare plan under an insurance policy in Arkansas is “not required” to provide coverage for gender-affirming procedures for those over the age of eighteen.⁸⁷ This framework suggests that even if a minor is able to seek out-of-state medical care, they may not have this care covered by their insurance policy, making treatment cost-prohibitive. This legislation increases financial barriers, deters gender-affirming conduct, and constitutes extraterritorial legislating.

⁷⁷ The SAFE Act refers to gender-affirming care as “gender transition procedures” which is an inaccurate characterization of what care is prohibited by the Act. ARK. CODE ANN. § 20-9-1501(6)(A). For example, the SAFE Act restricts a minor’s access to puberty blockers, but puberty blockers are not necessarily a “transition procedure.” *Id.* A minor who uses puberty blockers may not transition later in life. WPATH STANDARDS OF CARE, *supra* note 17, at 19. Due to the mischaracterization, this Note will refer to “gender transition procedures” as gender-affirming care.

⁷⁸ ARK. CODE ANN. § 20-9-1501(6)(A).

⁷⁹ *Id.*

⁸⁰ *Id.* § 20-9-1501(6)(B)(i); ALA. CODE § 26-26-4 (2022).

⁸¹ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 2(14) (Ark. 2021).

⁸² ARK. CODE ANN. § 23-79-166(b).

⁸³ ARK. CODE ANN. § 20-9-1503(a).

⁸⁴ See Jordan Aiken, *Promoting an Integrated Approach to Ensuring Access to Gender Incongruent Health Care*, 31 BERKLEY J. GENDER L. & JUST. 1, 13–19 (2016).

⁸⁵ Arkansas is the only state with policies that restrict private insurers from providing coverage for gender-affirming care. *Healthcare Law and Policies: Medicaid Coverage for Transgender-Related Health Care*, MOVEMENT ADVANCEMENT PROJECT (Oct. 3, 2023), <https://www.lgbtmap.org/img/maps/citations-medicaid.pdf>.

⁸⁶ ARK. CODE ANN. § 23-79-166(b).

⁸⁷ *Id.* § 23-79-166(c).

C. *The Executive Directive: Child Welfare*

1. *Texas*

Meanwhile, executive officials in Texas have criminalized gender-affirming care by characterizing it as a child welfare issue.⁸⁸ In Texas, as in other states,⁸⁹ parents are at risk for criminal sanctions and child separation if they seek out gender-affirming care for their child.⁹⁰ Texas demonstrates that there are other means to restrict access to gender-affirming care. Statutes are not the only avenue politicians have utilized to criminalize these procedures, nor are physicians the only parties subject to liability.

In February of 2022, the former Texas Attorney General, Warren Kenneth Paxton Jr. (Ken Paxton),⁹¹ and the Governor of Texas, Greg Abbott, fused their respective powers to classify gender-affirming procedures as “child abuse” under Texas law.⁹² Governor Greg Abbott issued a letter to the Commissioner of the Texas Department of Family and Protective Services regarding gender-affirming procedures. In the letter, Governor Abbott directed the agency to conduct an investigation of reports of child abuse. Days before Governor Abbott’s directive was sent, Ken Paxton issued an Opinion stating that under Texas law the provision of gender-affirming care to minors constituted “child abuse.”⁹³ To enforce this provision, Texas imposed reporting requirements upon medical professionals, school officials, and other professional members of the public.⁹⁴ A failure to report violations places the nonreporting professional at risk of criminal prosecution.⁹⁵

The opinion issued by Ken Paxton, however, has been discredited by highly esteemed medical professionals and academic scholars.⁹⁶ Ken Paxton based his opinion on what would be considered “bad science.” Susan Boulware, a professor of endocrinology at Yale School of Medicine, among other scholars, asserts that Ken Paxton “either misunderstands or

⁸⁸ A discussion of the constitutional legality of the Texas executive directive is beyond this Note. The constitutional analysis would be different given the use of executive rather than legislative power. Thus, it is not mentioned in Section III concerning the constitutional test. This Note mentions and discusses the executive directive to provide more context about the different approaches conservative lawmakers are taking to prohibit care for adolescents.

⁸⁹ FLA. STAT. ANN. § 61.517(1)(c) (West 2023).

⁹⁰ Letter from Greg Abbott, *supra* note 6.

⁹¹ In late May, Ken Paxton was suspended from his role as Texas’ Attorney General. Zach Despart & James Barragán, *Texas AG Ken Paxton Impeached, Suspended from Duties; Will Face Senate Trial*, TEXAS TRIBUNE (May 27, 2023), <https://www.texastribune.org/2023/05/27/ken-paxton-impeached-texas-attorney-general/>. The Texas House of Representatives filed twenty articles of impeachment against him. H.R. Res. No. 2377, 88th Leg., (Tex. 2023).

⁹² Letter from Greg Abbott, *supra* note 6 (enforcing Tex. Op. Att’y Gen., No. KP-0401 (Feb. 18, 2022)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ BOULWARE ET AL., *supra* note 8, at 1–2.

deliberately misstates medical protocols and scientific evidence.”⁹⁷ Much like Alabama’s legislative findings for V-CAP, the former Attorney General’s opinion disregards “established medical authorities” while spewing “discredited, outdated, and poor-quality information.”⁹⁸

D. *Exaggeration of Concerns & Pretext*

The Supreme Court has suggested that there is “no affirmative right to access *particular* medical treatments *reasonably* prohibited by the government,”⁹⁹ and thus, a complete ban on care or an unreasonable prohibition on certain medication may be unconstitutional.¹⁰⁰ While state legislatures are typically given deference when there are competing theories on whether the regulated activity is harmful or dangerous, the courts should not turn a blind eye to impermissible motives and faulty science.¹⁰¹

1. *Unfounded Concerns About Sterilization*

The fertility concerns set forth in the Alabama bill, Arkansas bill, and Texas Attorney General’s opinion are the most exaggerated and scientifically incorrect concerns. The Alabama bill states that when an individual begins cross-sex hormone therapy¹⁰² “pubertal blockade is expected to cause irreversible sterility.”¹⁰³ This assertion is unsupported and directly contradicts the vast body of scientific research that says otherwise.¹⁰⁴

Similarly, the Arkansas bill includes “irreversible infertility” as a side-effect of taking cross-sex hormones.¹⁰⁵ It is unclear whether the Arkansas legislature believes that GnRH analogues contribute to this alleged risk. This is significant. A plain reading of the Arkansas bill implies that cross-sex

⁹⁷ *Id.* at 2.

⁹⁸ *Id.*

⁹⁹ *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 (D.C. Cir 2007) (citing to numerous Supreme Court decisions, such as *Gonzales v. Raich*, *United States v. Rutherford*, and *United States v. Oakland Cannabis Buyers’ Cooperative*, to back the assertion).

¹⁰⁰ B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 285, 315 (2007).

¹⁰¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (“We must assume that . . . the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them.”).

¹⁰² When an individual undergoes cross-sex therapy, they may receive doses of estrogen or testosterone to induce a physical transition. For example, transgender men may receive testosterone preparations to boost testosterone levels. INT’L SOC’Y FOR SEXUAL MEDICINE, *What is Cross-Sex Hormone Therapy?*, <https://www.issm.info/sexual-health-qa/what-is-cross-sex-hormone-therapy/> (last visited July 27, 2023).

¹⁰³ S.B. 184, 2022 Reg. Sess. (Ala. 2022).

¹⁰⁴ BOULWARE ET AL., *supra* note 8, at 2; Bertelloni et al., *supra* note 48, at 369 (“Post-therapy data demonstrating normal endocrine and exocrine testicular function support the safety of gonadotropin-releasing hormone analogues on reproductive function.”); Heger et al., *supra* note 48, at 220 (“[L]ong-term treatment with depot GnRHa does not impair reproductive function.”); Pasquino et al., *supra* note 48, at 190 (“GnRHa treatment in [girls with idiopathic central precocious puberty] is safe for the reproductive system.”).

¹⁰⁵ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 2(6)(B) (Ark. 2021).

hormone therapy creates infertility risks, along with all the other potential side-effects, regardless of whether pubertal blockade occurred. The legislature states that puberty blockers should not be prescribed because there is a “lack of any long-term longitudinal studies evaluating the risks and benefits of using these drugs” for transitioning.¹⁰⁶ While it is true that there are not many studies on the long-term effects of using puberty blockers for the purpose of gender affirmation, this reasoning is not persuasive given the extensive research of their use in patients with precocious puberty.¹⁰⁷ The purpose of the use is immaterial; what matters is the effects of the drugs in the long-term. The scientific studies prove that use of these drugs for pubertal suppression do not constitute significant risks for adolescent users.¹⁰⁸ Given this, transgender, non-binary, and gender nonconforming adolescents should be given the opportunity to access puberty blockers to delay the onset of puberty until they decide whether to receive cross-sex hormone therapy as they near the age of consent.

Lastly, the former Texas Attorney General takes the most extreme, inaccurate position on the issue of fertility and sterilization. His opinion states that because gender-affirming care “can and do[es] result in sterilization,” it “implicate[s] a minor child’s constitutional right to procreate.”¹⁰⁹ He further claims that administering puberty blockers can “cause ‘mental or emotional injury to a child *that results in* an observable and material impairment in the child’s growth, development, or psychological functioning.’”¹¹⁰ The opinion then states that the minor would be subjected to a “mental and emotional injury associated with lifelong sterilization—an impairment to one’s growth and development.”¹¹¹ This reasoning is obviously flawed as Ken Paxton is trying to read in GnRH analogue therapy as falling within Texas’ definition of abuse.

The former Texas Attorney General suggests that receiving GnRH analogue therapy may result in a mental or emotional injury because it

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* Section I.A.

¹⁰⁸ Heger et al., *supra* note 48, at 217 (“No negative side effects have been observed on bone mineral density, body weight and psychosocial outcome.”); Bertelloni et al., *supra* note 48, at 372–73 (finding that long-term treatment with GnRH analogues improves final height in boys with central precocious puberty and long-term suppression of testicular function in childhood does not impair bone mineral density in late adolescence); Pasquino et al., *supra* note 48, at 194 (concluding that GnRHa treatment in girls with idiopathic central precocious puberty is safe for the reproductive system, bone mineral density, and body mass index and helpful in reaching adult height close to target height).

¹⁰⁹ Tex. Op. Att’y Gen., No. KP-0401, at 6 (Feb. 18, 2022). While it is true that the Supreme Court recognizes a right to procreate, the Texas Opinion still jumps to conclusions. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). There is no data that suggests that puberty blockers cause infertility. Any evidence of infertility is based off the use of cross-sex hormones. Cross-sex hormones may cause infertility with or without puberty blockers. Thus, puberty blockers should not be associated with a risk of infertility. Gender non-conforming adolescents do not face serious risks of infertility by taking puberty blockers. GnRH therapy provides minors with more time and prevents damage to their mental health while they determine whether they would like to continue with transitioning.

¹¹⁰ Tex. Op. Att’y Gen., *supra* note 109, at 2 (emphasis added) (citation omitted).

