

COMMENT

KEEPING TRANS KIDS SAFE: THE CONSTITUTIONALITY OF PROHIBITING ACCESS TO PUBERTY BLOCKERS

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In 2021, state legislatures introduced over 120 anti-transgender bills, the highest number introduced in a single year in American history. As part of this onslaught, the Arkansas legislature passed Act 626 over the governor's veto, a law that prevents transgender youth from accessing gender-affirming healthcare. This Comment uses Act 626 as a case study to analyze the constitutionality of legislation that denies transgender individuals access to healthcare. Specifically, this Comment argues that Act 626 is unconstitutional under Fourteenth Amendment jurisprudence for two reasons. First, transgender individuals should be considered a quasi-suspect classification under Fourteenth Amendment Equal Protection Clause jurisprudence. Second, access to gender-affirming healthcare invokes the fundamental liberty interest in bodily autonomy under the Fourteenth Amendment Due Process Clause. Act 626 ultimately fails intermediate scrutiny analysis because it is not narrowly tailored to meet an important state interest.

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INTRODUCTION

Anti-transgender bills are on the rise throughout the United States. During 2021 alone, state legislatures introduced over 120 such bills, the highest number in a single year in American history.¹ These bills are broad in scope and include banning transgender girls from competing in girls' sports,² preventing transgender individuals from using the bathroom that corresponds with their gender identity,³ and denying transgender individuals access to gender-affirming care.⁴ On March 29, 2021, Arkansas passed one of the furthest reaching of these bills, enacting the Save Adolescents From Experimentation (SAFE) Act (Act 626 or "the Act").⁵ Act 626 prohibits minors from accessing

1. David L. Hudson Jr., *States Drive a Wave of Bills Affecting Transgender Youth*, ABA J. (Aug. 1, 2021, 1:50 AM), <https://www.abajournal.com/magazine/article/states-drive-a-wave-of-bills-affecting-transgender-youth> [https://perma.cc/Z85L-UBZQ]; Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html> [https://perma.cc/9ZHY-B54S].

2. See David Crary, *In US, Pride Month Festivities Muted by Political Setbacks*, AP NEWS (June 11, 2021), <https://apnews.com/article/joe-biden-health-coronavirus-pandemic-biden-cabinet-lifestyle-7c2b0853ab968eb38f9518ee38188048> [https://web.archive.org/web/20211031163327/https://apnews.com/article/joe-biden-health-coronavirus-pandemic-biden-cabinet-lifestyle-7c2b0853ab968eb38f9518ee38188048] (stating that, as of June 1, 2021, eight states had passed laws banning transgender girls from competing in girls' sports at public schools).

3. See, e.g., Jonathan Mattise, Kimberlee Kruesi & Lindsay Whitehurst, *Tennessee Moves to the Forefront with Anti-Transgender Laws*, AP NEWS (May 23, 2021), <https://apnews.com/article/tennessee-transgender-laws-b8d81d56287d6ed9d56c5da2203596b0> [https://web.archive.org/web/20220403013912/https://apnews.com/article/tennessee-transgender-laws-b8d81d56287d6ed9d56c5da2203596b0] ("[Tennessee] is poised to become the first [state] to require government buildings and businesses that are open to the public to post signs if they let trans people use multi-person bathrooms and other facilities associated with their gender identity. Public schools, meanwhile, will soon risk losing lawsuits if they let transgender students or employees use multi-person bathrooms or locker rooms that do not reflect their sex at birth.").

4. See, e.g., Jordan Blair Woods, *Arkansas Passes Sweeping and Draconian Law Targeting Transgender Youth*, JURIST (Apr. 12, 2021, 09:00:38 AM), <https://www.jurist.org/commentary/2021/04/jordan-blair-woods-arkansas-law-targets-transgender-youth> [https://perma.cc/XAJ5-REEA] ("The law . . . prohibits youth under the age of 18 from receiving transitional or puberty-blocking hormones and surgery, and allows private insurers to refuse gender-affirming care.").

