

3-2-2023

First, Do No Harm: Prioritizing Patients Over Politics in the Battle Over Gender-Affirming Care

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Recommended Citation

Greg Mercer, *First, Do No Harm: Prioritizing Patients Over Politics in the Battle Over Gender-Affirming Care*, 39 GA. ST. U. L. REV. 479 (2023).

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FIRST, DO NO HARM: PRIORITIZING PATIENTS OVER POLITICS IN THE BATTLE OVER GENDER- AFFIRMING CARE

Greg Mercer*

ABSTRACT

The medical community's move to reclassify gender dysphoria as a condition that results in distress rather than a mental disorder has been instrumental in destigmatizing transgender people. However, state laws that aim to strip physicians of their ability to prescribe gender-affirming care, along with physicians' refusal to comply with federal regulations requiring access to gender-affirming care, threaten to undo those gains. Opponents of gender-affirming care attempt to wield the concept of medical judgment as both a sword and a shield—preventing physicians from exercising their medical judgment to provide gender-affirming care while simultaneously allowing physicians to abstain from providing it. Although the available research does not point to any one specific mode of treatment that is perfect for everyone, there is a consensus in the medical community that family acceptance and access to care are critical for the mental health of children experiencing gender dysphoria. Although lawmakers should ultimately leave a patient's specific course of treatment to physicians who specialize in gender-affirming care, the

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legal community can still play a vital role by removing barriers that limit access to care.

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INTRODUCTION

In 2007, Barbara Walters, co-anchor of the ABC News television series *20/20*, introduced the world to six-year-old Jazz Jennings.¹ Assigned male at birth, Jazz was reported to be “one of the youngest people ever to be diagnosed with gender dysphoria.”² Unlike many parents of transgender youth, Jazz’s mother and father supported her transition to the gender with which she identified “and allowed her to start transitioning from male to female while she was only in kindergarten.”³ Since that initial interview, Jazz has continued to inspire transgender children across the nation by writing a children’s book based on her life, starring in her own reality TV show, and advocating for transgender people’s rights on YouTube and Instagram.⁴ She has been called the “the public face of transgender

1. Alan B. Goldberg & Joneil Adriano, *I’m a Girl’—Understanding Transgender Children*, ABC NEWS (Apr. 27, 2007), <https://abcnews.go.com/2020/story?id=3088298&page=1&singlePage=true> [<https://perma.cc/7HGD-89DZ>] (“After months of careful deliberation, the Jennings agreed to participate in Barbara Walters’ special on transgender children, in the hope that doing so would further understanding of Jazz and others like her.”); GABE MURCHISON, HUM. RTS. CAMPAIGN FOUND., SUPPORTING & CARING FOR TRANSGENDER CHILDREN 3 (2016) <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/documents/SupportingCaringforTransChildren.pdf> [<https://perma.cc/2U3C-2A8Y>].

2. Brian Prowse-Gany, *The New Face of Transgender Youth*, YAHOO! NEWS (Oct. 22, 2014), <https://news.yahoo.com/the-new-face-of-transgender-youth-231106807.html> [<https://perma.cc/5CMZ-DDZM>]. Gender dysphoria is “a persistent unease with the characteristics of one’s gender, accompanied by a strong identification with the opposite gender.” *Id.* The Diagnostic and Statistical Manual of Mental Disorders sets out the criteria for a diagnosis of gender dysphoria in children. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013).

3. Prowse-Gany, *supra* note 2. According to the American Academy of Pediatrics, “[t]ransgender’ is usually reserved for a subset of such youth whose gender identity does not match their assigned sex and generally remains persistent, consistent, and insistent over time. These terms are not diagnoses; rather, they are personal and often dynamic ways of describing one’s own gender experience.” Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AM. ACAD. PEDIATRICS, Oct. 2018, at 1, 3 <https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for> [<https://perma.cc/TJE4-CKEJ>].

4. Lindsey Bever, *How a Transgender Teen Became a Nationally Known Activist*, WASH. POST (Mar. 19, 2015, 2:39 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/03/19/how-a-transgender-teen-became-a-nationally-known-activist/> [<https://perma.cc/4NQW-6WAF>].

children” and a “beacon” for the transgender community.⁵ Gay & Lesbian Alliance Against Defamation (GLAAD) president Sarah Kate Ellis believes “Jazz has actually saved lives” by “humaniz[ing] trans[gender] people by telling her story in a really positive, affirming way” that shows transgender youth they “can be happy, healthy, and accepted.”⁶

The sharp increase in the number of teens seeking treatment at gender clinics since 2000, along with a rise in the number of females first showing signs of gender dysphoria during adolescence, has led some researchers to question the role “social influences” are playing in these two emerging trends.⁷ Although researchers note that the overall destigmatization of transgender individuals may explain the increase in the total number of adolescents seeking care, they do not believe it fully explains the “inversion of the sex ratio,” where more natal females than natal males are now transitioning.⁸

In 2018, Dr. Lisa Littman, a physician and former professor at the Brown University School of Public Health, surveyed the parents of adolescent and young adult girls who, despite showing no signs of

5. *Id.* (internal quotation marks omitted); Claudia Eller, *TV Sensation Jazz Jennings Remains a Beacon for the Trans Community*, VARIETY (June 2, 2021, 11:15 AM), <https://variety.com/2021/tv/reality-tv-stars/jazz-jennings-pride-2021-elliott-page-demi-lovato-1234986120/> [<https://perma.cc/ELZ8-U9Y6>].

6. Eller, *supra* note 5. GLAAD “is an American non-governmental media monitoring organization originally founded as a protest against defamatory coverage of [the LGBT community].” GLAAD, WIKIPEDIA, <https://en.wikipedia.org/wiki/GLAAD> [<https://perma.cc/S29Z-9C6Q>] (Oct. 28, 2022, 19:18 UTC).

7. Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLOS ONE, Aug. 2018, at 1, 2–4, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0202330&type=printable> [<https://perma.cc/K5NU-BBQE>]. In a 2017 interview with *Slate* magazine, Dr. Johanna Olsen-Kennedy, a physician at the nation’s largest transgender youth clinic, Children’s Hospital in Los Angeles, confirmed that the ratio shift was present at her clinic, reporting that “the balance was about 50/50 when I started [7–8 years ago], and it’s shifted to be maybe 65-to-70 percent [natal females] today.” Evan Urquhart, *Why Are Trans Youth Clinics Seeing an Uptick in Trans Boys?*, SLATE (Sept. 13, 2017, 3:32 PM), <https://slate.com/human-interest/2017/09/trans-youth-clinics-are-seeing-more-trans-boys-than-before-why.html> [<https://perma.cc/7YJB-3ETM>] (alteration in original).

8. Littman, *supra* note 7, at 31, 35. “‘Sex’ or ‘natal gender,’ is a label, generally ‘male’ or ‘female,’ that is typically assigned at birth on the basis of genetic and anatomic characteristics, such as genital anatomy, chromosomes, and sex hormone levels.” Rafferty, *supra* note 3, at 2. According to Dr. Littman, “Adolescent-onset of gender dysphoria is a relatively new phenomenon for natal females.” Littman, *supra* note 7, at 3.

gender dysphoria before puberty, had recently come out as transgender.⁹ The parents reported that their children's onset of gender dysphoria followed an increased use of social media and appeared to coincide with their peers also coming out as transgender.¹⁰ The results of her study led Dr. Littman to hypothesize that, for some teens, social and peer contagion may produce a type of "rapid-onset gender dysphoria" (ROGD) distinct from the gender dysphoria that presents itself during early childhood or adolescence.¹¹

Dr. Littman's controversial study drew immediate criticism, prompting the study's publisher, PLOS ONE, to issue a correction clarifying that ROGD "is not a formal mental health diagnosis at this time."¹² Additionally, the publisher cautioned that ROGD "should not be used in a way to imply that it explains the experiences of all gender dysphoric youth nor should it be used to stigmatize vulnerable individuals."¹³ The World Professional Association for Transgender Health (WPATH), an organization that establishes international standards of care for the clinical treatment of gender dysphoria, issued its own statement highlighting that no major professional association recognized ROGD and warning physicians to "restrain[] from the use of *any* term" that may "instill fear" and foreclose prescribing gender-affirming treatment options.¹⁴ Moreover, WPATH "encourage[d]

9. Littman, *supra* note 7, at 1–2; *About*, DR. LISA LITTMAN, <https://littmanresearch.com/about/> [<https://perma.cc/7XL7-MTCE>].

10. Littman, *supra* note 7, at 1, 2.

11. *Id.* at 2, 32. "The expected prevalence of transgender young adult individuals is 0.7%. Yet, more than a third of the friendship groups described in this study had 50% or more of the [adolescents and young adults] in the group becoming transgender-identified in a similar time frame, a localized increase to more than 70 times the expected prevalence rate." *Id.* at 32 (footnote omitted).

12. Lisa Littman, *Correction: Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLOS ONE, Mar. 2019, at 1, 1, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0214157&type=printable> [<https://perma.cc/MKM5-DR6W>].

13. *Id.*

14. WPATH *Position on "Rapid-Onset Gender Dysphoria (ROGD)"*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (WPATH) (Sept. 4, 2018) [hereinafter WPATH Position Statement], https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/9_Sept/WPATH%20Position%20on%20Rapid-Onset%20Gender%20Dysphoria_9-4-2018.pdf [<https://perma.cc/7SY9-BA38>]. Gender-

continued scientific exploration” noting “that knowledge of the factors contributing to gender identity development in adolescence is still evolving and not yet fully understood by scientists.”¹⁵

Instead of heeding WPATH’s warning to not limit treatment options, Conservative lawmakers have seized upon the perceived admission that the science is “evolving” to propose legislation restricting transgender minors’ access to gender-affirming care.¹⁶ In 2020, Fred Deutsch, a member of the South Dakota House of Representatives, proposed a bill that “stops children from being mutilated” by “so-called doctors” prescribing gender-affirming care.¹⁷ In an interview with Tony Perkins, president of the Family Research Council, Deutsch explained that his motivation for the bill, which makes prescribing “[p]uberty-blocking medication to stop normal puberty” to anyone under the age of sixteen a Class 1 misdemeanor, stemmed from the emotions he felt after seeing internet photos of transgender people proudly showing off their surgery scars.¹⁸ He called the procedures that produced the scars “a crime against

affirming care “focus[es] on what the child says about their own gender identity and expression . . . allowing them to determine which forms of gender expression feel comfortable and authentic.” MURCHISON, *supra* note 1, at 12. Along with other entities, WPATH publishes “evidence-based guidelines and standards of care” for health care providers who treat children with gender dysphoria, and their guidelines are recognized as “the international gold standard outlining the guidelines for the clinical treatment of gender dysphoria.” *Clinical Guidelines & Training for Providers, Professionals, and Trainees*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Member_Resources/SOGIIC/Clinical_Guidelines_Training_Providers_Professionals_Trainees.aspx [<https://perma.cc/UJ5M-EJWQ>]. “[WPATH] is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health.” E. Coleman, W. Bockting, M. Botzer, P. Cohen-Kettenis, G. DeCuypere, J. Feldman, L. Fraser, J. Green, et. al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 166 (2012) [hereinafter *WPATH Standards of Care*].