¹¹¹ *Id.* at 11–12.

delays an adolescent's growth and development. His opinion then states that this "mental and emotional injury [is] associated with lifelong sterilization."¹¹² Pubertal blockade by means of GnRH analogue therapy would cause a delay in the gonadal development of an adolescent, but the delayed development does not cause a mental or emotional injury. Frankly, the opposite is true. The failure to provide an adolescent with puberty blockers can cause mental and/or emotional injury.¹¹³

2. *Exaggerated Concerns About "Off-Label" Use*

The Alabama law and Texas opinion both express concerns over the fact that GnRH analogues are not approved by the United States Food and Drug Administration (FDA) for gender-affirming care.¹¹⁴ The FDA requires that drugs be proven "safe and effective" for use "under conditions prescribed, recommended, or suggested in the labeling."¹¹⁵ Since the drug is not FDA-approved for gender-affirming care purposes, prescribing it to transgender, non-binary, and gender nonconforming adolescents to delay the onset of puberty is considered an "off-label" use.¹¹⁶ The term "off-label" does not "imply an improper, illegal, contraindicated, or investigational use."¹¹⁷ It only means that the FDA has not approved a "particular medication for a particular use."¹¹⁸ GnRH analogues are FDA approved to treat precocious puberty.¹¹⁹ It is extremely common for pediatric physicians to resort to "off-label" use of medications because "an 'overwhelming number of drugs' have no FDA-approved instructions for use" in minor patients.¹²⁰

3. *Concerns with Merit: Bone Mineral Density and Unmentioned Side-Effects*

Although many of the concerns raised by anti-gender-affirming care lawmakers are exaggerated, a loss of bone mineral density is a legitimate risk. Early studies on adolescent development when undergoing GnRH analogue therapy did not find significant evidence to show that taking the

¹¹² *Id.* at 11.

¹¹³ Connolly et al., *supra* note 35, at 494; Witcomb et al., *supra* note 35, at 313; Costa et al., *supra* note 35, at 2213.

¹¹⁴ S.B. 184, 2022 Reg. Sess. (Ala. 2022); Tex. Op. Att'y Gen., *supra* note 109, at 5.

¹¹⁵ *United States v. Rutherford*, 442 U.S. 544, 544 (1979); 21 U.S.C.A. § 321(p)(1).

¹¹⁶ Tex. Op. Att'y Gen., *supra* note 109, at 5.

¹¹⁷ Kathleen A. Neville, *Off-Label Use of Drugs in Children*, 133 AM. ACAD. PEDIATRICS 563, 563 (2014).

¹¹⁸ BOULWARE ET AL., *supra* note 8, at 24.

¹¹⁹ Carla M. Lopez, Daniel Solomon, Susan D. Boulware & Emily Christison-Lagay, *Trends in the "Off-Label" Use of GnRH Agonists Among Pediatric Patients in the United States*, 57 CLINICAL PEDIATRICS 1432, 1432 (2018).

¹²⁰ BOULWARE ET AL., *supra* note 8, at 24. For a study on off-label medication use in children, see H. Christine Allen, M. Connor Garbe, Julie Lees, Naila Aziz, Hala Chaaban, Jamie L. Miller, Peter Johnson & Stephanie DeLeon, *Off-Label Medication Use in Children, More Common than We Think: A Systematic Review of the Literature*, 111 J. OKLA. STATE MED. ASSOC. 777-78, 780-82 (2018) (advocating for a decrease in off-label prescriptions and improved FDA-labeling for pediatric use).

drug affected bone mineral density.¹²¹ In recent years, however, more complex studies have been performed focusing on the effects of GnRH analogues on transgender adolescents.¹²² These studies show that GnRH analogue therapy may affect the bone mineral density in transgender women more than transgender men.¹²³ This is a legitimate concern, but in weighing this fact against all of the proven benefits of administering gender-affirming care, the benefits significantly outweigh this concern.

In addition to the concerns raised by lawmakers, there remains another side-effect left unmentioned. For transgender women, the use of puberty blockers may cause complications if an individual chooses to surgically transition later in life.¹²⁴ If a transgender woman takes GnRH analogues from a young age, it can lessen the amount of penile skin promulgated during growth, and therefore make it less likely that a physician could form a “deep vagina” by using the “penile inversion method.”¹²⁵ This is a legitimate concern as it poses a long term side-effect. This point would strengthen the conservative lawmaker’s reasoning, yet they fail to mention this concern because they refuse to acknowledge the legitimacy of transgender identity.

4. *The Overwhelming Pretext*

Lawmakers’ efforts to justify bans on gender-affirming care conveniently fail to mention the numerous benefits that gender-affirming healthcare provides to individuals. There are many studies that explain the benefits of puberty blockers.¹²⁶ Instead, lawmakers plainly state that the benefits of puberty blockers are an “unproven” and “poorly studied series of interventions result[ing] in numerous harmful effects for minors.”¹²⁷ In fact, the Alabama bill states that “hormonal and surgical interventions often do not resolve the underlying psychological issues affecting the individual,”¹²⁸

¹²¹ Heger et al., *supra* note 48, at 217; Bertelloni et al., *supra* note 48, at 369; Pasquino et al., *supra* note 48, at 190.

¹²² Schagen et al., *supra* note 48, at e4257, e4261–62 (finding that areal bone mineral density z-scores decreased during GnRHa treatment and increased during gender-affirming hormone treatment—transboys had normal z-scores at baseline and at the end of the study while transgirls had relatively low z-scores, both at baseline and after three years of estrogen treatment). For context, z-scores represent the number of standard deviations a data point lies above or below the mean. Here, the z-scores for transgirls are below the mean.

¹²³ *Id.*

¹²⁴ L.C. de Vries et al., *supra* note 48, at 86.

¹²⁵ *Id.* at 92. This is a type of vaginoplasty that uses “genital skin to construct the vulva and neovaginal canal” for transgender women. Poone Shoureshi & Daniel Dugi III, *Penile Inversion Vaginoplasty Technique*, 46 UROLOGIC CLINICS N. AM. 511, 523 (2019).

¹²⁶ Wolf & Long, *supra* note 30, at 299; Connolly, *supra* note 35, at 494; Witcomb, *supra* note 35, at 313; Costa, *supra* note 35, at 2213.

¹²⁷ S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

¹²⁸ *Id.*

which is simply untrue.¹²⁹ Interventions may not entirely resolve underlying issues, but they surely lessen the effects of gender dysphoria.¹³⁰

There are many irreversible surgeries, such as circumcision or nose jobs, and other forms of medical care that pose similar or increased risks that legislators have not bothered to try to ban.¹³¹ While it is true that just because legislators regulate one thing does not mean they must regulate another, the pretext of the bills criminalizing gender-affirming care is clear. Legislators are not protecting adolescents; they are doing the opposite. Instead of furthering the interests of transgender, non-binary, and gender nonconforming adolescents, conservative legislators are exploiting the vulnerability of adolescents.¹³² These statutes, however, will not stand constitutional scrutiny because they violate a parent's right to the care, control, and custody of their child by interfering with a parent's right to direct the medical care of their child.

II. PARENTAL AUTHORITY & MEDICAL DECISION MAKING

This Part will begin by introducing parental rights as a protected substantive right, withstanding *Dobbs*, under the Fourteenth Amendment's Due Process Clause. The evolution of parental authority as a recognizable constitutional right occurred in the early twentieth century as Justices of the Supreme Court recognized the longstanding history of parental rights in

¹²⁹ Connolly et al., *supra* note 35, at 494; Costa et al., *supra* note 35, at 2213.

¹³⁰ Connolly et al., *supra* note 35, at 494. The fact that this drug was used by minors to treat precocious puberty without any notable amount of pushback or controversy shows how legislators are not actually concerned with the side-effects of the drug. If the concern arises from the pairing of GnRH analogues with cross-sex hormone treatment, the legislature must be clear about it. To support their position, the legislature should find data to support their findings and make clear why adolescents cannot take puberty blockers to buy themselves more time, without much or any harm done, before making the decision to receive cross-sex hormone therapy. Additionally, lawmakers appear to only be concerned about side-effects when a certain population is prescribed GnRH analogues because the statutes carve out exceptions where medical professionals are allowed to prescribe GnRH hormones to other populations—regardless of side-effects. ARK. CODE ANN. § 20-9-1501(6)(B); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022). See Section I.D.

¹³¹ For an interesting discussion on the issue, see B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295, 1310–13 (2015) (“Surprisingly, with the exception of reproductive healthcare, constitutional rights and entitlements have not permeated the law of therapeutic and nontherapeutic medical interventions to any significant extent.”).

¹³² The agenda does not stop with adolescents. In the first few days of 2023, two telling bills were introduced in Oklahoma. In January of 2023, Oklahoma legislators introduced bills proposing to criminalize gender-affirming care for individuals into adulthood. H.B. 1011, 59th Leg., 1st Sess. (Okla. 2023); S.B. 129, 59th Leg., 1st Sess. (Okla. 2023). First, Representative Jim Olsen introduced a bill that would criminalize providing gender-affirming care to individuals under the age of twenty-one. H.B. 1011, 59th Leg., 1st Sess. (Okla. 2023). Shortly after, Senator David Bullard introduced a bill entitled the Millstone Act, referencing the biblical verse Matthew 18:6. S.B. 129, 59th Leg., 1st Sess. (Okla. 2023). This Act proposes that physicians be found guilty of a felony if they provide gender-affirming care to any individual under the age of twenty-six. *Id.* The Oklahoma lawmakers' agenda is transparent. The bans on gender-affirming care are not meant to stop with minors, but eventually aim to encompass all people regardless of age.

western culture and tradition.¹³³ This Note argues that *Dobbs* did not disturb the previously recognized right. Reproductive rights jurisprudence provides the foundation for the autonomy line of cases, which is why this Note places such an emphasis on the *Dobbs* opinion.

Next, the discussion turns to parental rights in the medical context and how the Court handles legislation that restricts medical treatments. To illustrate how the court typically handles restrictive legislation, this Note references the two major lines of precedent that developed to handle issues in this area which are public health cases and autonomy cases. Like abortion, gender-affirming care falls into the autonomy line of cases.

Unlike parental rights, the support for autonomy-based cases was severely weakened by the *Dobbs* decision. The *Dobbs* Court stated that substantive due process rights are narrowly defined rights that are rooted in history and tradition.¹³⁴ In *Dobbs*, the Court refused to broadly characterize the issue as relating to bodily autonomy.¹³⁵ Thus, the gender-affirming care cases will find little support in the autonomy-based arguments, so litigators must support their claims in alternative ways. Litigators can no longer effectively argue that the statutes violate substantive due process due to their encroachment on a right to personal privacy and bodily autonomy. However, litigators can use parental rights to argue that the statutes restricting gender-affirming care are unconstitutional.

A parent's constitutional right to the care, control, and custody of their child is not absolute.¹³⁶ The state may enact laws that infringe on a parent's right and can still withstand constitutional review. To contextualize the strength of parental rights in the medical context with respect to state interests, this Note discusses how the Supreme Court reacted to different attempts by states to ban certain forms of medical care. The parental rights argument is strong. It is important, however, to note that parental agency is limited in other medical contexts such as the criminalization of abortion.¹³⁷ Lastly, this Section will conclude by explaining why the Supreme Court should not blindly defer to state legislatures on this issue.

A. *The Impact of Dobbs and Increased Reliance on Parental Rights*

Nearly fifty years after recognizing that the right to an abortion was protected by the Due Process Clause of the Fourteenth Amendment, the

¹³³ *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹³⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235–36 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1996)).

¹³⁵ *Id.* at 2257.

¹³⁶ In fact, a parent should not have “unfettered decision-making authority” over their child. Dailey & Rosenbury, *supra* note 39, at 95. But that does not mean the state should have considerable authority either. An adolescent's voice should be given considerable deference when making a decision that will affect the child for the rest of their life. The state should take on the role of a moderator.