5. An Act to Create the Arkansas Save Adolescents from Experimentation Act, H.B. 1570, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021); 2021 Ark. Acts 626.

gender-affirming care, including puberty blockers,⁶ hormone replacement therapy (HRT),⁷ and surgery.⁸ The legislature passed it despite Governor Asa Hutchinson's veto⁹ and national public outcry from medical and advocacy groups alike.¹⁰ Although the Eastern District Court of Arkansas issued a preliminary injunction against Act 626 in August 2021,¹¹ at least nineteen other state legislatures have since introduced similar legislation.¹² For example, just weeks after

6. Puberty blockers, also known as hormone blockers, work by temporarily blocking testosterone or estrogen production to delay changes associated with puberty, such as breast growth, facial hair growth, periods, voice deepening, and widening hips. *Puberty Blockers*, CHILDREN'S HOSP. ST. LOUIS, <https://www.stlouischildrens.org/conditions-treatments/transgender-center/puberty-blockers> [<https://perma.cc/A2P4-STDE>].

7. Hormone replacement therapy (HRT) involves the administration of estrogen or testosterone to treat gender dysphoria by inducing feminizing or masculinizing changes to the body. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 33 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [<https://perma.cc/KK5D-Z9WB>]. For example, in female-to-male patients, HRT can cause physical changes such as a deepened voice, increased body and facial hair growth, and an increased muscle mass. *Id.* at 36. In male-to-female patients, changes may include breast growth, decreased testicular size, and increased body fat. *Id.*

8. Gender alignment surgery can take many forms, but its purpose is to alter primary and/or secondary sex characteristics to align an individual's appearance with their gender identity. *Id.* at 55. For example, surgery for a transgender female may include an augmentation mammoplasty, vaginoplasty, clitoroplasty, gluteal implants, or hair reconstruction. *Id.* at 57. Surgery for a transgender male may include a subcutaneous mastectomy, implantation of testicular prosthesis, liposuction, or pectoral implants. *Id.*

9. An Act to Create the Arkansas Save Adolescents from Experimentation Act, H.B. 1570, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021).

10. Associated Press, *A Federal Judge Blocks Arkansas Ban on Trans Youth Treatments*, NPR (July 21, 2021, 1:53 PM), <https://www.npr.org/2021/07/21/1018867391/arkansas-trans-gender-confirming-treatment-judge-lawsuit> [<https://perma.cc/T6GJ-M2EY>] (“[Governor] Hutchinson vetoed the ban following pleas from pediatricians, social workers and the parents of transgender youths who said it would harm a community already at risk for depression and suicide.”).

11. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021).

12. Sara Reardon, *New Arkansas Law—and Similar Bills—Endanger Transgender Youth, Research Shows*, SCI. AM. (Apr. 9, 2021), <https://www.scientificamerican.com/article/new-arkansas-law-and-similar-bills-endanger-transgender-youth-research-shows> [<https://perma.cc/4M37-QGS2>]; see also *Legislative Tracker: Youth Healthcare Bans*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative->

Arkansas passed Act 626, Tennessee passed Senate Bill 126,¹³ which declares that “a healthcare prescriber shall not prescribe a course of treatment that involves hormone treatment for gender dysphoric or gender incongruent prepubertal minors.”¹⁴ Likewise, the Texas State Legislature introduced a bill that would prohibit physicians from treating youth by “affirming the child’s perception of the child’s sex if that perception is inconsistent with the child’s biological sex.”¹⁵ State legislators introduced similar legislation in Florida, Missouri, Alabama, and Montana; however, these efforts failed.¹⁶

This Comment reviews the constitutionality of state legislation that bans access to puberty blockers for minors by using Act 626 as a case study. The analysis will focus specifically on puberty blockers and not on other forms of gender-affirming care for two reasons. First, puberty blockers are only effective when prescribed to pubescent and pre-

tracker/medical-care-bans [<https://perma.cc/X774-GPZL>] (tracking the various state-sponsored anti-transgender medical care bans).

13. 2021 Tenn. Pub. Acts 460.

14. *Id.* § 1(b).

15. H.B. 133, 87th Leg., 2d Spec. Sess. (Tex. 2021). In February 2022, Texas Governor Greg Abbott took the state’s anti-transgender stance one step further by issuing a directive instructing state authorities to investigate gender-affirming care for transgender youth as child abuse. Jo Yurcaba, *Texas AG Says Transition Care for Minors Is Child Abuse Under State Law*, NBC NEWS (Feb. 23, 2022, 1:55 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-ag-says-transition-care-minors-child-abuse-state-law-rcna17176> [<https://perma.cc/NP9Y-VDCQ>]; Jo Yurcaba, *Texas Governor Calls on Citizens to Report Parents of Transgender Kids for Abuse*, NBC NEWS (Feb. 23, 2022, 4:52 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-governor-calls-citizens-report-parents-transgender-kids-abuse-rcna17455> [<https://perma.cc/97PY-U5QV>]. A Texas state district judge temporarily blocked the decree, but the state’s attorney general has vowed to appeal the decision to the Texas Supreme Court. Julián Aguilar, *A Texas Judge Blocks the State from Investigating Parents of Transgender Youth*, NPR (Mar. 11, 2022, 7:47 PM), <https://www.npr.org/2022/03/11/1086039378/texas-transgender-investigations-blocked> [<https://perma.cc/5ZCT-CUMT>].