15. WPATH Position Statement, *supra* note 14.

16. *Id.*; Lindsey Dawson, Jennifer Kates, & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/> [<https://perma.cc/U37A-UGPL>].

17. Tony Perkins, *Under the Knife of Cultural Blindness*, FRC ACTION (Jan. 22, 2020), <https://www.frcaction.org/updatearticle/20200122/cultural-blindness> [<https://perma.cc/LVK4-XCRJ>]; see H.B. 1057, 2020 Leg., 95th Sess. (S.D. 2020).

18. H.B. 1057, House State Affairs Engrossed, 2020 Leg., 95th Sess. (S.D. 2020), <https://sdlegislature.gov/Session/Bill/10226/63149> [<https://perma.cc/B6W8-94J4>]; Perkins, *supra* note 17.

humanity” and compared them to atrocities committed by the Nazis during World War II: “I’ve had family members killed in Auschwitz. And I’ve seen the pictures of the bizarre medical experiments. I don’t want that to happen to our kids. And that’s what’s going on right now.”¹⁹

The South Dakota legislature never passed Representative Deutsch’s bill.²⁰ To date, only Alabama and Arkansas have passed legislation banning all forms of gender-affirming care for minors.²¹ Passage of Arkansas’s law required overriding Republican Governor Asa Hutchinson’s veto.²² Purported to protect “the health and safety of its citizens, especially vulnerable children,” the Arkansas Save Adolescents From Experimentation (SAFE) Act makes it illegal for physicians to act in accordance with their medical judgment by providing gender-affirming care to minors or referring their transgender patients to physicians who do.²³ A federal judge temporarily blocked the law from being enforced after the American Civil Liberties Union (ACLU) successfully challenged it in court.²⁴ In August 2022, a three-judge panel of the Eighth Circuit Court of

19. Perkins, *supra* note 17. “But Deutsch, who is the son of a Holocaust survivor and had family members killed at Auschwitz, . . . absolutely wasn’t saying doctors who treat transgender children are the same as Nazis.” Lisa Kaczke, *S.D. Lawmaker Compares Transgender Surgeries to Holocaust’s ‘Bizarre Medical Experiments’*, ARGUS LEADER (Jan. 27, 2020, 5:11 PM), <https://www.argusleader.com/story/news/politics/2020/01/27/rep-fred-deutsch-pictures-transgender-surgery-scars-remind-him-holocaust-nazis/4586822002/> [https://perma.cc/DQD2-4KNL]. Deutsch later regretted his remarks. Devan Cole, *South Dakota State Lawmaker Says He Regrets Drawing Comparison Between Transgender Medical Procedures and Nazi Doctor Experiments*, CNN (Jan. 28, 2020, 3:40 PM), <https://www.cnn.com/2020/01/28/politics/south-dakota-fred-deutsch-transgender-bill-nazi-holocaust/index.html> [https://perma.cc/TV6F-847X].

20. See Tim Fitzsimons, *South Dakota’s Trans Health Bill Is Effectively Dead, Opponents Say*, NBC NEWS (Feb. 10, 2020, 5:40 PM), <https://www.nbcnews.com/feature/nbc-out/south-dakota-s-trans-health-bill-effectively-dead-opponents-say-n1134356> [https://perma.cc/6MGL-YNSD].

21. Dawson et al., *supra* note 16.

22. Meredith Deliso, *Arkansas State Legislature Overrides Governor’s Veto on Transgender Health Care Bill*, ABC NEWS (Apr. 6, 2021, 3:58 PM), <https://abcnews.go.com/US/arkansas-state-legislature-overrides-governors-veto-transgender-health/story?id=76904369> [https://perma.cc/SM3W-QPJ7].

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

24. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021); Alyssa Lukpat & Isabella Grullón Paz, *Judge Temporarily Blocks Arkansas Ban on Health Treatments for Transgender Youth*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/us/politics/arkansas-transgender-law-block-bill.html> [https://perma.cc/HSB7-QH6U].

Appeals upheld the preliminary injunction.²⁵ Testimony for the nation’s first trial contemplating the constitutionality of states’ efforts to ban gender-affirming care began on October 17, 2022.²⁶ As of this writing, the outcome is unknown.

Conservative lawmakers are not the only ones capitalizing on the “evolving” science of gender dysphoria to limit transgender minors’ access to healthcare. In 2021, the American College of Pediatricians, a national organization of pediatricians and other healthcare professionals, and the Catholic Medical Association, the largest association of Catholic individuals in healthcare, sued the United States Department of Health and Human Services (HHS).²⁷ The lawsuit argued that HHS’s requirement that physicians receiving federal funding “treat individuals consistent with their gender identity” and provide the same services to a transgender patient that they would provide to a cisgender patient forces their members to “act against their medical judgment.”²⁸ In July 2022, HHS filed a motion to dismiss the case, arguing the plaintiffs lacked standing and their claims were unripe or moot because HHS had yet to enforce the law.²⁹ As of this writing, no hearing date has been set in that case.

This Note explores the dangerous consequences that occur when patients’ health is subservient to politics. Part I traces how the linguistic battles waged by successive presidential administrations and

25. *Brandt v. Rutledge*, 47 F.4th 661, 667 (8th Cir. 2022).

26. Andrew DeMillo, *Landmark Trial Begins Over Arkansas’ Ban on Trans Youth Care*, ABC NEWS (Oct. 17, 2022, 8:19 AM), <https://abcnews.go.com/US/wireStory/landmark-trial-begins-arkansas-ban-trans-youth-care-91607097> [https://perma.cc/YHL3-93S3].

27. *See generally* Complaint, Am. Coll. of Pediatricians v. Becerra, No. 21-cv-195 (E.D. Tenn. Aug. 26, 2021) [hereinafter *Becerra* Complaint].

28. *Id.* at 2, 15–16. HHS has empowered the Office for Civil Rights to investigate a physician’s refusal to prescribe gender-affirming care to a transgender patient as a potential civil rights violation. Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27984 (May 25, 2021) (codified at 45 C.F.R. pts. 86, 92 (2021)). Cisgender is “[a] term that is used to describe a person who identifies and expresses a gender that is consistent with the culturally defined norms of the sex they were assigned at birth.” Rafferty, *supra* note 3, at 2.

29. Defendants’ Motion to Dismiss First Amended Complaint at 1, Am. Coll. of Pediatricians v. Becerra, No. 21-cv-195 (E.D. Tenn. July 19, 2022); Memorandum in Support of Defendants’ Motion to Dismiss First Amended Complaint at 9, Am. Coll. of Pediatricians v. Becerra, No. 21-cv-195 (E.D. Tenn. July 19, 2022).

the United States Supreme Court over the meaning of the word “sex” shaped the current law prohibiting discrimination against transgender people. Part II analyzes how the outcomes of the two pending cases discussed above could define the limits that medical judgment places on state legislatures and physicians who attempt to deny transgender minors access to gender-affirming care. Finally, Part III outlines several unifying proposals to increase transgender minors’ access to medically necessary care.

I. BACKGROUND

In 2020, the Supreme Court held in *Bostock v. Clayton County* that “[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex.”³⁰ However, the “straightforward rule” on employment matters that emerged from the majority’s opinion belied the complicated, and often contentious, pathway leading up to the decision—a pathway replete with enough twists and turns to give even the most casual observer “whiplash.”³¹

A. *On the Basis of Sex: The 2016 Rule*

When the Supreme Court took up the Conservatives’ challenge to “Obamacare,” the question at issue was whether it was constitutional for the federal government to force its citizens to purchase health insurance or, worse, broccoli.³² Lost in the debate was the fact that

30. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020).

31. *Id.* at 1741 (holding that “[f]rom the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”); see Selena Simmons-Duffin, ‘Whiplash’ of LGBTQ Protections and Rights, from Obama to Trump, NPR (Mar. 2, 2020, 3:12 PM), <https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump> [<https://perma.cc/XVJ2-YJGP>] (crediting the increasing power wielded by presidents as the cause of this “whiplash” effect).

32. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 521, 558, 572–74 (2012) (holding that,

Section 1557 of the Affordable Care Act (ACA) had laid the foundation for prohibiting discrimination against transgender people in healthcare.³³ The ACA incorporated Title IX of the Education Amendments of 1972's prohibition on "discrimination on the basis of sex" and delegated to the HHS Secretary the authority to interpret the meaning of the word "sex" in that statute.³⁴ In so doing, some commenters feared that Congress and then-President Barack Obama had emboldened HHS Secretary Sylvia Burwell to interpret half-century-old civil rights legislation in ways its drafters never imagined.³⁵

When HHS finalized the rule to implement Section 1557 of the ACA (2016 Rule) on May 18, 2016, Secretary Burwell did not disappoint her critics.³⁶ The 2016 Rule expanded Title IX's prohibition against sex discrimination to include "gender identity," defined as "an individual's internal sense of gender, . . . which may be different from an individual's sex assigned at birth."³⁷ Additionally, the Rule's equal

although the Commerce Clause did not give Congress the power to mandate the purchase of health insurance, the law was constitutional as a tax). "Republicans coined the term 'Obamacare' during the debate over the Affordable Care Act, seemingly as a means to generate opposition to the president's health care initiative." Edward Schumacher-Matos, *What We Hear When NPR Refers To 'Obamacare'*, NPR (Sept. 6, 2013, 5:52 PM), <https://www.npr.org/sections/publiceditor/2013/09/06/219765368/what-we-hear-when-npr-refers-to-obamacare> [<https://perma.cc/WL7D-ZXB7>]. "According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli . . ." *Sebelius*, 567 U.S. at 558 (Ginsburg J., concurring in part, concurring in judgment in part, and dissenting in part). In her concurring opinion, Justice Ginsburg mocked the Tea Party's argument that broccoli, a product consumers may or may not choose to buy in the future, was comparable to healthcare, a service every person will eventually need. Jason Farago, *Healthcare After the Supreme Court Ruling: 'Broccoli Horrible' and Medicaid*, GUARDIAN (June 29, 2012, 11:08 AM), <https://www.theguardian.com/commentisfree/2012/jun/29/healthcare-supreme-court-ruling-broccoli-medicare> [<https://perma.cc/44RT-6CJZ>].