¹³⁷ *Dobbs*, 142 S. Ct. at 2235–37.

Supreme Court decided to reverse course. In *Dobbs*, the Court held that the Due Process Clause does not provide for an implicit, substantive due process right to an abortion.¹³⁸ The Court reasoned that the right to an abortion is neither “deeply rooted in [the] Nation’s history and tradition” nor is it “implicit in the concept of ordered liberty.”¹³⁹ Several landmark decisions recognized certain privacy interests under the Fourteenth Amendment’s Due Process Clause without making history and tradition dispositive to the analysis.¹⁴⁰ Yet the *Dobbs* Court’s reasoning relies heavily upon historical tradition¹⁴¹ as it relates to a narrowly defined right.¹⁴² *Dobbs* is a decisive declaration of how the Roberts Court intends to handle questions regarding substantive due process.

The *Dobbs* decision is critical to consider when bringing challenges on constitutional grounds. It is especially significant for litigators challenging the statutes that criminalize gender-affirming care as parties cannot rely on autonomy-based due process arguments being successful. Substantive due process arguments, however, are not foreclosed altogether. Litigators can still rely on parental rights to challenge the statutes on due process grounds. While it is true that the *Dobbs* Court relied on the most constrained method of interpreting the Fourteenth Amendment’s Due Process Clause, a parent’s right to the care, control, and custody over their child is not at risk to be displaced. The court has consistently reinforced the idea that a parent’s right is objectively rooted in this nation’s history and tradition as to make it fundamental to the nation’s concept of ordered liberty.¹⁴³

¹³⁸ *Id.* at 2242.

¹³⁹ *Id.*

¹⁴⁰ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”); *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (recognizing that restrictions within the privacy of the home may implicate a fundamental right as the Court effectively overruled *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986), which held that “prohibitions of homosexual sodomy . . . do not implicate a ‘fundamental right’ under the Due Process Clause”); *Obergefell v. Hodges*, 576 U.S. 644, 737 (2014) (Alito, J., dissenting) (holding that the unenumerated, fundamental right to marry extends to same-sex couples despite counter-arguments stating that same-sex marriage is not deeply rooted in history or tradition). Notably, the *Glucksberg* Court surveyed more than seven hundred years of Anglo-American tradition when determining what is objectively, deeply rooted in the nation’s history and tradition. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1996). The *Obergefell* Court, however, noted that the fundamental right inquiry is guided by, but not limited to, what is rooted in the nation’s history and tradition. *Obergefell*, 576 U.S. at 664. The methodology adopted by the *Obergefell* Court “respects [the nation’s] history and learns from it without allowing the past alone to rule the present.” *Id.*

¹⁴¹ Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006).

¹⁴² It is important to note that even though the *Dobbs* Court embraced the *Glucksberg* approach by defining the right very narrowly, Justice Blackmun implicitly found that the right to an abortion, narrowly defined, was rooted in history and tradition. *Roe v. Wade*, 410 U.S. 113, 129 (1973). Justice Blackmun noted that the restrictions and criminalization of abortion are of “relatively recent vintage” as they derived from changes that took place in the latter half of the nineteenth century. *Id.* The *Dobbs* Court disagreed and reached the opposite conclusion. *Dobbs*, 142 S. Ct. at 2235.

¹⁴³ Conkle, *supra* note 141, at 71–72.

B. *The Recognition of Parental Rights Under Substantive Due Process*

The doctrine of substantive due process is “chao[tic]”¹⁴⁴ and parental rights are uniquely situated in the middle of it. Since the early twentieth century, the Supreme Court has embraced several competing theories when evaluating which rights are implicitly protected under the Fourteenth Amendment’s Due Process Clause.¹⁴⁵ The evolution of these theories has not been linear. Precedent reveals that the Court’s rationale for finding implicit rights under the Fourteenth Amendment has changed along with the composition of its bench. Despite the everchanging approach, the Court has consistently reaffirmed the fundamental nature of a parent’s right to direct the upbringing of their child.¹⁴⁶ The most recent substantial change in the doctrine of substantive due process occurred when the Court decided *Dobbs v. Jackson Women’s Health Organization*.¹⁴⁷

After *Dobbs*, concerns have been raised over the scope of the opinion and how it may affect the doctrine of substantive due process and previously recognized substantive rights.¹⁴⁸ This concern arose because the Court relies

¹⁴⁴ *Id.* at 66.

¹⁴⁵ See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (finding that “liberty” under the Fourteenth Amendment is broad enough to encompass and protect an individual’s right to contract); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (concluding that a parent’s right to direct their child’s education is within the purview of “liberty” as protected by the Fourteenth Amendment); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937) (overruling *Lochner* finding that the Fourteenth Amendment does not provide an absolute substantive right to contract, and thus, states may use their police powers to enforce reasonable regulations); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (interpreting specific guarantees in the Bill of Rights to create penumbral or peripheral rights, such as the right to privacy and the right to obtain contraceptives as falling within the protected zone of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to obtain contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (finding that the right to privacy includes a woman’s qualified right to terminate a pregnancy); *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (establishing the two primary features of the Court’s substantive due process analysis which are as follows: (1) the Court’s regular recognition of “fundamental rights and liberties which are, objectively deeply rooted in this Nation’s history and tradition”; and (2) the required “‘careful description’ of the asserted fundamental liberty interest”) (citations omitted); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing after *Glucksberg* that a parent’s right to the care, control, and custody of their child is a fundamental right under substantive due process); *Lawrence v. Texas*, 539 U.S. 558, 564, 567–68 (2003) (overruling *Bowers v. Hardwick* by finding that there is no longstanding history of laws directed against same-sex relations as a distinct matter and that individuals maintain a substantive right to privacy in their home concerning intimate, sexual relationships); *Obergefell v. Hodges*, 576 U.S. 644, 663–65 (2015) (holding that the Fourteenth Amendment’s Due Process clause protects an individual’s right to make choices central to “individual dignity and autonomy” which includes the right to same-sex marriage as the right to marry is deeply rooted in the Nation’s history and tradition); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–47 (2022) (overruling *Roe* finding that a individual’s right to terminate a pregnancy is not deeply rooted in history or tradition, and thus, no protection is afforded by the Fourteenth Amendment’s Due Process Clause).

¹⁴⁶ *Troxel*, 530 U.S. at 65.

¹⁴⁷ *Dobbs*, 142 S. Ct. at 2228.

¹⁴⁸ See Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling*, BLOOMBERG L. (June 24, 2022, 3:54 PM), <https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling> (discussing various rights at risk in light of the reasoning in *Dobbs*). The *Dobbs* majority states that “[n]othing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion” but the concurring and dissenting justices are skeptical of

heavily on *Glucksberg*'s substantive due process analysis.¹⁴⁹ The *Glucksberg* Court states that the Due Process Clause protects only those unenumerated rights “deeply rooted in [the] Nation’s history and tradition” and are an essential component of the United States’ “concept of ordered liberty.”¹⁵⁰ Further, the Court emphasizes that the right in question requires a “careful description” of the asserted fundamental liberty interest.¹⁵¹

Debates over the history and tradition of abortion aside, it is well-established that a parent’s right to the care, control, and custody over their child is of a fundamental character.¹⁵² This right was first recognized in the educational context during the early twentieth century, but it is not limited to educational decisions.¹⁵³ It has been recognized in the context of custody and medical care as well.¹⁵⁴ *Meyer* and *Pierce* gave rise to “individual constitutional privacy rights,” which include parental rights, among many others.¹⁵⁵ Notably, this right was given legal recognition due to Western civilization’s “strong tradition of parental concern” rooted within its “history and culture.”¹⁵⁶ Parents are afforded this right because the law presumes that parents are in the best position to make decisions for their child and those decisions will be made in the child’s best interest.¹⁵⁷ Furthermore, it insulates parents from unwanted state intrusion into the familial sphere.¹⁵⁸ Within the

this statement from the outset. *Dobbs*, 142 S. Ct. at 2239; *but see id.* at 2301 (Thomas, J., concurring) (“[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*.”); *Id.* at 2319 (Breyer, J., dissenting) (“And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.”).

¹⁴⁹ *Dobbs*, 142 S. Ct. at 2242 (citing *Glucksberg*, 521 U.S. at 721).

¹⁵⁰ *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

¹⁵¹ *Id.*

¹⁵² *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Troxel*, 530 U.S. at 65 (“The liberty interest . . . of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

¹⁵³ *See Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923) (recognizing a fundamental right to educate children as individual parents choose); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (striking down a state statute that prohibited parents from sending their children to private schools).

¹⁵⁴ *See Troxel*, 530 U.S. at 57, 65; *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

¹⁵⁵ Hill, *supra* note 131, at 1320.

¹⁵⁶ *Yoder*, 406 U.S. at 232.

¹⁵⁷ *Parham v. J.R.* 442 U.S. 584, 602 (“The law’s concept of family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”). *But see Dailey & Rosenbury*, *supra* note 39, at 81 (explaining that a broad presumption that parents always act in the best interests of their child is not always true because “even a fit parent is capable of treating a child like a mere possession”) (quoting *Troxel*, 530 U.S. at 86) (Stevens, J., dissenting).

¹⁵⁸ *Pierce*, 268 U.S. at 535 (“The child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

broader interpretation of this right, a parent's right to direct their child's medical care is implicated,¹⁵⁹ although these decisions are not absolute.¹⁶⁰ A state may limit parental control to further the "general interest in the youth's well-being."¹⁶¹

C. *Limiting Parental Authority in the Medical Context*

If a state legislature determines that a medical treatment is contrary to a child's best interest, the state may prevent parents from choosing it by passing laws prohibiting the treatment.¹⁶² These statutes should be backed by reliable legislative research.¹⁶³ When handling challenges to state statutes that criminalize medical care, some state courts defer to the legislature if there is existing scientific research from reliable professional organizations demonstrating that the care is unreasonably harmful.¹⁶⁴ The court, however, is less likely to uphold state statutes backed by legislative reasoning that directly contradicts numerous professional medical associations and world health organizations.¹⁶⁵

There are two constitutional issues involved: (1) a right to make medical treatment decisions; and (2) a parent's right to direct their child's medical care. It is settled that it is unconstitutional for the state to arbitrarily ban medical treatments.¹⁶⁶ Ordinarily, if a state bans certain medical treatment, adults are usually the class affected. If such a ban is challenged, litigators may rely heavily on autonomy-based arguments to establish a right to make decisions about particular medical treatments.¹⁶⁷ However, state

¹⁵⁹ *Parham*, 442 U.S. at 623 (establishing a parent's right to direct the medical decisions for their children under the Fourteenth Amendment).

¹⁶⁰ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("And neither rights of religion nor rights of parenthood are beyond limitation.").

¹⁶¹ *Id.* (explaining that the state's *parens patriae* power allows the state to limit parental freedom and authority in matters that concern the child's welfare).

¹⁶² Anne Puluka, *Parent Versus State: Protecting Intersex Children from Cosmetic Genital Surgery*, 2015 MICH. ST. L. REV. 2095, 2123 (2015).

¹⁶³ Legislatures are typically given deference and thus, courts should want to ensure that the information they are deferring to is reliable. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (noting that the courts have a duty to review factual findings when constitutional rights are at stake).