16. H.B. 935, 123d Leg., Reg. Sess. (Fla. 2021) (creating the Vulnerable Child Protection Act which establishes criminal penalties for physicians who provide gender-affirming care to minors); H.B. 33, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (prohibiting medical providers from administering medical or surgical gender-affirming treatment to minors); H.B. 1, 2021 Leg., Reg. Sess. (Ala. 2021) (proposing the Alabama Vulnerable Child Compassion and Protection Act to ban the use of puberty-blocking drugs, hormone therapy, and gender-affirming surgery to treat gender dysphoric children); H.B. 113, 67th Leg., Reg. Sess. (Mont. 2021) (subjecting physicians who treat or refer minors to treatment for gender dysphoria to a fine of up to \$50,000).

pubescent youth.¹⁷ Thus, the Act completely closes the very window in which the treatment is effective. In contrast, other forms of gender-affirming care, such as HRT and surgery, continue to be effective after an individual turns eighteen.¹⁸ Therefore, the harm done by this Act is particularly salient when it comes to puberty blockers. Second, unlike with other forms of gender-affirming care, a patient can stop taking puberty blockers at any time, and the treatment's effects will be reversed.¹⁹ This renders the argument made by the Arkansas legislature and the Arkansas Attorney General, namely, that minors need to be protected from making permanent healthcare decisions, far less convincing against puberty blockers than against other forms of more permanent gender-affirming care.²⁰

This Comment argues that Act 626's prohibition on puberty blockers is unconstitutional because it violates the Fourteenth Amendment's Equal Protection Clause and Due Process Clause. The Act violates the Equal Protection Clause because it impermissibly discriminates against transgender individuals—whom courts have begun identifying as a protected class²¹—and discriminates on the basis

17. *Puberty Blockers*, *supra* note 6. For further information and statistics on the percentage of transgender individuals who first experienced gender dysphoria from a young age, see *Most Gender Dysphoria Established by Age 7, Study Finds*, CEDARS SINAI (June 16, 2020), <https://www.cedars-sinai.org/newsroom/most-gender-dysphoria-established-by-age-7-study-finds> [<https://perma.cc/GQY9-UXCZ>]. The Comment discusses a study by urologist Maurice Garcia, which found that “73% of the transgender women and 78% of the transgender men first experienced gender dysphoria by age 7.” *Id.*

18. JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, NAT'L CTR. FOR TRANSGENDER EQUAL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 26* (2011) (finding that most transgender individuals who had “transitioned” did so between the ages of eighteen and forty-four).

19. Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, Feb. 2020, at 1, 2 (“GnRHa therapy is unique among gender-affirming medical interventions in that the resultant pubertal suppression is fully reversible, with the resumption of endogenous puberty after their discontinuation.”).

20. *See infra* Section II.C; *see also* Safe Act, 2021 Ark. Acts 626 § 2 (detailing legislative findings that transgender youth need to be protected from the long-term effects of gender-affirming care); Defendant's Combined Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction; and Reply in Support of Defendants' Motion to Dismiss at 1, *Brandt v. Rutledge*, 2021 WL 3292057 (E.D. Ark. Aug. 2, 2021) (No. 4:21-CV-00450-JM) (arguing that children should be prevented from making decisions, such as using puberty blockers, that have irreversible physical consequences).

21. *See infra* Section I.A.1.

of sex.²² The Act also violates substantive due process because it infringes on the personal liberty interests of transgender youth.

Part I of this Comment explores Fourteenth Amendment equal protection and due process jurisprudence. It examines how courts decide which pieces of legislation to subject to a higher standard of constitutional review, and what tests the courts apply to determine whether the legislation impermissibly infringes on an individual or a group's rights. Part II argues that Act 626 should be subjected to, and fails, intermediate scrutiny under the Equal Protection Clause because it discriminates against individuals on the basis of their transgender status or on the basis of sex and under the Due Process Clause because it infringes on minors' fundamental interest in bodily autonomy. Finally, Part III concludes that the puberty blocker section of the Act is unconstitutional and recommends that, going forward, courts should consistently subject legislation that targets transgender individuals to heightened scrutiny to prevent the majority from discriminating against a politically powerless group.