33. 42 U.S.C. § 18116(a) ("Except as otherwise provided for in this title . . . an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . , be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance . . ."). The provisions in Title IX provide that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

34. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31376, 31388 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2021)).

35. *See id.* at 31388.

36. *See id.* at 31467.

37. *Id.*

access provision ensured that healthcare providers could not deny any treatment to transgender patients if they provided that same treatment to patients who identified with their assigned sex.³⁸ The Rule's impact was short-lived, however. Three months later, before many of the health insurance provisions had even gone into effect, eight states and three private healthcare providers sued HHS and Secretary Burwell in the Northern District of Texas to enjoin the 2016 Rule.³⁹

In *Franciscan Alliance, Inc. v. Burwell*, the plaintiffs argued that HHS's interpretation of Title IX's definition of "sex" to include gender identity was "contrary to law," and, thus, violated the Administrative Procedure Act (APA).⁴⁰ Unpersuaded by HHS's argument that Section 1557's failure to explicitly discuss transgender discrimination created ambiguity that required interpretation, the district court agreed with the plaintiffs' contention that HHS's statutory interpretation was out of line with "Title IX's unambiguous definition of sex as the immutable, biological differences between males and females as acknowledged at or before birth."⁴¹ On December 31, 2016, the district court granted the plaintiffs' motion for a preliminary injunction, barring enforcement of the provisions prohibiting discrimination on the basis of gender identity, reasoning that "[i]n promulgating the [2016] Rule, HHS revised the core of Title IX sex discrimination under the guise of simply incorporating it."⁴²

B. Sudden Policy Reversals: The 2020 Rule

The election of Donald J. Trump brought many "[s]udden policy reversals" to Obama-era policies, including those related to

38. *Id.* at 31471 ("A covered entity shall provide individuals equal access to its health programs or activities without discrimination on the basis of sex; and a covered entity shall treat individuals consistent with their gender identity . . .").

39. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). State plaintiffs included Texas, Wisconsin, Nebraska, Kansas, Louisiana, Arizona, Kentucky, and Mississippi. *Id.* at 670 n.3.

40. *Id.* at 676. "In evaluating agency action under the APA, courts must 'hold unlawful and set aside' agency actions that are 'not in accordance with the law' or 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Id.* at 685 (quoting 5 U.S.C. § 706(2)).

41. *Id.* at 671, 686–87 (internal quotation marks omitted).

42. *Id.* at 687, 696.

transgender rights.⁴³ Within weeks of his inauguration, President Trump directed the Department of Justice and the Department of Education to rescind federal guidance to schools on controversial issues like transgender students' access to bathrooms.⁴⁴ However, despite swift action by those departments and others, HHS waited until 2019 before making its plans known by publishing a proposed rule that would go into effect in 2020 (2020 Rule).⁴⁵ Under the leadership of President Trump's appointee Alex Azar, HHS promised "substantial revisions" to the 2016 Rule, including "eliminat[ing] provisions that [were] inconsistent . . . with pre-existing civil rights statutes."⁴⁶ However, the judge presiding over the lawsuit that blocked the 2016 Rule from going into effect had grown weary that "the [2016] Rule remain[ed] on the books," even after a change in leadership at HHS and more than two years without revision to the Rule.⁴⁷ Rather than wait for Secretary Azar to finalize the new Rule, the district court issued its ruling in *Franciscan Alliance, Inc. v. Azar* on October 15, 2019.⁴⁸ Although the court vacated the 2016 Rule, it stopped short of issuing a permanent injunction reasoning that, because both parties were now in agreement that "sex" referred to biological sex, there was no indication that HHS would "defy the [c]ourt's order and attempt to apply the Rule against Plaintiffs or similarly situated non-parties."⁴⁹

Armed with a second favorable ruling from the court, Secretary Azar fired back at the critics who had accused his department of

43. See Simmons-Duffin, *supra* note 31.

44. *Id.*; Letter from Sandra Battle, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ. & T.E. Wheeler II, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Just., to Colleagues (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/3TWP-VSHA>].

45. See Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (June 14, 2019) (codified at 42 C.F.R. pts. 438, 440, 460 (2021), 45 C.F.R. pts. 86, 92, 147, 155, 156 (2021)).

46. *Id.* at 27848, 27895.

47. See *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 932–33 (N.D. Tex. 2019).

48. *Id.* at 946–47.

49. *Id.* at 946.

executive overreach.⁵⁰ Secretary Azar argued that, unlike the previous administration, which had instituted “legislative changes through administrative action,” the 2020 Rule’s interpretation of the word “sex” relied on “common usage” and “longstanding statutory interpretations that conform to the plain meaning of the underlying civil rights statutes.”⁵¹ However, as legal fate would have it, the Trump Administration’s victory would be short-lived.

C. *Unexpected Consequences: Bostock v. Clayton County*

On June 15, 2020, three days after HHS submitted the 2020 Rule for publication, the Conservative-leaning Supreme Court shocked the nation by ruling that Title VII of the Civil Rights Act of 1964 unequivocally barred an employer from firing an employee for being transgender.⁵² Justice Gorsuch, former President Trump’s first appointee to the Supreme Court, stunned the nation even more by authoring the opinion.⁵³ Moreover, by basing his ruling solely on the statutory text and not congressional intent, Justice Gorsuch circumvented the debate over whether Title VII’s reference to “sex” referred to gender identity, thereby undercutting the Trump Administration’s central claim that it was inconceivable that anyone in 1964 could have intended for “sex” to refer to anything but the

50. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37165 (June 19, 2020) (codified at 42 C.F.R. pts. 438, 440, 460 (2021), 45 C.F.R. pts. 86, 292, 147, 155, 156 (2021)) (“The Department does not exceed its authority by rescinding the portions of the 2016 Rule that exceeded the Department’s authority.”).

51. *Id.* at 37161, 37165, 37178–79.

52. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020); Pete Williams, *Two Supreme Court Jaw Droppers: The LGBTQ Decision and You Can’t Believe Who Wrote It*, NBC NEWS, <https://www.nbcnews.com/politics/supreme-court/two-supreme-court-jaw-droppers-lgbtq-decision-you-can-t-n1231120> [<https://perma.cc/CJV7-HZKK>] (June 15, 2020, 5:42 PM) (noting “[t]he irony of Trump’s first appointee to the top court authoring a landmark ruling on gay rights”).

53. Williams, *supra* note 52. According to SCOTUSblog publisher Tom Goldstein, “[t]he irony here is that the most [C]onservative Trump appointee writes the sweeping opinion, while Kavanaugh, who the left had more hopes for, is with the dissenters.” *Id.* “In choosing [Justice Gorsuch], Mr. Trump reached for a reliably [C]onservative figure in Justice Scalia’s mold, but not someone known to be divisive.” Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html> [<https://perma.cc/483E-RWUV>].

biological differences between males and females.⁵⁴ Instead, Justice Gorsuch reasoned that “the limits of the drafters’ imagination supply no reason to ignore the law’s demands” because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁵⁵ He laid out his rationale that sex discrimination is a prerequisite for transgender discrimination in a series of hypotheticals, including the following:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. . . . [T]he individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.⁵⁶

If Chief Justice Roberts had hopes of shielding the Court from claims of judicial activism by assigning the opinion to a “proud textualist” like Justice Gorsuch, his efforts failed.⁵⁷ In his dissent, Justice Alito chided the majority: “There is only one word for what the Court has done today: legislation.”⁵⁸ In particular, Justice Alito took issue with Justice Gorsuch’s claim that he had applied a “textualist school of statutory interpretation championed by our late colleague

54. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37178–79; *Bostock*, 140 S. Ct. at 1737.

55. *Bostock*, 140 S. Ct. at 1737, 1741.

56. *Id.* at 1741–42.

57. See Williams, *supra* note 52. “Chief Justice John Roberts assigned Gorsuch the task of writing the opinion, perhaps to underscore that it is meant to be based on a strict reading of the law—the Civil Rights Act of 1964, which bans job discrimination because of race, religion and sex, among other factors.” *Id.* “The exclusive reliance on text when interpreting text is known as *textualism*.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012). “Textualism, in its purest form, begins and ends with what the text says and fairly implies.” *Id.*

58. *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting).

Justice Scalia.”⁵⁹ Instead, Justice Alito argued that Justice Gorsuch had engaged in “a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”⁶⁰ Finally, Justice Alito took issue with the majority’s assurance that the decision only held ramifications for the matter before them.⁶¹ He noted that the more than one hundred federal statutes prohibiting discrimination based on sex made it “virtually certain” that the majority’s opinion would have “far-reaching consequences” and that healthcare, in particular, “may emerge as an intense battleground.”⁶²

D. *Judicial Irony: The Current Rule*

The final version of the 2020 Rule, published four days after the Supreme Court issued its landmark ruling, failed to mention *Bostock* despite public assurances from then-President Trump that his administration would “live with the decision of the Supreme Court.”⁶³ Instead, the Rule maintained that discrimination based on sex did not encompass gender identity.⁶⁴ However, in a twist of judicial irony, one day before the 2020 Rule took effect, in a separate case involving transgender discrimination in healthcare, an Eastern District of New York judge enjoined the Rule for violating the APA.⁶⁵ In that case, the judge admonished the Trump Administration for ignoring the Supreme

59. *Id.* at 1755.

60. *Id.* at 1756 (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997)).

61. *Id.* at 1778, 1781; *id.* at 1753 (majority opinion) (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”).

62. *Id.* at 1778, 1781 (Alito, J., dissenting).

63. Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR, <https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees> [<https://perma.cc/DJ6Z-AH5Z>] (June 15, 2020, 5:52 PM) (quoting then-President Trump). See generally Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (codified at 42 C.F.R. pts. 438, 440, 460 (2021), 45 C.F.R. pts. 86, 292, 147, 155, 156 (2021)).

64. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37162.

65. *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).

Court's decision in *Bostock*, holding that because HHS's actions were "contrary to *Bostock*," they were "contrary to law."⁶⁶

As of this writing, the Biden Administration has not revealed when it will implement its new rule. However, on May 25, 2021, HHS issued a notification that it would once again enforce the 2016 Rule's protections for transgender people.⁶⁷ Despite current federal law prohibiting discrimination against transgender people, transgender minors still face obstacles gaining access to necessary care.⁶⁸

II. ANALYSIS

How does *Bostock*, a ruling that the Supreme Court insisted only applied to employment matters, impact transgender minors' ability to receive gender-affirming care? It is because "[f]ederal courts generally interpret Title VII and Title IX in tandem, such that the prohibitions of discrimination on the basis of sex carry the same meaning in both statutes."⁶⁹ Therefore, although the Obama Administration's interpretation of Title IX to prohibit discrimination on the basis of gender identity was "tenuous" and "based on unsettled law," *Bostock* "provide[s] firm footing for the Biden Administration's current interpretation and enforcement of these protections."⁷⁰ On his first day in office, President Biden issued an executive order on "Preventing and Combating Discrimination on the Basis of Gender Identity or

66. *Id.* at 420, 429.

67. Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27984 (May 25, 2021) (codified at 45 C.F.R. pts. 86, 92 (2021)).

68. *See generally* Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021); *Becarra* Complaint, *supra* note 27.

69. Katz Banks Kumin LLP, *Biden Administration Relies on Supreme Court Decision to Bolster LGBTQ+ Protections for Students and Employees*, NAT'L L. REV. (Sept. 10, 2021), <https://www.natlawreview.com/article/biden-administration-relies-supreme-court-decision-to-bolster-lgbtq-protections> [<https://perma.cc/2PT7-ZBVN>]; Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964 . . . it guides our evaluation of claims under Title IX.").

70. Katz Banks Kumin LLP, *supra* note 69 ("[U]ntil the Supreme Court makes clear that *Bostock*'s reasoning applies to Title IX," there is a risk that "[f]uture administrations could decline to follow the weight of judicial authority, and could elect to interpret *Bostock* narrowly, as the Trump Administration did.").

Sexual Orientation,” citing “*Bostock*’s reasoning” as the justification for why Title IX’s prohibition on sex discrimination encompasses gender identity.⁷¹

Barring a reversal of *Bostock*, which seems unlikely because a Conservative justice authored the opinion utilizing a mode of interpretation championed by Conservatives, groups who wish to limit minors’ access to gender-affirming care will need to seek other avenues to achieve their goals. The first avenue, opposition based on religious grounds, is outside the scope of this Note.⁷² The second avenue, discussed below, is labeling gender-affirming care as “experimental” and “medically dangerous.”⁷³ By doing so, opponents of gender-affirming care attempt to wield the concept of medical judgment as both a sword and a shield—preventing physicians from exercising their medical judgment to provide gender-affirming care while simultaneously allowing physicians to abstain from providing it.⁷⁴

A. *Irreparable Harm*: Brandt v. Rutledge

When Arkansas lawmakers passed the SAFE Act on March 29, 2021, Chase Strangio, deputy director for transgender justice at the

71. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021); see Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL ST. J. (Jan. 22, 2021, 1:44 PM), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/KS4X-9PHF>].

72. See *Minton v. Dignity Health*, 252 Cal. Rptr. 3d 616, 625 (Cal. Ct. App. 2019), *cert. denied*, 142 S. Ct. 455 (2021) (“[A]ny burden the Act places on the exercise of religion is justified by California’s compelling interest in ensuring full and equal access to medical treatment for all its residents, and that there are no less restrictive means available for the state to achieve that goal.”); see also *N. Coast Women’s Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (holding that although compliance with the law “would substantially burden their religious beliefs . . . that burden is insufficient to allow them to engage in such discrimination.”). *But see* *Otto v. City of Boca Raton*, 981 F.3d 854, 860, (11th Cir. 2020) (holding municipal ordinance prohibiting talk therapy for clients with sincerely held religious beliefs conflicting with homosexuality violated the First Amendment (internal quotation marks omitted)).

73. See discussion *infra* Section II.A.1; *Brandt*, 551 F. Supp. 3d at 891; *Becerra* Complaint, *supra* note 2728, at 2; Defendants’ Combined Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 76, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 21-CV-00450) [hereinafter *Brandt* Defense Brief] (“Arkansas has left open avenues for treatment of gender dysphoria while prohibiting only dangerous and experimental gender-transition procedures.”).

74. See generally *Brandt*, 551 F. Supp. 3d; *Becerra* Complaint, *supra* note 27.

ACLU and one of the lead attorneys representing the plaintiffs challenging the Arkansas law, called it “the single most extreme anti-trans law to ever pass through a state legislature.”⁷⁵ The law not only banned physicians from providing gender-affirming care to their patients, but it also banned them from referring patients to any other medical provider willing to provide such care.⁷⁶ Even Republican Governor Hutchinson, who signed a separate bill banning “transgender girls from competing on school sports teams consistent with their gender identity” into law four days earlier, thought the bill went too far.⁷⁷ Although Governor Hutchinson believed his party’s aims were “well-intended,” he vetoed the bill, fearing that this form of “government overreach” would “set a standard for legislation overriding health care.”⁷⁸ Nonetheless, on April 6, 2021, the Arkansas state legislature voted overwhelmingly to override the Governor’s veto, becoming the first state to restrict access to gender-affirming care.⁷⁹

Whether the law is constitutional is already at issue.⁸⁰ Four minor patients, their parents, and their healthcare providers filed suit in the Eastern District of Arkansas, claiming the SAFE Act violates the Constitution’s Equal Protection Clause, Due Process Clause, and the First Amendment.⁸¹ Arkansas Attorney General Leslie Rutledge argued that the State has a “compelling government interest in protecting the health and safety of its citizens, particularly ‘vulnerable’ children who are gender nonconforming or who experience distress at

75. Jo Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC NEWS (Mar. 29, 2021, 6:14 PM), <https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412> [<https://perma.cc/82JM-UK4A>]. Attorney Strangio also referred to the bill as “potentially genocidal,” noting that “the consequences of all of the bills are the same: People are going to lose health care.” *Id.*

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

77. Ivan Pereira, *Arkansas Governor Vetoes Bill that Would Ban Gender-Confirming Treatments for Transgender Youth*, ABC NEWS (Apr. 5, 2021, 3:44 PM), <https://abcnews.go.com/US/arkansas-governor-vetoes-bill-ban-gender-confirming-treatments/story?id=76883145> [<https://perma.cc/A8RP-6B6L>].

78. *Id.* (quoting Arkansas Governor Asa Hutchinson).

79. Deliso, *supra* note 22.

80. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 887–88 (E.D. Ark. 2021).

81. *Id.* at 888.

identifying with their biological sex.”⁸² The State of Arkansas’s preferred treatment for gender dysphoria is the “watchful-waiting” approach, which avoids gender-affirming care and, instead, relies on “established psychotherapeutic techniques to alleviate the distress experienced by the person with gender dysphoria.”⁸³ Arkansas Attorney General Rutledge defended this “cautious approach,” claiming that “the data shows that an overwhelming majority of the time, a child’s gender dysphoria will desist on its own and in the absence of any other intervention.”⁸⁴ In response, the plaintiffs attacked the State’s use of “discredited” experts championing “discredited views.”⁸⁵ Additionally, the American Academy of Pediatrics (AAP), the American Academy of Child and Adolescent Psychiatry, and numerous state and national organizations that treat children with gender dysphoria filed an amici brief in support of the plaintiffs, arguing that the SAFE Act is actually a “Health Care Ban” and “represents a broad legislative encroachment into the patient-health care provider relationship.”⁸⁶

1. Equal Protection Claim

Arkansas contends that the Supreme Court’s ruling in *Bostock* does not apply to the SAFE Act because the law in no way discriminates on

82. *Id.* at 887–88; H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

83. *Brandt* Defense Brief, *supra* note 73, at 8. “Unlike watchful waiting approaches, which prohibit certain forms of gender expression until a child is older, gender-affirmative approaches follow the child’s lead.” MURCHISON, *supra* note 1, at 16.

84. *Brandt* Defense Brief, *supra* note 73, at 8. According to the State’s experts, there are studies that show the desistence rate can be as high as eighty to ninety-eight percent. *Id.*

85. Reply Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 21–22, 24, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 21-CV-00450) [hereinafter *Brandt* Reply Memorandum].

86. Brief of *Amici Curiae* American Academy of Pediatrics and Additional National and State Medical, Mental Health, and Educational Organizations in Support of Plaintiffs’ Motion for Preliminary Injunction at 19, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 41-CV-00450) [hereinafter *Brandt* Amici Brief]. “Medical evidence, not politics, should inform treatment decisions[.]” Press Release, Endocrine Society, Endocrine Society Condemns Efforts to Block Access to Med. Care for Transgender Youth (Apr. 14, 2021), <https://www.endocrine.org/news-and-advocacy/news-room/2021/endocrine-society-condemns-efforts-to-block-access-to-medical-care-for-transgender-youth> [<https://perma.cc/K8PM-56RP>].

the basis of sex—only age and medical procedure.⁸⁷ However, the district court rejected that argument by finding that the law discriminates based on “sex-based classifications . . . because ‘transgender people constitute at least a quasi-suspect class.’”⁸⁸ Accordingly, the Eastern District of Arkansas applied intermediate scrutiny when ruling on the plaintiffs’ equal protection claim.⁸⁹ Under this standard, a law based on sex “must be substantially related to a sufficiently important governmental interest” and “supported by an ‘exceedingly persuasive justification.’”⁹⁰

Plaintiffs argue that gender-affirming care is not experimental.⁹¹ Therefore, on its face, the SAFE Act does not protect children.⁹² “Instead, it bans potentially life-saving treatment to transgender adolescents given in accordance with widely accepted medical protocols for treatment of adolescent gender dysphoria.”⁹³ Gender dysphoria is marked by “an incongruence between the patient’s gender identity (i.e., the innate sense of oneself as being a particular gender) and the patient’s sex assigned at birth.”⁹⁴ Because failure to treat this incongruence can lead to “debilitating anxiety and depression, self-harm, and suicide,” one of the primary goals of gender-affirming care

87. See *Brandt* Defense Brief, *supra* note 73, at 46, 67.

88. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021) (quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020)).

89. *Id.*

90. *Id.* (quoting *U.S. v. Virginia*, 518 U.S. 515, 531 (1996)); see *Virginia*, 518 U.S. at 555 (“[A]ll gender-based classifications today’ warrant ‘heightened scrutiny.’”).

91. *Brandt*, 551 F. Supp. 3d at 890; *Brandt* Reply Memorandum, *supra* note 85, at 2.

92. *Brandt*, 551 F. Supp. 3d at 890 (“The consensus recommendation of medical organizations is that the only effective treatment for individuals at risk of or suffering from gender dysphoria is to provide gender-affirming care.”); see Maria Temming, *Gender-Affirming Care Improves Mental Health for Transgender Youth*, SCIENCE NEWS (Aug. 6, 2021, 1:00 PM), <https://www.sciencenews.org/article/transgender-youth-mental-health-gender-affirming-care-laws> [https://perma.cc/H35V-YA89] (“Laws restricting this treatment may harm an already vulnerable community.”).

93. *Brandt*, 551 F. Supp. 3d at 890; *Brandt* Reply Memorandum, *supra* note 85, at 61–62 (noting that even before the law went into effect it had a serious and negative impact on transgender youth in the state of Arkansas).