¹⁶⁴ Puluka, *supra* note 162, at 2123 (citing *Pickup v. Brown* 740 F.3d 1208 (9th Cir. 2014)). In *Pickup*, the plaintiffs challenged California's ban on conversion therapy. *Pickup*, 740 F.3d at 1222–24. The plaintiff argues that the California law violates parents' fundamental right to make decisions about their children's medical treatment. *Id.* at 1235. The Ninth Circuit rejects this argument. *Id.* at 1236. In 2013, New Jersey banned conversion therapy and listed the same sources used in California's session laws. Puluka, *supra* note 162, at 2122. When the law was challenged, the district court cited the Ninth Circuit's reasoning in *Pickup*. *Doe v. Christie*, 33 F. Supp.3d 518, 529 (D.N.J. 2014). The district court states that "fundament[al] parental rights do not extend to allow parents to seek medical treatment for their children that the legislature has 'reasonably deemed harmful or ineffective.'" Puluka, *supra* note 162, at 2122 (citing *Doe*, 33 F. Supp.3d at 528). Importantly, the sources cited in the California session laws were accredited sources unlike the sources offered by the Arkansas and Alabama legislatures. Puluka, *supra* note 162, at 2120–21.

¹⁶⁵ *See Pickup*, 740 F.3d at 1222–23, 1235–36 (relying on the positions of major mental health associations in its decision).

¹⁶⁶ *Lochner v. New York*, 198 U.S. 45, 56.

¹⁶⁷ Hill, *supra* note 100, at 304–07.

criminalization of minors' access to puberty blockers and other gender-affirming care is unique as it stands at the intersection of traditional autonomy arguments which were weakened by *Dobbs*, and parental rights, which were strengthened by *Dobbs*' reliance on *Glucksberg*.¹⁶⁸ Thus, litigators may be able to rely on parental rights arguments to bolster their claims against restrictive legislation.

In proposing this, it is important to note that the Supreme Court has taken inconsistent approaches when considering medical evidence offered by the state in support of legislative bans on medical treatment.¹⁶⁹ Jessie Hill, a legal scholar and professor, explores the different approaches while arguing that the substantive due process right to make medical treatment decisions has already been recognized by the Supreme Court.¹⁷⁰ She analyzes two Supreme Court cases that consider whether an individual has a right to protect their health with a preferred medical treatment that the state has chosen to regulate.¹⁷¹ She concludes that the doctrine surrounding this issue diverges into two lines of cases—"public health" and "autonomy" cases.¹⁷² Thus, litigators should feel encouraged to make arguments in this vein. One such argument might be: If the state is impeding on a child's right to obtain medical care *without reliable evidence*¹⁷³ to support the claim that such treatment is unreasonably harmful, the state is inherently impeding on a parent's right to procure that treatment for their child.

D. *The Police Power Versus Parental Rights*

It is clearly established that an individual's fundamental rights are not absolute, and at times, may yield to an appropriate exercise of the state's police power.¹⁷⁴ States retain the power to regulate activity pertinent to a

¹⁶⁸ See *supra* Part II.A.

¹⁶⁹ Hill, *supra* note 100, at 282–83.

¹⁷⁰ *Id.* at 282 (“[A] right to protect one’s health by making medical treatment decisions has already been recognized by the Supreme Court but that its application has largely been clouded by the problem of deference . . .”).

¹⁷¹ *Id.* at 294. The cases she analyzes concern the rights of adults. *Id.* This does not mean that minors are exempt from the protection. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 692 (1977) (“Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”) (citations omitted). If the minor does not have the right, then such decisions should fall unto their parent because the law understands parents to be in the best position to know what is in their child’s best interest. Dailey & Rosenbury, *supra* note 39, at 149; Stern, *supra* note 11, at 91.

¹⁷² Hill, *supra* note 100, at 278.

¹⁷³ The fact that legislators are restricting puberty blockers without reliable evidence to support the restrictions is important to this argument. If the parental rights argument can bolster claims regarding the legality of puberty blockers, then why does the parental rights angle fail to succeed in the context of abortions for minors? The evidentiary piece is what sets puberty blockers apart from abortions. For abortion, the parental rights argument would fail because it is at least debatable, medically speaking, to assert that abortion affects someone other than individual who is receiving the care. Thus, in the abortion context, a realized harm to support the legislation could be cognizable. But with puberty blockers, however, the science is clear, and a consensus has formed. Any “evidence” put forth to show that puberty blockers are dangerous is likely unreliable as it goes against professional consensus.

¹⁷⁴ *Lochner v. New York*, 198 U.S. 45, 56.

legitimate state interest.¹⁷⁵ This power is derived from the Tenth Amendment as “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁷⁶ Generally, the police power refers to a sovereign state’s right to provide for the health, safety, and welfare of its citizens.¹⁷⁷

This is not the first time that courts have considered whether parents’ fundamental rights include the right to choose for their children a particular medical treatment that the state deemed harmful.¹⁷⁸ In such cases, the courts have recognized that a patient, or parent making a decision for a child, would not have a “constitutional right to obtain a particular type of treatment . . . if the government has reasonably prohibited that type of treatment or provider.”¹⁷⁹ Courts also have held that individuals have “no substantive due process right to obtain drugs that the FDA has not approved.”¹⁸⁰ While this remains good law, the precedent does not apply to the constitutionality of the statutes at issue in this Note.

The statutes at issue fall outside of the above-mentioned line of precedent for the following reasons: (1) the legislators of Alabama and Arkansas did not reasonably prohibit a particular treatment; and (2) the FDA has approved gonadotropin-releasing hormone analogues for other uses.

1. *The Prohibitions on GnRH Analogue Treatments Are Objectively Unreasonable*

Typically, the legislature is given deference to determine which medical treatments may be harmful, and thus, prohibited.¹⁸¹ This is true when there is reasonable disagreement about the effectiveness of a treatment.¹⁸² The effectiveness of GnRH analogues for treating adolescents diagnosed with gender dysphoria is not a “close call[] or area[] of reasonable disagreement.”¹⁸³ The science relied upon by the Alabama and Arkansas legislatures comes from biased, agenda-driven sources.¹⁸⁴ The legislative history surrounding these statutes speaks volumes in what it fails to mention. The numerous benefits that accompany the use of GnRH analogues to delay

¹⁷⁵ *Mayor of New York v. Miln*, 36 U.S. 102, 103 (1837).

¹⁷⁶ U.S. CONST. amend. X.

¹⁷⁷ *Lochner*, 198 U.S. at 53.

¹⁷⁸ *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (relating to the constitutionality of the statutes that ban “conversion therapy” (quotations added to show the questionable terminology chosen to describe abusive procedures)).

¹⁷⁹ *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) (emphasis added).

¹⁸⁰ *Doe v. Christie*, 33 F. Supp. 3d 518, 530 (D.N.J. 2014) (referencing *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980)). *See also* *United States v. Rutherford*, 442 U.S. 544, 559 (1979) (finding that terminally ill patients did not have a right to access drugs not yet proven safe and effective).

¹⁸¹ *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

¹⁸² *Puluka*, *supra* note 162, at 2123.

¹⁸³ *BOULWARE ET AL.*, *supra* note 8, at 2.

¹⁸⁴ *See infra* Section III.A.2 (discussing those who wrote amicus briefs in support of Alabama and Arkansas in the cases challenging the constitutionality of the anti-gender-affirming care statutes).

the onset of puberty as a treatment for gender dysphoria in adolescents clearly outweigh any of the potential side-effects that may result.¹⁸⁵ Yet the statutes do not consider any benefits associated with GnRH analogues.¹⁸⁶ This is a life-or-death situation for many transgender, non-binary, and gender nonconforming adolescents.¹⁸⁷ The failure to recognize the gravity of the decision demonstrates the pretextual nature of the statutes in claiming to “protect” adolescents.

2. *The FDA Approved GnRH Analogues for Other Uses*

As a last resort, litigators defending the anti-gender-affirming care statutes could argue that regardless of the right to obtain gender-affirming care, individuals do not have a substantive right to obtain drugs that have not been approved by the FDA for off-label use.¹⁸⁸ The Supreme Court has never determined whether individuals have a substantive right to obtain drugs approved by the FDA for off-label use. The Court acknowledged the issue in *United States v. Rutherford*, but did not comment on it.¹⁸⁹ In *Rutherford*, the Court considered whether the FDA precluded terminally ill cancer patients from obtaining Laetrile, a “new drug” that was not proven to be “safe and effective” under the applicable statute.¹⁹⁰ The District Court ruled in favor of the plaintiffs holding that the denial of a cancer patient's “right to use a nontoxic substance in connection with their personal health, [] infringed on constitutionally protected privacy interests.”¹⁹¹ The Tenth Circuit affirmed without commenting on that issue.¹⁹² The Supreme Court reversed and held that the FDA does not make an exception as to the “safe and effective” requirement for terminally ill patients.¹⁹³ Given that the Court held without further consideration of the issue suggests that individuals may not have a substantive right to obtain unapproved drugs. GnRH analogues, however, are approved by the FDA.

¹⁸⁵ See *supra* Part I.D.

¹⁸⁶ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

¹⁸⁷ Turban et al., *supra* note 31.

¹⁸⁸ This argument is often bolstered by relying on *United States v. Rutherford*, 442 U.S. 544 (1979), which involved terminally ill cancer patients. It is important to note, however, that in that case, the drug Laetrile was *never* approved by the FDA for *any* purpose. *Rutherford*, 442 U.S. at 544. See also Carnohan v. United States, 616 F.2d 1120, 1122 (9th Cir. 1980) (“Constitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power. Carnohan has failed to show that government regulation of laetrile traffic bears no reasonable relation to the legitimate state purpose of protecting public health”) (citations omitted).

¹⁸⁹ *Rutherford*, 442 U.S. at 550.

¹⁹⁰ *Id.* at 546–47.

¹⁹¹ *Id.* at 550.

¹⁹² Instead, the Tenth Circuit found that the “safety” and “effectiveness” requirement does not apply to terminally ill patients because those patients would “die of regardless of what may be done” so safety and effectiveness could not be reasonably measured for that class of individuals. *Id.* at 551 (citations omitted).

¹⁹³ *Id.* at 558–59.

Applying current precedent pertaining to agency deference and the lack of precedent on this issue, the right to use FDA approved drugs, albeit for other uses, off-label does currently exist.¹⁹⁴ The FDA recognizes and approves of “off-label” uses of approved drugs.¹⁹⁵ The FDA states: “From the FDA perspective, once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient.”¹⁹⁶ Thus, if the legislature steps in and unreasonably prevents medical professionals from prescribing drugs that have been approved by the FDA for other uses, the legislature is infringing on an individual’s substantive right to obtain medical treatment by deeming a medication harmful.