I. BACKGROUND

To examine Act 626 under a constitutional analysis, Section I.A of this Comment provides additional context on Act 626. Section I.B provides an overview of how courts apply different levels of scrutiny when analyzing a constitutional challenge to legislation under the Fourteenth Amendment. Section I.C examines the tests used by courts to determine when legislation is subject to heightened scrutiny under the Equal Protection Clause, and Section I.D looks at applying heightened scrutiny in the context of the Due Process Clause.

22. This Comment will use "sex" to refer to the identity assigned at birth (usually male, female, or intersex) as indicated by biological characteristics such as sex chromosomes, gonads, internal reproductive organs, and external genitalia. *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 AM. PSYCH. 10, 11 (2012). In contrast, "gender" refers to "the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex." *Id.* However, this static definition of sex, and the seemingly clear-cut distinction between sex and gender, has been critiqued as failing to appreciate the role that social values and norms play in defining one's sex. See Katrina Karkazis, *The Misuses of "Biological Sex"*, 394 LANCET 1898, 1898–99 (2019) (arguing that "'sex' is not a static, discrete, or even strictly biological characteristic that exists prior to the relations and practices that produce it" and discussing the history and implications of decision-making regarding which characteristics should be used to define sex).

A. Arkansas Act 626

Representative Robin Lundstrum introduced Act 626 to the Arkansas State Legislature on February 25, 2021, and the legislature passed the Act shortly thereafter on March 29, 2021.²³ Facing national pressure from health and advocacy groups, Governor Hutchinson vetoed the bill.²⁴ He reasoned that it was overreaching and unreasonably interfered with the relationship between physicians, parents, and transgender youth working together to “deal with some of the most complex and sensitive matters involving young people.”²⁵ However, the legislature overrode the governor’s veto on April 6, 2021.²⁶ The American Civil Liberties Union filed suit challenging the constitutionality of the law on behalf of four transgender minors and their families, and the U.S. District Court for the Eastern District of Arkansas granted its request for a preliminary injunction one week before the law was scheduled to go into effect.²⁷

The original bill begins with a section detailing the legislative findings.²⁸ Among these are that “Arkansas has a compelling government interest in protecting the health and safety” of children²⁹ and that the use of puberty blockers³⁰ is being done “despite the lack

23. An Act to Create the Arkansas Save Adolescents From Experimentation Act, H.B. 1570, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021).

24. Associated Press, *supra* note 10.

25. Vanessa Romo, *Arkansas Governor Vetoes Ban on Gender-Affirming Care for Trans Youth*, NPR (Apr. 5, 2021, 5:46 PM), <https://www.npr.org/2021/04/05/984555637/arkansas-governor-vetoes-anti-transgender-treatment-ban-for-minors> [<https://perma.cc/Q8F4JFZP>].

26. *HB1570—To Create the Arkansas Save Adolescents from Experimentation (SAFE) Act*, ARK. STATE LEGISLATURE, <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1570&ddBienniumSession=2021%2F2021R> [<https://perma.cc/CQW4UPMU>] (providing procedural history of H.B. 1570).

27. Jo Yurcaba, *Judge Blocks Arkansas’ Ban on Gender-affirming Care for Transgender Minors*, NBC (July 21, 2021, 1:40 PM) <https://www.nbcnews.com/nbc-out/out-politics-and-policy/judge-blocks-arkansas-ban-gender-affirming-care-transgender-minors-rcna1477> [<https://perma.cc/7V5A-7D75>].

28. Safe Act, 2021 Ark. Acts 626 § 2.

29. *Id.* § 2(1).

30. The statute defines “puberty-blocking drugs” as gonadotropin-releasing hormone analogues or other synthetic drugs used in biological males to stop luteinizing hormone secretion and therefore testosterone secretion, or synthetic drugs used in biological females which stop the production of estrogens and progesterone, when used to delay or

of any long-term longitudinal studies evaluating [their] risks and benefits.”³¹ The law bars “gender transition procedures” for minors by prohibiting physicians from performing or making referrals for gender-affirming procedures³² and disallowing state and private health insurance companies from covering the procedures.³³ The law also gives individuals and the Arkansas Attorney General the right to bring a claim against a healthcare provider for an alleged violation.³⁴

Notably, the Act only prohibits the use of puberty-blocking drugs when used “for the purpose of assisting an individual with a gender transition.”³⁵ The Act specifies that “gender transition procedures” do not include the treatment of “medically verifiable disorder[s] of sex development,” any injury that has been caused by gender transition procedures, or any other physical illness that would “place the individual in imminent danger of death or impairment.”³⁶ Overall, Act 626 is a comprehensive law with far-reaching impacts for transgender youth.