94. *Brandt* Amici Brief, *supra* note 86, at 3.

is to minimize the dysphoria by minimizing the incongruence.⁹⁵ Starting at the onset of puberty, physicians can administer gonadotropin-releasing hormone (GnRH) analogs, commonly referred to as “puberty blockers,” to “delay further pubertal development.”⁹⁶ Like the watchful-waiting approach, the goal of this treatment is to allow adolescents “time to make more informed decisions about their gender identity.”⁹⁷ Unlike watchful waiting, which can “lead to irreversible physical changes that may negatively impact health outcomes for adolescents with gender dysphoria,” gender-affirming care suppresses puberty.⁹⁸ Supporters of this approach argue there is no risk because “puberty blocking treatment is fully reversible; if the treatment is suspended, endogenous puberty will resume.”⁹⁹ In contrast, not providing gender-affirming care “needlessly prolongs these patients’ distress and materially heightens the risk of adverse outcomes, including suicide.”¹⁰⁰

However, opponents of gender-affirming care highlight the fact that, although the Food and Drug Administration (FDA) has approved the use of puberty blockers to treat precocious puberty, the FDA has not approved the use of puberty blockers to “halt the normal progression

95. *Id.*; Jo Yurcaba, *Hormone Therapy Linked to Lower Suicide Risk for Trans Youths, Study Finds*, NBC NEWS, <https://www.nbcnews.com/nbc-out/out-health-and-wellness/hormone-therapy-linked-lower-suicide-risk-trans-youths-study-finds-rcna8617> [https://perma.cc/M29W-3CHZ] (Dec. 15, 2021, 9:23 AM) (“Gender-affirming hormone therapy is strongly linked to a lower risk of suicide and depression for transgender youths, according to the first large-scale study to examine the issue.”).

96. *Brandt* Amici Brief, *supra* note 86, at 10; see *WPATH Standards of Care*, *supra* note 14, at 177 (explaining the criteria that must be met before physicians should administer puberty suppressing hormones).

97. *Brandt* Amici Brief, *supra* note 86, at 10–11.

98. *Id.* at 17.

99. *Id.*; Rafferty, *supra* note 3, at 5.

100. *Brandt* Amici Brief, *supra* note 86, at 2, 17. “Treating [gender dysphoric]/gender-incongruent adolescents entering puberty with GnRH analogs has been shown to improve psychological functioning in several domains.” Wylie C. Hembree, Peggy T. Cohen-Kettenis, Louis Gooren, Sabine E. Hannema, Walter J. Meyer, M. Hassan Murad, Stephen M. Rosenthal, Joshua D. Safer et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3880 (2017).

of puberty.”¹⁰¹ Additionally, opponents cite “the lack of any long-term longitudinal studies evaluating the risks and benefits of using [puberty blockers] for the treatment of such distress or gender transition.”¹⁰² However, the court should give little weight to the distinction between “approved” and “non-approved” drugs. According to the Mayo Clinic, a 2007 study reported that “78.9% of children discharged from pediatric hospitals were taking at least [one] off-label medication.”¹⁰³ Additionally, it is not uncommon for off-label drug uses to become widely entrenched in clinical practice and become the predominant treatment for a given clinical condition, which appears to be the case with puberty blockers and gender-affirming care.¹⁰⁴ Finally, obtaining FDA approval, even for a medication that is already approved for one use, can be costly and time consuming, which is why drug companies often do not seek FDA approval for off-label drug uses.¹⁰⁵

Reasoning that the State of Arkansas would ban the use of puberty blockers for all children “[i]f the State’s health concerns were genuine,” the Arkansas district court held that the bill was “not substantially related to protecting children in Arkansas from experimental treatment.”¹⁰⁶ “The State’s goal in passing [the SAFE

101. *Brandt* Defense Brief, *supra* note 73, at 9; *Precocious Puberty*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/precocious-puberty/symptoms-causes/syc-20351811> [<https://perma.cc/9Z2W-JGUA>] (Feb. 15, 2021) (“When puberty begins before age 8 in girls and before age 9 in boys, it is considered precocious puberty.”). Symptoms of precocious puberty can include “[b]reast growth and first period in girls; [e]nlarged testicles and penis, facial hair and deepening voice in boys; [p]ubic or underarm hair; [r]apid growth; [a]cne; [and] [a]dult body odor.” *Precocious Puberty*, *supra*.

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

103. Christopher M. Wittich, Christopher M. Burkle, & William L. Lanier, *Ten Common Questions (and Their Answers) About Off-Label Drug Use*, 87 MAYO CLINIC PROC. 982, 983 (2012), <http://dx.doi.org/10.1016/j.mayocp.2012.04.017> [<https://perma.cc/6XMV-375V>]. “[M]orphine has never received an FDA indication for pain treatment in children, but it is extensively used for this indication in hospitalized pediatric patients.” *Id.*

104. See Grace Lidinsky-Smith, Gender Care Consumer Advocacy Network, Opinion, *There’s No Standard for Care When it Comes to Trans Medicine*, NEWSWEEK (June 25, 2021, 11:27 AM), <https://www.newsweek.com/theres-no-standard-care-when-it-comes-trans-medicine-opinion-1603450> [<https://perma.cc/ZH3B-6VLE>].

105. Wittich et al., *supra* note 103, at 985 (“To add additional indications for an already approved medication requires the proprietor to file a supplemental drug application, and, even if eventually approved, revenues for the new indication may not offset the expense and effort of obtaining approval.”).

106. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021).

Act] was not to ban a treatment. It was to ban an outcome that the State deems undesirable.”¹⁰⁷

Importantly, the court rejected Arkansas’s argument that the FDA-approved treatment for precocious puberty is fundamentally different from using puberty blockers to suppress puberty.¹⁰⁸ It is true that the side effects of puberty blockers are well-known, but “[f]ew data are available on the effect of GnRH analogs on [bone mineral density] in adolescents with [gender dysphoria]/gender incongruence” or on “the effects of GnRH analogs on brain development.”¹⁰⁹ Nonetheless, the court’s reasoning conforms with the 2016 Rule even though the court did not reference Section 1557 of the ACA in its decision.¹¹⁰

Finally, the court held that the SAFE Act’s “ban of services and referrals by healthcare providers [was] not substantially related to the regulation of the ethics of the medical profession in Arkansas.”¹¹¹ The court emphasized that “[g]ender-affirming treatment is supported by medical evidence that has been subject to rigorous study” and has been recognized by “[e]very major expert medical association” as a form of treatment for gender dysphoria in children.¹¹² The court reasoned that the law’s outcome was “counterintuitive” to the stated goal of protecting children by “ensuring that healthcare providers in the State of Arkansas abide by ethical standards.”¹¹³ Instead, the court reasoned that the law failed to protect children by “ensur[ing] that its healthcare providers do not have the ability to abide by their ethical standards.”¹¹⁴ Thus, the court held that “[i]f the Act is not enjoined, healthcare

107. *Id.*

108. *See id.* at 893.

109. Hembree et al., *supra* note 100, at 3882–83.

110. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31471 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2021)).

111. *Brandt*, 551 F. Supp. 3d at 891.

112. *Id.*

113. *Id.*

114. *Id.*

providers . . . will not be able to consider the recognized standard of care for adolescent gender dysphoria.”¹¹⁵

2. *Due Process Claim*

The Supreme Court has repeatedly held that absent a compelling interest, states may not interfere with a parent’s fundamental right to “make decisions concerning the care, custody, and control of their children.”¹¹⁶ The Court’s deference to parental decision-making is based in part on the notion that “[p]arents are presumed to be acting in the best interest of their children.”¹¹⁷ But the Court has “recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”¹¹⁸ This line of reasoning has allowed state laws prohibiting conversion therapy to withstand appeal.¹¹⁹ In such cases, appellate courts found no reason to disagree with legislatures’

115. *Id.* Regarding the Equal Protection issue:

the Court finds that Plaintiffs will suffer irreparable harm if [H.B. 1570] is not enjoined. The Act will cause irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment. Plaintiffs who have begun puberty blocking hormones will be forced to stop the treatments which will cause them to undergo endogenous puberty. Plaintiffs who will soon enter puberty will lose access to puberty blockers. In each case, Patient Plaintiffs will have to live with physical characteristics that do not conform to their gender identity, putting them at high risk of gender dysphoria and lifelong physical and emotional pain. Parent Plaintiffs face the irreparable harm of having to watch their children experience physical and emotional pain or of uprooting their families to move to another state where their children can receive medically necessary treatment. Physician Plaintiffs face the irreparable harm of choosing between breaking the law and providing appropriate guidance and interventions for their transgender patients.

Id. at 892.

116. *See Troxel v. Granville*, 530 U.S. 57, 66, 80 (2000). “[T]he ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ . . .” *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

117. *Brandt*, 551 F. Supp. 3d at 892 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

118. *Parham*, 442 U.S. at 603.

119. *See Pickup v. Brown*, 740 F.3d 1208, 1235 (9th Cir. 2014) (“[P]arents have a fundamental right to raise their children as they see fit, but . . . cannot compel the State to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views.”) (internal quotation marks omitted).

conclusion that conversion therapy is “harmful and ineffective.”¹²⁰ However, in the equal protection analysis discussed above, the court in *Brandt v. Rutledge* was not persuaded that gender-affirming care is harmful.¹²¹

Therefore, applying that idea to the facts in this case, the Eastern District of Arkansas found that the parent plaintiffs “have a fundamental right to seek [gender-affirming] care for their children and, in conjunction with their adolescent child’s consent and their doctor’s recommendation, make a judgment that medical care is necessary.”¹²² Because the SAFE Act infringed on this “fundamental parental right,” the court applied the strict scrutiny standard when deciding the due process claim.¹²³

In doing so, the court held that the defendants failed to meet the “burden of showing that Arkansas has a compelling state interest in infringing upon parents’ fundamental right to seek medical care for their children, or that [the SAFE Act] is narrowly tailored to serve that interest.”¹²⁴ Like in its ruling on the equal protection claim, the court questioned the sincerity of the defendants’ “stated goal of protecting Arkansas’s children,” calling it “pretextual” because the SAFE Act only bans the use of puberty blockers for the treatment of gender dysphoria in transgender children but permits the use for cisgender children.¹²⁵

120. *Id.* at 1232; *King v. Governor of N.J.*, 767 F.3d 216, 239 (3d Cir. 2014) (finding that, based on the evidence presented to the New Jersey legislature, lawmakers were not “unreasonable” to conclude that conversion therapy was harmful). *But see* *Otto v. City of Boca Raton*, 981 F.3d 854, 860, 871 (11th Cir. 2020) (holding city’s ban on talk therapy violated the First Amendment).