III. CONSTITUTIONAL TEST

The statute passed by Alabama is currently enjoined due to pending constitutional challenges.¹⁹⁷ The Eastern District of Arkansas, however, ruled that the Arkansas statute is unconstitutional because it violates parental rights among other constitutional rights.¹⁹⁸ This legislation does not warrant a straightforward application of constitutional judicial review. First, it must be determined how much deference is appropriate for the court to give to the states’ legislative findings.¹⁹⁹ This is important because it affects the validity and strength of the state interest that is allegedly being advanced by the legislation. The statutes of concern present an unprecedented issue, and thus, analogous case law is scarce. *Stenberg v. Carhart*²⁰⁰ and *Gonzales v. Carhart*²⁰¹ provide some guidance on how courts should assess evidence that affects the constitutionality of a statute. This caselaw supports the argument that “uncritical deference” to the states’ legislative findings would be inappropriate.²⁰² The evidence offered by the state is agenda-driven and

¹⁹⁴ *Understanding Unapproved Use of Approved Drugs “Off Label,”* U.S. FOOD & DRUG ADMIN., (Feb. 5, 2018), <https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label>. Although, this may change depending on how the Court rules in *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part* 143 S. Ct. 2429 (2023), which could upend *Chevron* and other forms of agency deference. Even if agency deference still exists after *Loper*, the FDA’s stance on “off-label” drug use may change in 2024 if a Republican president is elected because the president appoints the Commissioner. See *Robert M. Califf M.D., MACC, Commissioner of Food and Drugs, Food and Drug Administration*, U.S. FOOD & DRUG ADMIN (Feb. 17, 2022), <https://www.fda.gov/about-fda/fda-organization/robert-califf>.

¹⁹⁵ *Understanding Unapproved Use of Approved Drugs “Off Label,” supra* note 194.

¹⁹⁶ *Id.*

¹⁹⁷ *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1138 (M.D. Ala. 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 886 (E.D. Ark. 2021).

¹⁹⁸ *Brandt v. Rutledge*, 2023 WL 4073727, at *1 (E.D. Ark. June 20, 2023); *but see Williams v. Skrmetti*, 2023 WL 4410576, *1 (6th Cir. July 8, 2023) (disagreeing with the Eastern District of Arkansas while staying a preliminary injunction on the Tennessee anti-gender-affirming care statute).

¹⁹⁹ See *Stenberg v. Carhart*, 530 U.S. 914, 970 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 144, 166 (2007).

²⁰⁰ *Stenberg*, 530 U.S. at 914.

²⁰¹ *Gonzales*, 550 U.S. at 124.

²⁰² *Id.* at 165.

contradicts the consensus reached by professional medical associations and world health organizations.²⁰³ Courts should take this into consideration when considering whether the state has a “compelling” or “important” state interest.²⁰⁴

Even if a court finds a “compelling” or “important” government interest, the statutes will still fail the constitutional test under either strict or intermediate scrutiny because the statutes are not narrowly tailored nor are they substantially related to serving an important state interest.²⁰⁵

A. *Proper Deference to Legislative Findings*

1. *Stenberg & Gonzales*

While it is true that when the legislature “undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation,” the effectiveness and safety of puberty blockers is not an area that is fraught with medical and scientific uncertainties.²⁰⁶ This is an area of medicine where professional organizations reach consistent conclusions.²⁰⁷ Puberty blockers are a safe and effective treatment for gender dysphoria.²⁰⁸ Arkansas and Alabama, among many other states, claim that puberty blockers are “experimental” and pose a threat to the health of minors.²⁰⁹ The states, however, lack support to back their assertions and the court should not blindly defer to state legislatures when contradictory evidence is presentable.

Two cases relating to abortion legislation provide guidance on how courts should treat contradictory medical evidence that affects the constitutionality of the statutes at issue. *Stenberg* and *Gonzales* both involve banning “partial birth abortions.”²¹⁰ The Court reached different conclusions in each case, and yet *Gonzales* does not overrule *Stenberg*.²¹¹ Interestingly in *Stenberg*, Justice Kennedy wrote a dissenting opinion, and in *Gonzales*,

²⁰³ Brief for Ethics and Public Policy Center as Amicus Curiae, *Eknes-Tucker v. Gov. of Ala.*, 2022 WL 2669153 *1 (July 5, 2022); Brief for America First Legal Foundation as Amicus Curiae, *Eknes-Tucker*, 2022 WL 2669157 *1 (July 5, 2022); Brief for Child & Parental Rights Campaign, Inc. as Amicus Curiae, *Eknes-Tucker*, 2022 WL 2668879 *1 (July 5, 2022); Brief for Medical and Mental Health Professionals as Amici Curiae, *Brandt*, 551 F. Supp. 3d 882; Brief for Women’s Liberation Front as Amicus Curiae, *Brandt*, 551 F. Supp. 3d 882.

²⁰⁴ See *Gonzales*, 550 U.S. at 176–79.

²⁰⁵ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283, 1298 (2007).

²⁰⁶ *Marshall v. U.S.*, 414 U.S. 417, 427 (1974); *BOULWARE ET AL.*, *supra* note 8, at 2, 13. See also *supra* Part I.A.

²⁰⁷ *BOULWARE ET AL.*, *supra* note 8, at 11.

²⁰⁸ *Id.* at 5.

²⁰⁹ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

²¹⁰ *Stenberg v. Carhart*, 530 U.S. 914, 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 124–25 (2007).

²¹¹ *Gonzales*, 550 U.S. at 132–33.

he wrote the majority opinion.²¹² Justice Kennedy disagreed with the majority's approach in *Stenberg* concerning how conflicting medical evidence was treated.²¹³ In *Stenberg*, the majority found that despite contradictory medical evidence presented by the parties, there was significant evidence to show that the banned method was safer, and thus, required an exception to protect the health of the mother.²¹⁴ Justice Kennedy pointed to *Kansas v. Hendricks* and noted that "[t]he Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate."²¹⁵ In *Gonzales*, the Court cited to *Hendricks* when finding that if "medical uncertainty persists," challenged statutes can survive a facial attack.²¹⁶ Importantly, in *Hendricks*, when referring to medical uncertainty the Court pointed to amicus briefing from the American Psychological Association and the Menninger Foundation.²¹⁷ Both amici are professional and accredited institutions.²¹⁸ *Hendricks* remains good law. Justice Kennedy affirmed this in *Gonzales* while also making an important point in rejecting certain arguments.²¹⁹

In *Gonzales*, the Attorney General argued that the statute should have been upheld based on congressional findings alone, but Justice Kennedy rejected this argument because some of the findings were "factually incorrect."²²⁰ Later in the opinion, Justice Kennedy notes that although it is typical for the Court to provide deference to legislative findings, the Court will not be "uncritical" when contradictory evidence is presented.²²¹ He continues to criticize the "evidentiary hurdle" that *Stenberg* created.²²² *Stenberg* was interpreted "to leave no margin of error for legislatures to act in the face of medical uncertainty."²²³ In other words, *Stenberg* was read to require an exception if there was contradictory medical evidence, otherwise it would be unconstitutional. Justice Kennedy states that this interpretation goes too far noting that "[a] zero tolerance policy would strike down legitimate . . . regulations . . . if some part of the medical community were disinclined to follow the proscription."²²⁴ Thus, in *Gonzales*, the Court

²¹² *Stenberg*, 530 U.S. at 919; *Gonzales*, 550 U.S. at 130.

²¹³ *Stenberg*, 530 U.S. at 969–72.

²¹⁴ *Id.* at 916.

²¹⁵ *Id.* at 970.

²¹⁶ *Gonzales*, 550 U.S. at 129.

²¹⁷ *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997).

²¹⁸ *About APA*, AM. PSYCH. ASS'N, <https://www.apa.org/about> (last visited Oct. 7, 2023) (stating their status as the leading scientific and professional organization representing psychology in the United States); *MENNINGER CLINIC*, <https://www.menningerclinic.org/> (last visited June 2, 2023) (citing that Menninger receives the best hospital ranking in psychiatry yet again).

²¹⁹ *Gonzales*, 550 U.S. at 163.

²²⁰ *Id.* at 165.

²²¹ *Id.* at 166.

²²² *Id.* (referencing Chief Justice Walker's concurrence in *Nat'l Abortion Fed. v. Gonzales*, 437 F.3d 278, 296 (2d Cir. 2006) (quoting *Carhart v. Gonzales*, 413 F.3d 791, 796 (8th Cir. 2005) and *Planned Parenthood Fed'n of America v. Gonzales* 435 F.3d 1163, 1173 (9th Cir. 2006)).

²²³ *Gonzales*, 550 U.S. at 166.

²²⁴ *Id.*

decided that a statute would not be rendered unconstitutional when there is credible disagreement over whether it is medically necessary to include an exception for the health of the mother.²²⁵ Put differently, the Court will not strike down a statute when there is evidence supporting both sides, in conformance with the rule put forth in *Hendricks*.²²⁶

Stenberg and *Gonzales* provide valuable insight into how courts should handle the evidence supporting the statutes that criminalize puberty blockers. The issue concerning puberty blockers is inverted in comparison to *Gonzales*. In *Gonzales*, Justice Kennedy was concerned that regulations would be invalidated solely because a contradictory medical opinion existed.²²⁷ In fact, Justice Kennedy wanted to ensure that valid regulations were not being invalidated because a few outliers expressed a contradictory medical opinion.²²⁸ Here, as discussed below, the state is using those outliers to try to support the regulations.²²⁹ Justice Kennedy believes that outliers should not cause a statute to be invalidated, but the inverse should also be true—that outliers should not cause a statute to be validated. Especially when the majority, consisting of professional medical associations and world health organizations, is disinclined to follow the proscription set out by the outliers. This is especially true because the scientific evidence weighs heavily in favor of the individuals challenging the regulation.

2. *The States' Support*

The Arkansas and Alabama legislative findings are not supported by credible, reputable sources. Arkansas does not transcribe the testimony presented before their state legislative committees, so it is very difficult to locate the specific sources that legislators relied on when drafting the legislation.²³⁰ Similarly, the Alabama legislature does not provide access to past sessions.²³¹ Although there is not a clear record, the court cases that raise constitutional challenges to the statutes provide more insight on the state's support for the legislation.²³² The amicus briefing from *Brandt* and *Eknes-Tucker* is especially telling.²³³

²²⁵ *Id.* at 162–63.

²²⁶ *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). *See also Gonzales*, 550 U.S. at 129 (applying *Hendricks*).

²²⁷ *Gonzales*, 550 U.S. at 166. Justice Kennedy points to *Jacobson v. Massachusetts* in his *Stenberg* dissent because *Jacobson* acknowledged judicial deference. *Stenberg v. Carhart*, 530 U.S. 914, 970–71 (2000) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Like *Gonzales*, the Court in *Jacobson* considers whether a statute should be invalidated due to disagreement in the medical field. *Id.* Importantly, the challenger did not bear a clear majority of scientific support. *Id.* For that reason, the cases concerning gender-affirming care are distinguishable.

²²⁸ *Gonzales*, 550 U.S. at 166.

²²⁹ *See infra* Section III.A.2.

²³⁰ *See* ARK. STATE LEGIS., <https://www.arkleg.state.ar.us/> (last visited June 7, 2023) (showing a notable lack of published research and transcriptions informing legislation).

²³¹ ALA. LEGIS., <https://alison.legislature.state.al.us/> (last visited June 10, 2023).

²³² *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (M.D. Ala. 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021).

²³³ *See* Briefs submitted as Amici Curiae cited *supra* note 203.