121. *See supra* Section II.A.1.

122. *Brandt*, 551 F. Supp. 3d at 892. “[If] a parent adequately cares for [their] children, ‘there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.’” *Id.* (quoting *Troxel v. Granville* 530 U.S. 57, 68–69 (2000)).

123. *Id.* at 893. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (creating the test for strict scrutiny).

124. *Brandt*, 551 F. Supp. 3d at 893.

125. *Id.*

3. *First Amendment Claim*

Finally, the plaintiffs argue that the SAFE Act infringes upon their First Amendment rights by “prevent[ing] healthcare professionals from speaking, and their patients and parents from hearing, about medically accepted treatments for gender dysphoria.”¹²⁶ When government regulates speech based on its content, the Supreme Court holds those laws to be “presumptively unconstitutional” and subject to strict scrutiny.¹²⁷ Moreover, the Court finds restrictions of viewpoints to be “a ‘more blatant’ and ‘egregious form of content discrimination.’”¹²⁸

In her response, Arkansas Attorney General Rutledge attempted to sidestep the issue of free speech. Instead, she argued that the SAFE Act only regulated professional conduct, noting that WPATH’s own guidelines indicate that a referral is conduct because they advise that the referring health professional should “provide documentation—in the chart and/or referral letter—of the patient’s personal and treatment history, progress, and eligibility.”¹²⁹ The court dismissed this argument, citing Supreme Court precedent that “the creation and dissemination of information are speech within the meaning of the First Amendment.”¹³⁰ Accordingly, the court held that the law’s “ban on referrals by healthcare providers [was] a regulation of speech.”¹³¹ Additionally, the court pointed to Supreme Court findings that “professional speech” is not recognized as a distinct category of speech under the law.¹³² Therefore, a state may not deny someone their First Amendment rights “under the guise of prohibiting professional misconduct.”¹³³ Once the court found that the SAFE Act regulated

126. *Id.*

127. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

128. *Reed*, 576 U.S. at 168 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 525 U.S. 819, 829 (1995)).

129. *Brandt* Defense Brief, *supra* note 73, at 95 (internal quotation marks omitted); *WPATH Standards of Care*, *supra* note 14, at 181–82.

130. *Brandt*, 551 F. Supp. 3d at 893 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011)).

131. *Id.*

132. *Id.* (quoting *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018)).

133. *Id.* (quoting *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963)).

speech, its remaining analysis was straightforward and succinct.¹³⁴ Applying the strict scrutiny standard, the court rejected the argument that the State of Arkansas had a compelling interest in preventing parents and their children from receiving “truthful information” about “the recognized standard of care for adolescent gender dysphoria.”¹³⁵

B. *Battle Of the Experts: Precedent*

When Governor Hutchinson vetoed the SAFE Act, he did so out of fear that it could set a precedent allowing state legislatures to obstruct the doctor-patient relationship.¹³⁶ Instead, the *Brandt* decision may ultimately set a different precedent, preventing lawmakers from interfering with the doctor-patient relationship. Historically, the Supreme Court has shown deference to physicians’ medical judgment.¹³⁷ In *Doe v. Bolton*, the “companion case” to *Roe v. Wade*, the Supreme Court “underscored the importance of affording the physician adequate discretion in the exercise of medical judgment.”¹³⁸ Moreover, the Court found it critical that physicians be allowed to exercise their medical judgment “in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”¹³⁹ Overall, as a general matter, the Supreme Court recognizes that, when faced with “complex medical judgment[s],” disagreement amongst experts should not only be expected but tolerated.¹⁴⁰ However, in cases involving gender dysphoria where the overwhelming weight of medical opinion favors gender-affirming care, it is unlikely that courts will find deviating opinions credible. Therefore, barring a reversal of course by the

134. *See id.* at 894.

135. *Id.* at 891, 893–94 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

136. *Pereira*, *supra* note 77.

137. *See generally* *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979); *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In light of *Dobbs v. Jackson Women’s Health Organization*, the level of deference to physicians’ medical judgment in the provision of abortion care is in flux. *See Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

138. *Colautti*, 439 U.S. at 387.

139. *Doe*, 410 U.S. at 192.

140. *Colautti*, 439 U.S. at 401.

medical community, it is hard to envision that any law categorizing gender-affirming care as experimental would not run afoul of the Constitution's Due Process Clause or the First Amendment.

C. Compulsion: American College of Pediatricians v. Becerra

Unlike the Arkansas lawmakers who insist their ban on gender-affirming care does not regulate speech, the healthcare providers suing President Biden's HHS Secretary, Xavier Becerra, claim the "2016 Rule's referral mandate" violates their First Amendment rights.¹⁴¹ In *American College of Pediatricians v. Becerra*, the plaintiffs argued that "it is harmful to encourage a patient to undergo gender transition procedures, and so referring for or providing information affirming medical transition procedures is contrary to [their] best medical and ethical judgment."¹⁴²

The Supreme Court has long held that government cannot compel speech.¹⁴³ In an opinion overruling a prior Supreme Court decision that upheld a state law compelling students' participation in a flag-salute, Justice Jackson noted: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁴⁴

However, equally strong precedent dictates that, in cases involving the provision of healthcare, federal funding does not come without strings attached.¹⁴⁵ In *Rust v. Sullivan*, the Supreme Court held that a

141. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 893 (E.D. Ark. 2021); *Becerra* Complaint, *supra* note 27, at 16, 61–62.

142. *Becerra* Complaint, *supra* note 27, at 63.

143. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

144. *Id.*

145. *See* *Maher v. Roe*, 432 U.S. 464, 465–66, 480 (1977) (holding that although "Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the joint federal-state Medicaid program established by that statute," that ruling "does not proscribe government funding of nontherapeutic abortions"). Congress's role is to determine which controversial

federal program promoting family planning yet prohibiting any program participant receiving federal funding from providing counseling on abortion or making referrals for abortion did not violate the Constitution.¹⁴⁶ In that case, the Supreme Court held that “the government may make a value judgment” favoring one activity over another and “implement that judgment by the allocation of public funds.”¹⁴⁷ Moreover, it can do so “without violating the Constitution” because “[t]here is a basic difference between direct state interference with a protected activity [like free speech] and state encouragement of an alternative activity consonant with legislative policy.”¹⁴⁸ This judgment does not amount to “discriminat[ion] on the basis of viewpoint.”¹⁴⁹ Instead, the government “has merely chosen to fund one activity to the exclusion of the other.”¹⁵⁰

Here, HHS has listened to the medical community’s consensus and has chosen to only fund treatments for gender dysphoria that include gender-affirming care as one of the potential treatment options. Unlike Arkansas’s “Health Care Ban,” which prevents all doctors in the state from making referrals for gender-affirming care, HHS’s regulation only impacts physicians who receive federal funding.¹⁵¹ Granted, due to the ubiquity of Medicare and Medicaid dollars in the nation’s healthcare system, the regulatory reach of Section 1557 is nearly absolute.¹⁵² In the preamble to the 2016 Rule, HHS “concluded that almost all practicing physicians in the United States are reached by Section 1557 because they accept some form of Federal remuneration

social policies deserve funding. *Id.* “Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.” *Id.* See also *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that the Hyde Amendment, which prohibited federal funding of abortions, did not violate the Constitution).

146. See *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

147. *Id.* at 174, 192–93 (citing *Maier*, 432 U.S. at 474).

148. *Id.* at 193 (quoting *Maier*, 432 U.S. at 475); see *Maier*, 432 U.S. at 476 (“Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.”).

149. *Rust*, 500 U.S. at 193.

150. *Id.*

151. H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); *Brandt* Amici Brief, *supra* note 86, at 2; Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31445 (May 18, 2016) (codified at 45 C.F.R. pt. 92 (2021)).

152. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31445–46.

or reimbursement.”¹⁵³ Importantly, the *Becerra* plaintiffs implied that *Rust* should guide the court’s decision in this case, lamenting the fact that due to HHS’s referral mandate, physicians “face an untenable choice: either act against their medical judgment . . . by [making referrals for] . . . medically dangerous gender-transition interventions, or succumb to huge financial penalties, lose participation in Medicaid and other federal funding, and, as a practical matter, lose the ability to practice medicine in virtually any setting.”¹⁵⁴

However, more recently, the Supreme Court has suggested that there may be a limit to the government’s “coercing of speech.”¹⁵⁵ In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Supreme Court distinguished *Rust*, holding that when government regulations “requir[e] recipients [of federal funding] to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient” and thus violates the First Amendment.¹⁵⁶ However, because HHS only requires physicians to refer patients to specialists who may prescribe gender-affirming care, it is unlikely a court would find the plaintiffs in *Becerra* are required to adopt the government’s view as their own.

Finally, physicians may not be immune to civil lawsuits even if they choose to forgo federal funding to avoid referring transgender patients for affirming care.¹⁵⁷ Physicians deviating from their state’s accepted standard of care was once acceptable if a “respectable minority” approved of the deviation.¹⁵⁸ However, most courts now take the position that “the standards of medical practice cannot be determined

153. *Id.* at 31446.

154. *Becerra* Complaint, *supra* note 27, at 2.

155. *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 222 (2013) (Scalia, J., dissenting).

156. *Id.* at 218 (majority opinion).

157. *See* Lee Gutschenritter, *Countering Standard of Care Defenses: How to Frame Your Case for Success*, in STATE BAR GA., MEDICAL MALPRACTICE BOOTCAMP 6–7 (2019), https://www.gabar.org/membership/cle/upload/10308_medicalMalpracticeBootcamp0919-ebookMobile.pdf [<https://perma.cc/88PW-5H5R>] (“The medical judgment defense is frequently raised in medical malpractice cases.”). “As a legal matter, a doctor can use his best judgment and still violate the standard of care.” *Id.* at 7.

158. *State Bd. of Med. Exam’rs v. McCroskey*, 880 P.2d 1188, 1194 (Colo. 1994).

simply by counting how many physicians follow a particular practice.”¹⁵⁹ Instead, “[t]he content of the duty of care must be objectively determined by reference to the availability of medical and practical knowledge” and “failure to conform to an established medical custom regarding care will generally lead inescapably to the conclusion that the duty of care has been breached.”¹⁶⁰

III. PROPOSAL

*Primum non nocere.*¹⁶¹ First, do no harm.¹⁶² Although this “ancient dictum of medical ethics” does not appear in the text of the Hippocratic Oath, “avoiding harm” endures as a guiding principle in medicine.¹⁶³ Accordingly, the motivations of physicians who do not support gender-affirming care should not automatically be equated with the motivations of politicians who may be motivated by animus. Often these pediatricians lack the proper training to treat children with gender dysphoria.¹⁶⁴

However, “[t]he right to practice medicine is a privilege” granted by state medical boards.¹⁶⁵ Once granted, physicians retain this privilege by “demonstrat[ing] that they have maintained acceptable standards of

159. See, e.g., *id.*

160. *Hall v. Hilbun*, 466 So. 2d 856, 872 (Miss. 1985). “[C]ustoms vary within given medical communities and from one medical community to another.” *Id.* at 871–72. “[A] physician may incur civil liability only when the quality of care he renders (including his judgment calls) falls below minimally acceptable levels.” *Id.* at 871.