In the case filings for *Brandt*, there are several amicus briefs that have been filed in support of the defendant-appellant, Arkansas.²³⁴ Unsurprisingly, none of the amicus briefs for the appellant are written by professional medical associations or world health organizations. Instead, the professional medical associations wrote in support of the plaintiff-appellee, who is challenging of the SAFE Act.²³⁵ Much of the state's support comes from individuals associated with conservative or right-leaning nonprofit organizations.²³⁶ Notably, some of the appellant's support stems from politically motivated physicians who are mentioned in the amicus brief filed by the Alliance Defending Freedom (ADF) attorneys.²³⁷

For example, two physicians mentioned in the ADF amicus brief, Quentin L. Van Meter and Andre Von Mol, are members of the American College of Pediatricians.²³⁸ The American College of Pediatricians is a conservative advocacy group, though self-branded as a “scientific medical association.”²³⁹ Additionally, these two physicians appear to be heavily involved in religious organizations that may influence their perspective on gender-affirming care rather than base their opinions on reliable, medical evidence.²⁴⁰ Personal opinions cannot stand on equal ground to reliable, accredited institutions. A Texas judge recognized this when she found that Quentin Van Meter was not certified as an expert witness to speak about whether “an adolescent transgender child should be administered puberty

²³⁴ Brief for Medical and Mental Health Professional as Amici Curiae, *Brandt*, 551 F. Supp. 3d 882; Brief for Women's Liberation Front as Amicus Curiae, *Brandt*, 551 F. Supp. 3d 882.

²³⁵ Brief for American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations as Amici Curiae, *Brandt*, 551 F. Supp. 3d 882.

²³⁶ Brief for Medical and Mental Health Professionals as Amici Curiae, *Brandt*, 551 F. Supp. 3d 882 (drafted by attorneys associated with ADF); Brief for Women's Liberation Front as Amicus Curiae, *Brandt*, 551 F. Supp. 3d 882.

²³⁷ See Brief for Medical and Mental Health Professionals as Amici Curiae, *Brandt*, 551 F. Supp. 3d 882. Many of the physicians are publicly affiliated with political and religious organizations. *André Van Mol, MD*, CHRISTIAN MED. & DENTAL ASS'NS, <https://cmda.org/andre-van-mol-md/> (last visited June 10, 2023) (explaining how Dr. Van Mol serves on the boards of Bethel Church of Redding and Moral Revolution); *Past President, Quentin Van Meter, MD*, AM. COLLEGE OF PEDIATRICS, <https://acpeds.org/about/meet-our-board/president-quentin-van-meter-md> (last visited June 10, 2023) (describing how Dr. Van Meter is an active member of the parish of the Cathedral of Christ the King); *About Us*, CHRISTIAN SEXUALITY, <https://christian-sexuality.com/about/> (last visited June 10, 2023) (showing Dr. Laidlaw as an affiliate).

²³⁸ CHRISTIAN MED. & DENTAL ASS'NS, *supra* note 237; AM. COLLEGE OF PEDIATRICS, *supra* note 237.

²³⁹ *Frequently Asked Questions*, AM. COLLEGE OF PEDIATRICS, <https://acpeds.org/about/faq> (last visited June 10, 2023) (claiming that the organization, though often interviewed by conservative publications, is not a political or religious organization but openly holds anti-LGBTQ+ views); R.G. Cravens, *Documents Reveal ADF Requested Anti-Trans Research from American College of Pediatricians*, S. POVERTY L. CTR. (June 5, 2023), <https://www.splcenter.org/hatewatch/2023/06/05/documents-reveal-adf-requested-anti-trans-research-american-college-pediatricians> (describing ADF and American College of Pediatricians as a “hate group”).

²⁴⁰ *Brandt v. Rutledge*, 21CV00450, 2023 WL 4073727, at *29 (E.D. Ark. June 20, 2023) (“[I]t is clear from listening to the testimony that [three out of four of the State's witnesses] were testifying more from a religious doctrinal standpoint rather than that required of experts by *Daubert*.”); See CHRISTIAN MED. & DENTAL ASS'NS, *supra* note 237; AM. COLLEGE OF PEDIATRICS, *supra* note 237; CHRISTIAN SEXUALITY, *supra* note 237.

blockers.”²⁴¹ The court noted that his opinion “tended to be more agenda-driven than scientific[ally] driven.”²⁴²

Alabama’s amicus briefing in the *Eknes-Tucker* case is not different. The only support offered in favor of the state’s position comes from members of right-leaning organizations, religious institutions, and a conservative agenda-driven campaign.²⁴³ The names of the state’s amici appear well-intentioned and legitimate, but after further inquiry, the titles are entirely misleading. For example, the Ethics and Public Policy Center prides itself on “apply[ing] the riches of the Judeo-Christian tradition to contemporary questions of law, culture, and politics, in pursuit of America’s continued civic and cultural renewal.”²⁴⁴ The America First Legal Foundation is an organization founded by a former senior White House advisor to former president Donald Trump and aims to destroy the “radical left.”²⁴⁵ Lastly, perhaps the most misleading, the Child and Parental Rights Campaign is a law firm that is dedicated to fighting against gender-affirming care.²⁴⁶

There is a clear undertone to the amicus briefing in these cases. The challengers’ amicus briefing is supported by professional associations and evidence-based science whereas the state’s amicus briefing is politically driven. The politicization of transgender, non-binary, and gender nonconforming children is placing the health and well-being of youth in need of gender affirming care in jeopardy. Courts should analyze the legitimacy of the evidence presented to them and should not be uncritically deferential when determining whether a state has an interest to justify the regulations.

B. *Strict and Intermediate Scrutiny*

The notion that the Constitution requires different levels of judicial scrutiny for different issues was introduced in *U.S. v. Carolene Products Co.*²⁴⁷ The three-tiered system of judicial scrutiny evolved over the course of the twentieth century.²⁴⁸ Strict scrutiny is applied when a statute is

²⁴¹ Stephen Caruso, *A Texas Judge Ruled This Doctor Was Not an Expert. A Pennsylvania Republican Invited Him to Testify on Trans Health Care*, PA. CAPITAL-STAR, (Sept. 15, 2020, 7:24 AM), <https://www.penncapital-star.com/government-politics/a-texas-judge-ruled-this-doctor-was-not-an-expert-a-pennsylvania-republican-invited-him-to-testify-on-trans-health-care/>.

²⁴² *Id.*

²⁴³ Brief for Ethics and Public Policy Center as Amicus Curiae, *Eknes-Tucker v. Gov. of Ala.*, 2022 WL 3595111, at *1 (July 5, 2022); Brief for America First Legal Foundation as Amicus Curiae, *Eknes-Tucker*, 2022 WL 3595111, at *1 (July 5, 2022); Brief for Child & Parental Rights Campaign, Inc. as Amici Curiae, *Eknes-Tucker*, 2022 WL 3595111, at *1 (July 5, 2022).

²⁴⁴ 2022 *Annual Report*, ETHICS & PUB. POL’Y CTR., <https://eppc.org/> (last visited June 10, 2023).

²⁴⁵ AM. FIRST LEGAL, <https://aflegal.org/> (last visited June 10, 2023).

²⁴⁶ CHILD & PARENTAL RTS. CAMPAIGN, <https://childparentrights.org/advocacy/> (last visited June 10, 2023).

²⁴⁷ *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

²⁴⁸ *Id.*; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964).

challenged on the grounds that it violates a fundamental right.²⁴⁹ To withstand strict scrutiny, the state must demonstrate a compelling state interest and prove that the statute is narrowly tailored to serve that purpose.²⁵⁰ A statute is narrowly tailored if it employs the least restrictive means to achieve the desired goal.²⁵¹ If a statute is overinclusive by affecting groups not involved, it will be invalidated.²⁵² Similarly, if a statute is underinclusive by not applying to all groups or activities that it would be expected to apply to, it will be invalidated.²⁵³ Thus, in limiting parental authority under strict scrutiny, the Arkansas and Alabama state legislatures must have a compelling interest in doing so and the respective statute must be narrowly tailored to serve that purpose.²⁵⁴

Under intermediate scrutiny, a court will only uphold a statute if it is substantially related to an important government purpose.²⁵⁵ Intermediate scrutiny oftentimes is used in Equal Protection cases dealing with sex²⁵⁶ and gender²⁵⁷ as well as what the Court called “illegitimate” children.²⁵⁸ There is a viable Equal Protection argument that could be made in conjunction with the parental rights argument while challenging the Arkansas and Alabama statutes, because the statutes impermissibly treat transgender, non-binary, and gender nonconforming youth differently than cisgendered youth.²⁵⁹ For the purposes of intermediate scrutiny, the Equal Protection argument is stronger because of the lack of clarity surrounding the standard to be applied in parental rights cases.²⁶⁰ If intermediate scrutiny is applied to due process issues in parental rights cases, it is unclear how lenient the court would be in applying the standard²⁶¹ whereas with equal protection, the impermissible distinction is more apparent and more difficult for a court to ignore.

²⁴⁹ Fallon, *supra* note 205, at 1284.

²⁵⁰ *Id.* at 1268.

²⁵¹ *Id.* at 1326.

²⁵² *Id.* at 1328.

²⁵³ *Id.*

²⁵⁴ Because a parent's right to direct the upbringing of their child implicates a fundamental liberty interest, any statute that restricts that interest is subject to strict scrutiny. *See* *Washington v. Glucksberg*, 521 U.S. 702, 766–67 (1997) (discussing the line of precedent that creates modern substantive due process doctrine); *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (holding that the Fourteenth Amendment's Due Process Clause provides heightened scrutiny to fundamental rights and liberty interests including “parents' fundamental right to make decisions concerning the care, custody, and control of their children”).

²⁵⁵ Fallon, *supra* note 205, at 1298.

²⁵⁶ *Craig v. Boren*, 429 U.S. 190, 201, 218 (1976).

²⁵⁷ *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (ruling that discrimination based on gender is a form of sex discrimination under Title VII, not under the Constitution).

²⁵⁸ *Mathews v. Lucas*, 427 U.S. 495, 503, 505 (1976).

²⁵⁹ *See infra* Part III.B.1 & Part III.B.2.

²⁶⁰ *See infra* Part III.B.

²⁶¹ The application of intermediate scrutiny expanded to other constitutional issues such as First Amendment and Second Amendment cases. *Drummond v. Robinson Twp.*, 9 F.4th 217 (3d Cir. 2021) (handling a Second Amendment issue); *Dowling v. Twp. of Woodbridge*, 2005 WL 419734, at *1 (D.N.J. Feb. 22, 2005) (concerning the First Amendment). If intermediate scrutiny were to be applied in parental rights cases, courts may set a similar standard set forth in such cases to determine what is an “important”

The Supreme Court has not clearly set forth which standard of review is to be applied to parental rights cases,²⁶² but when a state impedes on certain liberty interests the Due Process Clause affords individuals heightened protection.²⁶³ Here, the Alabama and Arkansas statutes implicate a parent's liberty interest in the care, control, and custody over their child.²⁶⁴ Although it is not clear which level of scrutiny would apply, it is safe to assume that it would rise to at least the level of intermediate scrutiny based upon a review of precedent. In *Troxel*, for example, the Court implies that statutes that implicate parental rights should receive strict scrutiny.²⁶⁵ Some scholars, however, advocate for intermediate scrutiny in parental rights cases.²⁶⁶

1. *Compelling or Important State Interest*

Under strict scrutiny a statute that infringes on a fundamental right “bears a heavy burden of justification” and it will only “be upheld if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.”²⁶⁷ Here, the state interest asserted by the state is to protect youth from “experimental” medical procedures.²⁶⁸ As discussed above, whether the court finds this to be a valid and compelling or important state interest depends on how much deference is given to the state's legislative findings.²⁶⁹ The state's support reveals the pretextual and politically motivated nature of the statutes. Legislators are trying to give effect to “[p]rivate biases,” which is constitutionally impermissible.²⁷⁰ The court should be especially critical of the states' findings because of the reliable, contradictory evidence that is being presented to them by the challengers.