161. *Primum Non Nocere*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100345841> [<https://perma.cc/KL6Z-3MR9>].

162. *Id.*

163. *Id.*; *Greek Medicine*, NAT'L LIBR. OF MED., https://www.nlm.nih.gov/hmd/greek/greek_oath.html [<https://perma.cc/5PKB-929Y>] (Feb. 7, 2012) [hereinafter *Hippocratic Oath*]; Robert H. Shmerling, *First, Do No Harm*, HARVARD HEALTH PUBL'G: HARV. HEALTH BLOG (June 22, 2020), <https://www.health.harvard.edu/blog/first-do-no-harm-201510138421> [<https://perma.cc/65AU-T5VP>] (stating that the principle of avoiding harm comes from another book by Hippocrates, *Of the Epidemics*).

164. Rafferty, *supra* note 3, at 10 (“In a 2009–2010 survey of US medical schools, it was found that the median number of hours dedicated to LGBTQ health was [five], with one-third of US medical schools reporting no LGBTQ curriculum during the clinical years.”).

165. Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, AMA J. ETHICS, <https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-06/pfor1-0504.pdf> [<https://perma.cc/4AHG-GE3N>].

ethics and medical practice.”¹⁶⁶ Except in “extreme cases, when a child’s well-being is significantly threatened by withholding treatment,” or when the treatment itself is dangerous, lawmakers should be cautious not to inject themselves into the doctor-patient relationship.¹⁶⁷ Instead, the primary policy goal should be to eliminate obstacles to care through consensus building.

A. *Universally Rejected: Ban Conversion Therapy Nationwide*

“Conversion” or “reparative therapy” is “based on the false premise that being lesbian, gay, bisexual, transgender, or queer (LGBTQ) is a mental illness that needs to be cured.”¹⁶⁸ According to AAP guidelines, referral for conversion or reparative theory is never appropriate.¹⁶⁹ Despite being “universally rejected” by the medical community, a recent national survey found that “10% of LGBTQ youth reported undergoing conversion therapy.”¹⁷⁰ Moreover, “those who had done so report[ed] more than twice the rate of attempting suicide in the past year compared to those who did not,” bolstering the scientific consensus that conversion therapy harms transgender youth by “increasing internalized stigma, distress, and depression.”¹⁷¹

166. *Id.*

167. Rebecca M. Harris, Amy C. Tishelman, Gwendolyn P. Quinn & Leena Nahata, *Decision Making and the Long-Term Impact of Puberty Blockade in Transgender Children*, 19 AM. J. BIOETHICS 67, 68 (2019).

168. *Therapeutic Fraud Prevention Act of 2019 - S.2008*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/federal-legislation/therapeutic-fraud-prevention-act-of-2019-s-2008> [https://perma.cc/5VKR-KYP5] (Mar. 10, 2020).

169. David A. Levine & Comm. on Adolescence, *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 AM. ACAD. PEDIATRICS e297, e301 (2013) www.pediatrics.org/cgi/doi/10.1542/peds.2013-1283 [https://perma.cc/Y7JP-AJP7].

170. *Therapeutic Fraud Prevention Act of 2019 - S. 2008*, *supra* note 168; Amit Paley, *National Survey on LGBTQ Youth Mental Health 2020*, at 1, TREVOR PROJECT, <https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf> [https://perma.cc/69CB-AKNM].

171. Jeff Taylor, *Biden Talked a Big Game on LGBTQ Rights. Here’s What His Agenda May Look Like.*, NBC NEWS (Nov. 11, 2020, 3:29 PM), <https://www.nbcnews.com/feature/nbc-out/biden-talked-big-game-lgbtq-rights-here-s-what-his-n1247451> [https://perma.cc/9X6H-BBF3]; Levine et al., *supra* note 169.

Currently, there is no federal ban on conversion therapy.¹⁷² School counselors, social workers, and mental health professionals working in foster care and juvenile justice institutions are not prohibited “from directly providing or referring minors to providers of conversion therapy.”¹⁷³ Unlike in Canada, which banned the practice of conversion therapy on December 8, 2021, there does not appear to be support for a nationwide ban in the United States.¹⁷⁴ Congressman Ted Lieu, who authored the first successful statewide ban of conversion therapy as a state senator in California, has repeatedly failed to gain support for his Therapeutic Fraud Prevention Act.¹⁷⁵ The legislation would “amend[] the Federal Trade Commission Act to clarify that providing conversion therapy to any person in exchange for monetary compensation or advertising such services is an unfair or deceptive act or practice.”¹⁷⁶ Initially introduced in 2015, the bill has been reintroduced in 2017, 2019, and 2021.¹⁷⁷ That is not to say there has not been any progress. Since California banned conversion therapy in 2012, nineteen states plus the District of Columbia have passed similar laws.¹⁷⁸ Additionally, six states and one territory partially ban

172. See Caitlin O’Kane, *Canada Bans Conversion Therapy*, CBS NEWS (Dec. 9, 2021, 9:25 AM), <https://www.cbsnews.com/news/canada-bans-conversion-therapy/> [<https://perma.cc/ZD83-Z6UQ>].

173. HUM. RTS. CAMPAIGN, *BLUEPRINT FOR POSITIVE CHANGE 2020*, at 11 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Blueprint-2020.pdf?mtime=20201110185320&focal=none> [<https://perma.cc/UUT9-GX7T>].

174. O’Kane, *supra* note 172.

175. Press Release, Ted Lieu, Congressman for California’s 33rd District, Rep Lieu, Sen Murray and Sen Booker Reintroduce Conversion Therapy Ban (June 24, 2021), <https://lieu.house.gov/media-center/press-releases/rep-lieu-sen-murray-and-sen-booker-reintroduce-conversion-therapy-ban> [<https://perma.cc/ET7R-DA5E>].

176. *Therapeutic Fraud Prevention Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/therapeutic-fraud-prevention-act> [<https://perma.cc/8LKL-VXR6>] (May 23, 2022).

177. *Therapeutic Fraud Prevention Act*, WIKIPEDIA, https://en.wikipedia.org/wiki/Therapeutic_Fraud_Prevention_Act#115th_Congress [<https://perma.cc/JD3M-RC9M>] (May 30, 2022, 15:26 UTC).

178. *Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/CS8T-9ZC8>] (Oct. 25, 2022). As of October 2022, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington have banned conversion therapy. *Id.*

conversion therapy for minors.¹⁷⁹ Even in places like Ohio where state legislatures have been unwilling to pass statewide bans, local city councils have been willing to protect minors by criminalizing a form of therapy that “has long been discredited as harmful by medical professionals.”¹⁸⁰ Nonetheless, in 2022, it is disgraceful for twenty-one states to not have a law outlawing conversion therapy.

During his presidential campaign, Joe Biden vowed to bring an end to the controversial practice.¹⁸¹ However, the President has fallen short of his pledge.¹⁸² On June 15, 2022, he did sign an executive order tasking HHS with “explor[ing] guidance to clarify that federally-funded programs cannot offer so-called ‘conversion therapy.’”¹⁸³ The order also authorized the Federal Trade Commission to undertake many of the same regulatory measures proposed in Congressman Lieu’s bill.¹⁸⁴ Although encouraging, both measures fall short of an outright ban.

Even for a topic as divisive as gender-affirming care, some basic tenets should be shared by all people. Invariably, it is much easier to pass or, in this case, not pass laws that impact other people’s children. It is also quite possible that many politicians who oppose banning conversion therapy have never met a transgender child. Rather than shouting at these lawmakers, energy would be better spent inviting them to hear firsthand the damaging effects such “treatment” can have. That type of “conversion” is not likely to occur under the glare of a national spotlight. But it might be possible at the local coffee shop.

179. *Id.* As of October 2022, Michigan, Minnesota, North Carolina, North Dakota, Pennsylvania, Puerto Rico, and Wisconsin have partially banned conversion therapy. *Id.*

180. Courtney Astolfi, *Cleveland City Council Bans Conversion Therapy for LGBTQ Youth*, CLEVELAND.COM, <https://www.cleveland.com/news/2022/10/cleveland-city-council-to-ban-conversion-therapy-for-lgbtq-youth.html> [<https://perma.cc/AG7W-SLMP>] (Oct. 11, 2022, 4:09 PM).

181. *See* Taylor, *supra* note 171.

182. Trevor Hunnicutt, *Biden Targets Conversion Therapy, Transgender Bans in Pride Month Order*, REUTERS (June 15, 2022, 6:49 PM), <https://www.reuters.com/world/us/biden-pride-order-aims-conversion-therapy-transgender-bans-2022-06-15/> [<https://perma.cc/D3WA-9X2X>].

183. Press Release, White House, Fact Sheet: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/> [<https://perma.cc/A4KW-AHXS>].

184. *Id.*

B. Wedge Issue: Fostering Care Through Parental Support

There is a misconception amongst certain Conservative groups, even amongst highly educated physicians, that a politicized medical community is working with the federal government to force pediatricians to prescribe puberty blockers to their patients.¹⁸⁵ In reality, AAP guidelines contradict this narrative.¹⁸⁶ What the AAP does make clear, however, is that pediatricians are obligated to refer transgender youth to a mental health professional qualified to treat gender dysphoria if they lack sufficient training themselves.¹⁸⁷

The second misconception amongst Conservative groups is that physicians and therapists treating gender dysphoria always prescribe puberty-blocking hormones.¹⁸⁸ However, AAP guidelines contradict this narrative as well, making it clear that there is no “prescribed path, sequence, or end point” for treating gender dysphoria because “[t]he decision of whether and when to initiate gender-affirmative treatment is personal and involves careful consideration of risks, benefits, and other factors unique to each patient and family.”¹⁸⁹ Healthcare providers recognize that, for some children, “rushing into transition could be as harmful as putting it off.”¹⁹⁰

Ironically, two of the people “fan[ning] the flames” of the opposition are proponents of gender-affirming care.¹⁹¹ Laura Edwards-Leeper is the founding psychologist at the first pediatric gender clinic in the United States.¹⁹² Erica Anderson, who is transgender and also a clinical psychologist, is the former president of the U.S. Professional

185. *Becerra* Complaint, *supra* note 27, at 9.