The current composition of the Supreme Court, however, has a majority of conservative justices who may be more likely to overlook the false reasoning presented by the state.²⁷¹ Additionally, aside from what can be

purpose and if the regulation is “substantially related.” Fallon, *supra* note 205, at 1298. Circuit courts have found statutes to satisfy intermediate scrutiny when the state is able to “demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate [those] harms in a direct and material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Similar to strict scrutiny, a statute will not survive intermediate scrutiny if it is underinclusive with respect to achieving its stated goals. *See Drummond*, 9 F.4th at 217; *Dowling*, 2005 WL 419734, at * 6.

²⁶² Stern, *supra* note 11, at 91.

²⁶³ *Troxel v. Granville*, 530 U.S. 57, 57 (2000).

²⁶⁴ ALA. CODE § 26-26-4(b) (2022); ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504 (West 2021).

²⁶⁵ *Troxel*, 530 U.S. at 65.

²⁶⁶ Dailey & Rosenbury, *supra* note 39, at 85 (“[P]arental rights should trigger the strictest judicial review when the physical separation of a child is threatened but an intermediate standard of review for lesser intrusions aimed at furthering children's independent interests and agency . . .”).

²⁶⁷ *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

²⁶⁸ H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

²⁶⁹ *See supra* Section III.A.1.

²⁷⁰ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

²⁷¹ For example, this Court ignored fifty years of precedent in *Dobbs*. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2261–78 (2022). More recently, the Court has ignored

interpreted from *Gonzales* there is a lack of concrete guidance on the issue. Thus, it remains unclear whether the Court will find a compelling state interest or important government interest. Even if the Court does find a state interest under either standard, the statutes should still be unconstitutional because they are not narrowly tailored, nor are they substantially related to serve their stated purpose.

2. *Narrowly Tailored*

The Alabama and Arkansas statutes are not narrowly tailored because they are underinclusive with respect to achieving the state interest asserted. As stated above, both strict and intermediate scrutiny require statutes to be narrowly tailored or substantially related to the asserted government interest to serve such interest.²⁷² Statutes are underinclusive when they fail to include certain regulations that would be necessary to achieve their stated interest.²⁷³ Underinclusiveness may diminish the credibility of the government's rationale for implementing the restriction in the first place.²⁷⁴ A plain showing of underinclusiveness exists when a statute chooses to regulate an activity or substance for some classes of people but not others.

The Alabama and Arkansas statutes make exceptions for procedures “undertaken to treat a *minor* born with a medically verifiable disorder of sex development.”²⁷⁵ This includes treatment for minors that do “not have [typical] . . . sex steroid hormone production, or sex steroid hormone action for a male or female.”²⁷⁶ The onset of precocious puberty causes an increase in sex steroid serum levels.²⁷⁷ This means minors who are diagnosed with precocious puberty can still be treated under these statutes with GnRH analogues. This distinction is illogical and impermissible. Even though GnRH analogue treatment for precocious puberty is approved by the FDA, the effect of the drug is the same. If the legislature finds that GnRH analogues are too dangerous to prescribe to minors to treat gender dysphoria, then it would follow that the legislature cannot allow the same drug to be prescribed to minors for another purpose that has the same effects and potential, though minimal, risks. This statute is underinclusive, and thus, not narrowly tailored, so it fails both strict and intermediate scrutiny.

standing concerns in *Biden v. Nebraska*, 143 S. Ct. 2355, 2365–68 (2023). More alarming, the plaintiff in *303 Creative* never made a wedding website for a gay couple, and a hypothetical injury was sufficient grounds for the case to proceed on, which led to the Court favoring discriminatory practices. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308–09 (2023).

²⁷² See *supra* Part III.B.

²⁷³ Fallon, *supra* note 205, at 1327.

²⁷⁴ *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (“[U]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”).

²⁷⁵ S.B. 184, 2022 Leg., Reg. Sess. § 6(b) (Ala. 2022) (emphasis added).

²⁷⁶ *Id.* § 6(b)(2) (Ala. 2022); ARK. CODE ANN. § 20-9-1502(c)(2) (West 2021).

²⁷⁷ A.B. Hansen, D. Wojdemann, C.H. Renault, A.T. Pedersen, K.M. Main, L.L. Raket, R.B. Jensen & A. Juul, *Sex Steroid Action in Adolescence: Too Much, Too Little; Too Early, Too Late*, 184 EUR. J. ENDOCRINOLOGY R17, R20 (2021).

Under strict scrutiny, if a statute is not narrowly tailored or the least restrictive in achieving the stated purpose, it fails the test. Thus, if the statute is underinclusive the state's interest is not meaningfully furthered and thus, is rendered unconstitutional.²⁷⁸ As stated above, the statutes create exceptions to prescribe the same drugs to minors who have not been diagnosed with gender dysphoria.²⁷⁹ The prescription of puberty blockers to minors is not experimental, as it has been prescribed for decades to treat precocious puberty.²⁸⁰ Physicians know the potential side-effects of long-term use and have rendered it safe for use. Lawmakers are aware of this. The studies on precocious puberty prove that the long-term use of GnRH analogues is safe regardless of what it is being used to treat. The results of these studies explain why lawmakers carved out certain exceptions that allow physicians to prescribe GnRH analogues to minors. But, given the lack of harm caused by GnRH analogue therapy, lawmakers cannot criminalize GnRH analogues for a minority population for discriminatory purposes.

Under intermediate scrutiny, the issue of being underinclusive more strongly implicates the Equal Protection Clause of the Fourteenth Amendment.²⁸¹ Under the Fourteenth Amendment, states cannot invidiously discriminate, or in other words, treat individuals dissimilarly for arbitrary or illegitimate reasons.²⁸² The Alabama and Arkansas statutes plainly discriminate against transgender, non-binary, and gender nonconforming youth as they allow for cisgendered youth to receive GnRH analogue treatment for diagnoses other than gender dysphoria.²⁸³ The GnRH analogue therapy accessible to cisgendered youth carries the same risks and side-effects known to physicians as it would if it were to be used to treat gender dysphoria. Thus, applying existing precedent, this is an impermissible, unconstitutional form of invidious discrimination.

To analogize this to a well-known case, consider *Eisenstadt v. Baird*.²⁸⁴ In *Eisenstadt*, the Supreme Court considered the constitutionality of a Massachusetts statute that prohibited the sale of contraceptives to unmarried persons.²⁸⁵ Massachusetts explicitly advanced a moral justification for the distinction between married persons and unmarried persons.²⁸⁶ The state sought to prohibit the sale of contraceptives to unmarried persons because it was thought that "contraceptives per se [were] considered immoral."²⁸⁷ The Court found the regulation to be impermissible under due process and equal

²⁷⁸ Fallon, *supra* note 205, at 1328.

²⁷⁹ ALA. CODE § 26-26-4(b) (2022); ARK. CODE ANN. §§ 20-9-1501 to 20-9-1504 (West 2021).

²⁸⁰ Comite et al., *supra* note 43, at 1546.

²⁸¹ See *supra* Part III.B.

²⁸² See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

²⁸³ See ALA. CODE § 26-26-4 (2022); ARK. CODE ANN. §§ 20-9-1501 to -1502 (West 2021).

²⁸⁴ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁸⁵ *Id.* at 438.

²⁸⁶ *Id.* at 452–53.

²⁸⁷ *Id.* at 452.

protection frameworks.²⁸⁸ Importantly, under equal protection, the Court found the statute to be underinclusive as it invidiously discriminated between married and unmarried persons.²⁸⁹ The Court pointed to Justice Jackson's concurrence in *Railway Express Agency v. New York*, stating that to protect against arbitrary and unreasonable government interference the framers required that "the principles of law which officials would impose upon a minority must be imposed generally."²⁹⁰ States cannot "pick and choose only a few to whom they will apply legislation."²⁹¹ As in *Eisenstadt*, and for the same reasons described by Justice Jackson in *Railway Express Agency*, the Alabama and Arkansas statutes are unconstitutional. The statutes impermissibly create legislation that solely affects a minority population while explicitly making exceptions for the majority, cisgendered population. Thus, under intermediate scrutiny, the statutes violate the Equal Protection Clause and are unconstitutional.

It is unclear whether the Court will find that the state has a compelling or important governmental interest in regulating this issue. However, under either strict or intermediate scrutiny, the Arkansas and Alabama statutes would not pass constitutional muster. If the Court applies logic similar to that which Justice Kennedy expressed in *Gonzales*, it is likely that the Court would not find a state interest under either standard. Given the current composition of the Court, this may be unlikely. Despite finding a compelling or important state interest, the statutes still should not pass the second requirement of either standard. Under strict scrutiny, the statutes are not narrowly tailored because they are underinclusive and thus, are unconstitutional. Under intermediate scrutiny, the statutes would not materially further the important state interest but rather hinder it.

IV. GAPS IN PROTECTION FOR ADOLESCENTS WITH UNSUPPORTIVE PARENTS

If litigators pursue the parental rights line of reasoning in combating the statutes that criminalize gender-affirming care, they may be successful in striking down the legislation, but that is only the first battle. The anti-gender-affirming care legislation is likely to evolve in a similar fashion to the anti-abortion legislation.²⁹² This means that if the Supreme Court strikes down

²⁸⁸ *Id.* at 452–55.

²⁸⁹ *Eisenstadt*, 405 U.S. at 454.

²⁹⁰ *Id.* (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949)).

²⁹¹ *Id.*

²⁹² Before *Dobbs*, the Supreme Court limited the restrictions that could be placed on abortions case by case. This evolution was not linear as some cases, even before *Dobbs*, were considerable setbacks. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (establishing the "undue burden" standard for abortion restrictions). Although not linear, the outright criminalization of abortion treatment became impermissible as competing interests were raised and considered. The composition of the current Supreme Court does not favor gender-affirming care, but legitimate legal issues have been raised by parties that the Court will have to address. This is demonstrated by the Eastern District of Arkansas

the prohibitions, then legislators may instead try to burden access to gender-affirming care for minors. Even if they do not, transgender, non-binary, and gender nonconforming adolescents without parents,²⁹³ or with unsupportive parents,²⁹⁴ are left without a remedy. This Note offers potential legal solutions that would allow for minors to seek gender-affirming care without parental consent. It is important to recognize that this Note is merely a step in the direction of creating legal protections for adolescents for generations to come.

This Part analyzes *Carey v. Population Services International*²⁹⁵ to suggest that adolescents have a privacy right to decide whether they want to undergo puberty. Additionally, this Part canvasses the mature minor doctrine, exceptions to religious exemptions, and *Bellotti v. Baird*²⁹⁶ to observe that a judicial bypass system for transgender, non-binary, and gender nonconforming adolescents' "initial access" to gender-affirming care options is in alignment with existing precedent.

A. *Carey*

For almost fifty years the Supreme Court has recognized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."²⁹⁷ Thus, minors have a substantive due process right to privacy which include "decisions affecting procreation" because that right "extends to minors as well as to adults."²⁹⁸ *Dobbs* limited the scope of an individual's ability to make decisions affecting procreation, but as of the writing of this Note, adolescents still retain a right to contraceptives.²⁹⁹

In *Carey*, the Supreme Court determined that regulations imposing a burden on "whether or not to beget or bear a child" may be subject to strict scrutiny.³⁰⁰ Later cases, such as *Roe* and *Casey*, used *Carey* to demonstrate that this precedent supports the right to obtain an abortion.³⁰¹ The majority in *Dobbs* disagreed with this reasoning, stating that "the right to obtain an

opinion: *Brandt v. Rutledge*, 21CV00450, 2023 WL 4073727 at *1 (E.D. Ark. June 20, 2023). It is likely that the outright criminalization of gender-affirming care will be prohibited and slowly exceptions and a framework for addressing issues may be created.