186. Rafferty, *supra* note 3, at 4 (“If a pediatric provider does not feel prepared to address gender concerns when they occur, then referral to a pediatric or mental health provider with more expertise is appropriate.”).

187. See Levine et al., *supra* note 169, at e297.

188. See MURCHISON, *supra* note 1, at 13–15.

189. Rafferty, *supra* note 3, at 5; MURCHISON, *supra* note 1, at 14, 15.

190. MURCHISON, *supra* note 1, at 15–16.

191. Emily Bazelon, *The Battle Over Gender Therapy*, N.Y. TIMES, <https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html> [https://perma.cc/Z59H-3PPR] (June 24, 2022).

192. *Id.*

Association for Transgender Health (USPATH).¹⁹³ In October 2021, during an interview with journalist Abigail Shrier, Anderson criticized some of her colleagues for providing “sloppy” care to their transgender patients.¹⁹⁴ Although Anderson told Shrier that she anticipated criticism for her comments, her colleagues were more concerned about the audience than Anderson’s words.¹⁹⁵ In addition to being a journalist, Shrier is the author of *Irreversible Damage: The Transgender Craze Seducing Our Daughters*.¹⁹⁶ Knowing that Shrier’s audience would likely seize upon Anderson’s words angered Anderson’s colleagues at USPATH.¹⁹⁷ A week after Shrier posted the article on Substack, USPATH and WPATH issued a statement warning against engaging the “lay press” in the “scientific debate” over gender-affirming care.¹⁹⁸ Anderson ignored their warning and, instead, co-authored an opinion essay with Edwards-Leeper in the *Washington Post*.¹⁹⁹

In the essay, the psychologists decried the “sloppy, dangerous care” provided by some U.S. and Canadian providers who they accused of “hastily dispensing medicine” without conducting proper mental health assessments.²⁰⁰ Although, in that same essay, the pair voiced their “enthusiastic[] support” for gender-affirming care along with their “digust[]” for laws banning it, many felt the damage was done.²⁰¹ One week after the *Post* article appeared, Genecis, the lone adolescent gender clinic in the Dallas area willing to provide hormone therapy to minors, closed under “political pressure” from Texas Governor Greg

193. *Id.*

194. *Id.*; Abigail Shrier, *Top Trans Doctors Blow the Whistle on ‘Sloppy’ Care*, COMMON SENSE (Oct. 4, 2021), <https://www.commonsense.news/p/top-trans-doctors-blow-the-whistle> [<https://perma.cc/5B88-3F97>].

195. *Id.*; Bazelon, *supra* note 191.

196. Bazelon, *supra* note 191.

197. *Id.*

198. *Id.*

199. Laura Edwards-Leeper & Erica Anderson, *The Mental Health Establishment Is Failing Trans Kids*, WASH. POST (Nov. 24, 2021, 5:54 PM), <https://www.washingtonpost.com/outlook/2021/11/24/trans-kids-therapy-psychologist/> [<https://perma.cc/YM3K-3JX3>].

200. *Id.*

201. *Id.*

Abbott.²⁰² Andrew Cronyn, a “pediatrician and a former adviser on policy about L.G.B.T. health for the [AAP],” placed the blame squarely on Edwards-Leeper.²⁰³

Sadly, in the aftermath of that article, both sides have come away with the wrong lessons. Conservative media has identified that by “misrepresent[ing] facts about [transgender] care,” they can force politicians to take action.²⁰⁴ In September 2022, “right-wing pundit” Matt Walsh leveraged his Twitter following, which included Tennessee State Representative Jason Zachary, to pressure Vanderbilt University Medical Center to temporarily pause gender-affirming surgeries for minors.²⁰⁵ For their part, instead of engaging in a dialogue in an attempt to reassure parents that their fears are misguided, proponents of gender-affirming care are seemingly stoking division within families that have transgender children.

After Virginia Governor Glenn Youngkin tasked his state’s department of education with updating its guidelines to require schools to notify a child’s parents if their child wants to socially transition, State Delegate Elizabeth Guzman proposed a bill that would make it a crime if parents did not affirm their child’s gender identity.²⁰⁶ Ultimately, Virginia Democrats did not move forward with the bill due to the political “firestorm” it ignited in the state.²⁰⁷

However, in California, Governor Gavin Newsome did sign a bill into law transforming California into a “sanctuary state for transgender

202. Bazelon, *supra* note 191.

203. *Id.*

204. Zachary Schermele, *Tennessee GOP Urges Pediatric Clinic to Stop Providing Gender-Affirming Surgeries*, NBC NEWS (Oct. 1, 2022, 10:54 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/tennessee-gop-urges-pediatric-clinic-stop-providing-gender-affirming-s-rcna50181> [<https://perma.cc/GT2V-D5M2>].

205. *Id.*; Associated Press, *Vanderbilt to Pause Gender-Affirming Procedures for Minors*, NBC NEWS (Oct. 10, 2022, 9:24 AM), <https://www.nbcnews.com/nbc-out/out-news/vanderbilt-pause-gender-affirming-surgeries-minors-rcna51445> [<https://perma.cc/SST7-SPMF>].

206. Ava Sasani, *Virginia Reverses School Protections for Transgender Students*, N.Y. TIMES (Sept. 18, 2022), <https://www.nytimes.com/2022/09/18/us/virginia-transgender-students.html> [<https://perma.cc/N8HV-VPEJ>]; Kayla Gaskins, *VA Democrats Say They Will Not Introduce Controversial LGBTQ Bill Criminalizing Parents*, NEWS5 WCYB (Oct. 19, 2022), <https://wcyb.com/news/nation-world/va-democrats-say-they-will-not-introduce-controversial-lgbtq-bill-criminalizing-parents> [<https://perma.cc/26KA-DC5Q>].

207. Gaskins, *supra* note 206.

children.”²⁰⁸ By providing “refuge” to Texas and Alabama families with transgender children who cannot legally obtain gender-affirming care in their home states, the law attempts to combat Republican efforts to “tear . . . families apart.”²⁰⁹ However, a provision in the law that grants California “temporary emergency jurisdiction” to decide custody disputes between parents who disagree over whether their child should receive gender-affirming care may result in unanticipated collateral damage.²¹⁰

These are only the most recent examples of what may be well-meaning, yet misguided, legislation. In 2019, the State of Washington safeguarded an individual’s right to privacy by requiring health insurance companies to send all communications concerning the treatment of “sensitive health care services,” which includes treatments of gender dysphoria and gender-affirming care, directly to patients age thirteen or older.²¹¹ The reasoning that “[w]hen people are assured of the ability to confidentially access health care services, they are more likely to seek health services, disclose health risk behaviors to a clinician, and return for follow-up care” is not unsound.²¹² Nonetheless, this reasoning may be short-sighted, considering the minor child’s parent is still responsible for any unpaid copays or

208. Lindsey Holden & Andrew Sheeler, *California to Become Sanctuary State for Transgender Children Under New Law*, SACRAMENTO BEE, <https://www.sacbee.com/news/politics-government/capitol-alert/article266601076.html> [<https://perma.cc/7FNA-G5JG>] (Sept. 30, 2022, 1:01 PM).

209. Jo Yurcaba, *California Governor Signs Bill Offering Legal Refuge to Transgender Youths*, NBC NEWS (Sept. 30, 2022, 4:30 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/california-governor-signs-bill-offering-legal-refuge-transgender-youth-rcna50240> [<https://perma.cc/Y5UA-HGSJ>] (quoting United States Senator Scott Wiener).

210. Reuters Fact Check, *Fact Check-California Law Gives Courts Clear Jurisdiction Over Minors Seeking Gender Care in the State*, REUTERS (Sept. 30, 2022, 10:23 AM), <https://www.reuters.com/article/factcheck-explainer-california-transgend/fact-check-california-law-gives-courts-clear-jurisdiction-over-minors-seeking-gender-care-in-the-state-idUSL1N311JR> [<https://perma.cc/5XML-LQFN>] (internal quotation marks omitted).

211. See generally S.B. 5889, 66th Leg., Reg. Sess. (Wash. 2019); *Confidentiality of Health Care Services FAQ*, UNITED HEALTHCARE, <https://www.uhc.com/legal/required-state-notices/washington/confidentiality-of-health-care-services-faq> [<https://perma.cc/95J4-HL8P>]; Sue Lani Madsen, *Sue Lani Madsen: The Ultimate Surprise Medical Bill*, SPOKESMAN-REV. (Jan. 11, 2020), <https://www.spokesman.com/stories/2020/jan/11/sue-lani-madsen-the-ultimate-surprise-medical-bill/> [<https://perma.cc/FZM5-W33V>].

212. S.B. 5889, 66th Leg., Reg. Sess. (Wash. 2019).

deductibles related to the treatment.²¹³ Unlike some treatments, medical interventions for gender dysphoria can last years.²¹⁴ It is not hard to imagine an argument over a “surprise” bill growing so heated that it results in a transgender youth running away from home voluntarily or in a parent forcing them out of the house against their will.²¹⁵

Although there are instances of gender-dysphoric children in acute danger that warrant the administration of hormones without parental consent, the medical guidelines overwhelmingly support parental involvement in a child’s gender therapy.²¹⁶ Transgender adolescents who have the support of at least one person in their life experience markedly less distress than those who only face rejection.²¹⁷ To unwittingly remove a supportive parent prematurely ignores the science.

CONCLUSION

The medical community’s move to reclassify gender dysphoria as a condition that results in distress rather than a mental disorder has been instrumental in destigmatizing transgender people. However, state laws that aim to strip physicians of their ability to prescribe gender-affirming care, along with physicians’ refusal to comply with federal regulations requiring access to gender-affirming care, threaten to undo those gains. Although the available research does not point to any one mode of treatment that is perfect for everyone, there is a consensus in the medical community that family acceptance and access to care are critical for the mental health of children experiencing gender dysphoria. Lawmakers should ultimately leave a patient’s specific

213. Madsen, *supra* note 211.

214. *WPATH Standards of Care*, *supra* note 14, at 177.

215. See Madsen, *supra* note 211; Laura L. Kimberly, Kelly McBride Folkers, Phoebe Friesen, Darren Sultan, Gwendolyn P. Quinn, Alison Bateman-House, Brendan Parent, Craig Konnoth et al., *Ethical Issues in Gender-Affirming Care for Youth*, AM. ACAD. PEDIATRICS, Dec. 2018, at 1, 2 http://publications.aap.org/pediatrics/article-pdf/142/6/e20181537/1075510/peds_20181537.pdf [<https://perma.cc/TJW2-V8SR>].

216. See Rafferty, *supra* note 3, at 8.

217. *Id.*

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course of treatment to physicians who specialize in gender-affirming care, but the legal community can still play a vital role by removing barriers that limit access to care.