²⁹³ See JONAH DECHANTS, AMY E. GREEN, MYESHIA N. PRICE & CARRIE DAVIS, HOMELESSNESS AND HOUSING INSTABILITY AMONG LGBTQ YOUTH 12 (Trevor Project, 2021), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>.

²⁹⁴ See Florence Ashley, *Puberty Blockers Are Necessary, but They Don't Prevent Homelessness: Caring for Transgender Youth by Supporting Unsupportive Parents*, 19 AM. J. BIOETHICS 87, 88 (2019); Maura Priest, *Transgender Children and the Right to Transition: Medical Ethics When Parents Mean Well but Cause Harm*, 19 AM. J. BIOETHICS 45 (2019).

²⁹⁵ *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

²⁹⁶ *Bellotti v. Baird*, 443 U.S. 622 (1979).

²⁹⁷ *Id.* at 692 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

²⁹⁸ *Carey*, 431 U.S. at 693.

²⁹⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Carey*, 431 U.S. at 679.

³⁰⁰ *Carey*, 431 U.S. at 685. In this context the term "beget" means "to become the father of a child." *Beget*, OXFORD LEARNER'S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/beget> (last visited Oct. 7, 2023). The term beget has biblical connotations. *Id.*

³⁰¹ *Dobbs*, 142 S. Ct. at 2314.

abortion [does not] have a sound basis in precedent.”³⁰² The *Dobbs* Court, however, did not overturn *Carey*.³⁰³ This suggests that the fundamental privacy right to decide whether an individual wants to “beget a child” still stands. Thus, individuals still maintain a right to obtain contraceptives and take steps to prevent “begetting” a child.

GnRH analogue therapy should be granted the same protections as contraceptives. Like the decision as to whether an individual wants to “beget a child,” the decision to undergo puberty is equally weighty. As described above, transgender adolescents may experience significant harm, short-term and long-term, due to the effects of puberty.³⁰⁴ The *Carey* Court reiterated that fundamental privacy rights of this nature, as applied to contraceptives, must survive strict scrutiny.³⁰⁵ The state’s restriction on contraceptives in *Carey* was found unconstitutional.³⁰⁶ The Court noted that in trying to demonstrate a compelling state interest, New York failed to assert “medical necessity for imposing a medical limitation” on minors.³⁰⁷ Although the Alabama and Arkansas state legislatures assert medical concerns to justify the limitations, such concerns are not supported by reliable scientific research.³⁰⁸ Without supportive scientific research, the restrictions on GnRH analogues are similar to those on contraceptives in *Carey* because the rationale rests solely on morality.³⁰⁹ The difference is in defending the statute in *Carey*, New York explicitly argued that the statute was a piece of moral legislation whereas Arkansas and Alabama are using pretext to avoid the statutes being characterized as such.

Carey demonstrates why states should be prohibited from placing restrictions on access to puberty blockers. The decision as to whether an individual wants to undergo puberty is an intimate choice. The Court recognized that the state cannot intrude into the realm of privacy for the purposes of obtaining contraceptives without satisfying the demands of strict judicial review.³¹⁰ The Court should afford GnRH therapy similar protections. If the Court protects the right to obtain GnRH analogue therapy for minors, then minors with unsupportive parents need an avenue to secure the treatment without parental consent. *Bellotti* offers guidance to address this issue.

³⁰² *Id.* at 2257 (citing to *Carey*, 431 U.S. at 678).

³⁰³ *Id.* at 2277–78 (“Nothing in [the] opinion should be understood to cast doubt on precedents that do not concern abortion.”).

³⁰⁴ WPATH STANDARDS OF CARE, *supra* note 17, at 20.

³⁰⁵ *Carey*, 431 U.S. at 693 (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976)).

³⁰⁶ *Carey*, 431 U.S. at 681–82.

³⁰⁷ *Id.* at 697.

³⁰⁸ BOULWARE ET AL., *supra* note 8, at 2.

³⁰⁹ *Carey*, 431 U.S. at 679 (“[T]he provision prohibiting distribution of contraceptives to persons under 16 . . . cannot be justified as a permissible regulation of minors’ morality.”).

³¹⁰ *Id.* at 703.

B. *Bellotti*

The Court should provide transgender, non-binary, and gender nonconforming adolescents “initial access” to gender-affirming care options by creating a judicial bypass system. The judicial bypass system was first introduced in *Bellotti* as a means for minors to secure an abortion without getting their parent(s) involved initially.³¹¹ This framework is appropriate in the context of gender-affirming care due to the time sensitive nature of the treatment. Like abortion care, transgender, non-binary, and gender nonconforming adolescents cannot wait until they reach the age of majority to seek treatment.³¹² By then, irreversible effects of puberty will have occurred, and it would be too late to provide the best medical options to a person in need of gender-affirming care.³¹³ By the age of majority, individuals have gone through puberty and developed into adults.

Unfortunately, after *Dobbs*, *Bellotti* does not provide protection for minors who are seeking an abortion. The *Bellotti* Court premised their decision on the underlying fact that minors had a right to an abortion at the time they created the judicial bypass procedure.³¹⁴ The *Dobbs* Court held that this right does not exist under the Constitution because the right to obtain an abortion was not deeply rooted in the nation’s history and tradition, therefore it was not deemed to be fundamental to the nation’s concept of ordered liberty.³¹⁵ But the *Dobbs* Court did not eliminate the right to access certain treatments,³¹⁶ nor did they eliminate a right to care in general.

The *Bellotti* framework operates upon the basis of an underlying right. There are a few options that the framework could be based upon in the gender-affirming care context. For example, some scholars argue that the courts have “partially but inconsistently” recognized a minor’s right to bodily integrity.³¹⁷ After *Dobbs* however, courts may narrowly construe the right to bodily integrity and find that such right is not rooted in the nation’s history and tradition. Thus, the right to bodily integrity does not provide a solid foundation for the *Bellotti* analysis. Litigators must ground their *Bellotti* argument in another cognizable, underlying right. Two options remain: (1) the right to privacy; or (2) the right to life-saving care.

As explained above, the Supreme Court recognized that legislatures cannot prohibit certain medications that are integral to an individual’s right to make certain intimate decisions.³¹⁸ The *Bellotti* framework for gender-affirming care could rest on the right of privacy: If an individual has a right to make intimate decisions free from governmental control, all individuals

³¹¹ *Bellotti v. Baird*, 443 U.S. 622, 648 (1979).

³¹² Turban et al., *supra* note 31, at 7.

³¹³ WPATH STANDARDS OF CARE, *supra* note 17, at 19.

³¹⁴ *Bellotti*, 443 U.S. at 640.

³¹⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253 (2022).

³¹⁶ *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 678, 693 (1977).

³¹⁷ Hill, *supra* note 131, at 1304.

³¹⁸ *See Carey*, 431 U.S. at 693.

should be given that opportunity regardless of age. Alternatively, the framework could rest upon the long-standing right that adolescents have a right to life-saving care.³¹⁹ Given the high rates of suicide in transgender youth,³²⁰ it is fair to say that prohibiting gender-affirming care is to deny an adolescent life-saving care.³²¹ On some occasions the state will override parental decisions and act on behalf of the child to provide them life-saving medical care if a parent refuses the care on religious or other grounds.³²² In the past, this right is only recognized when there is a sense of impending death and a need for immediate action.³²³ The typical circumstances, however, do not take away from the right itself. If the state is authorized to act in the best interests of the child in those situations, then this should apply to transgender, non-binary, and gender nonconforming youth as well. The state should be permitted to assess the best-interests of the child and intervene accordingly regardless of parental consent in order to protect a minor's right to life-saving gender-affirming care.

A judicial bypass system would allow the court to assess an adolescent's right to obtain puberty blockers without parental consent. The judicial bypass functions in a similar manner as compared to the mature minor doctrine.³²⁴ To determine whether a minor is permitted to receive care without parental consent the judge assesses whether the individual is "mature enough and well enough informed . . . in consultation with [their] physician" to make the decision "independently of [their] parent's wishes."³²⁵ If the statutes criminalizing gender-affirming care get struck down, regardless of what happens next, a judicial bypass system is necessary in order to protect transgender adolescents without parents or with unsupportive parents.

CONCLUSION

This Note focuses on puberty blockers because puberty is a critical stage of life for transgender, non-binary, and gender nonconforming youth. For these youths, puberty is more than just a developmental stage of life. The onset of puberty can severely worsen gender dysphoria and mental health as

³¹⁹ In *Parham*, the Supreme Court established parents' Fourteenth Amendment right to make medical decisions for their child. *Parham v. J.R.*, 442 U.S. 584, 584–85, 601–04, 623 (1979). This right, however, is not absolute. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). In the medical context, states are permitted to overcome an objecting parent and provide a minor with lifesaving care. See generally, *Jehovah's Witnesses in the State of Wash. v. King Cnty. Hosp. Unit No. 1*, 278 F. Supp. 488, 505 (W.D. Wash. 1967); *Custody of a Minor*, 379 N.E.2d 1053, 1053 (Mass. 1978).

³²⁰ GREENE, *supra* note 25, at 2.

³²¹ Turban et al., *supra* note 31, at 2.

³²² See generally, *King Cnty. Hosp. Unit No. 1*, 278 F. Supp. at 488; *Custody of a Minor*, 375 N.E.2d at 1053.

³²³ *King Cnty. Hosp. Unit No. 1*, 278 F. Supp. at 488; *Custody of a Minor*, 375 N.E.2d at 1053.

³²⁴ Emily Ikuta, *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. INTERDISCIPLINARY L.J. 179, 199–203 (2016).

³²⁵ *Id.* at 199.

well as make it much more difficult for some adolescents to transition later in life. Puberty blockers are essential as they buy an adolescent more time to decide whether they would like to transition. After analyzing medical science on GnRH analogue treatment, the benefits substantially outweigh any potential negative side-effects. The statutes that have been enacted to criminalize gender-affirming care are backed by unreliable science that contradicts multiple national and world health organizations.

Conservative lawmakers state that these prohibitive statutes are promoting child welfare and protecting youth from “experimental” treatment.³²⁶ Yet, GnRH analogue treatment has been safely prescribed to minors for decades, and only now are conservative lawmakers taking issue with it. This suggests that to these lawmakers, protecting adolescents is nothing but pretext. Lawmakers rely heavily on unreliable science, do not give fair weight to the numerous benefits associated with gender-affirming care, and still allow adolescents to be treated with GnRH analogues and cross-sex hormones in other medical contexts. It is the purpose behind the use of puberty blockers in gender-affirming care that these lawmakers take issue with; it is not about the health risks associated with the care. For these reasons, the statutes do not withstand constitutional muster under intermediate or strict scrutiny, as they unreasonably interfere with a parent’s fundamental right to direct the upbringing of their child. As argued, this right is still recognized after *Dobbs*, under the Fourteenth Amendment’s Due Process Clause.

The anti-transgender agenda is going to progress, but litigators can use parental rights to bolster the unconstitutionality of this legislation. This Note is a step towards combating anti-transgender legislation. The next step should be in the direction of securing access to care for all adolescents, regardless of state or family support.

³²⁶ See, e.g., S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).