B. Levels of Scrutiny Under Fourteenth Amendment Constitutional Analysis

Traditionally, the judiciary has applied three levels of scrutiny to constitutional claims brought under the Fourteenth Amendment: rational basis review, intermediate scrutiny, and strict scrutiny.³⁷ The default level of scrutiny applied to state action is rational basis review, which requires only that the means are “rationally related” to the state’s goal.³⁸ Courts have long accepted the use of state police power to protect public health and safety as a legitimate state interest.³⁹ As early as 1888, the Supreme Court declared:

suppress pubertal development in children for the purpose of assisting an individual with a gender transition.

ARK. CODE ANN. § 20-9-1501(11) (2021).

31. 2021 Ark. Acts 626 § 2(6) (B).

32. ARK. CODE ANN. § 20-9-1502(a)-(b) (2021).

33. *Id.* §§ 20-9-1503(a)-(d), 23-79-164(b).

34. *Id.* § 20-9-1504(a)-(b), (f) (1).

35. *Id.* § 20-9-1501(11).

36. *Id.* § 20-9-1501(6) (B).

37. WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 11:3 (3d ed. 2011).

38. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

39. *E.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888); *see also Constitution Annotated: Police Powers*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/police_powers [<https://perma.cc/S4C8-GM4T>]; Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical*

[I]t is the settled doctrine of this court that, as government is organized for the purpose . . . of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States.⁴⁰

In this vein, states have permissibly regulated everything from environmental pollution caused by public transportation,⁴¹ to the manufacture of margarine,⁴² to the registration of pharmacists.⁴³

If, however, a state discriminates against a protected class, in violation of the Equal Protection Clause, or treads on a fundamental liberty interest, in violation of the Due Process Clause, the Court applies a heightened level of scrutiny.⁴⁴ The most difficult level of analysis for legislation to survive is strict scrutiny. Under strict scrutiny analysis, a state must demonstrate first, that it has a compelling interest, and second, that there are no less restrictive means available to meet this interest.⁴⁵

The lower tier of heightened analysis is intermediate scrutiny. The first step of intermediate scrutiny asks whether the state has an “important” interest.⁴⁶ If the state lacks an important interest, the legislation is unconstitutional.⁴⁷ The state’s interest cannot be based on animus alone.⁴⁸ If the court finds that the state does have an important interest, it moves on to step two. Step two analyzes whether the means taken by the state are “substantially related” to its important

Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations 8 ANNALS OF HEALTH L. & LIFE SCI. 201, 202 (1999) (discussing the historical understanding that the regulation of healthcare is a legitimate state activity).

40. *Powell*, 127 U.S. at 683.

41. *Minnesota v. Chi., Milwaukee & St. Paul Ry. Co.*, 130 N.W. 545, 546–47 (Minn. 1911).

42. *Wright v. Maryland*, 41 A. 795, 796, 799 (Md. 1898).

43. *Wisconsin v. Heinemann*, 49 N.W. 818, 819 (Wis. 1891).

44. *Id.* See generally 16B Am. Jur. 2d *Constitutional Law* § 847 (stating that rational basis review is “departed from only when a challenged statute places burdens on suspect classes of persons or on a constitutional right that is deemed fundamental”).

45. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

46. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020).

47. *Id.*

48. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“Amendment 2 . . . is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

interest.⁴⁹ As in step one, the burden in step two is on the state to show that its means are “substantially and directly” related to its objective.⁵⁰ Even if a state finds a “predictive empirical relationship[.]” between the protected status and the matter the state seeks to legislate, it does not necessarily mean that the use of discrimination is justifiable.⁵¹ The state must make a stronger showing to meet this rigorous standard of scrutiny.⁵²

Often, legislation will fail this stage of analysis if the means taken to meet the goal are overinclusive or underinclusive. For example, in *Kramer v. Union Free School District*,⁵³ the Court struck down a law that prohibited residents to vote in school board elections if they did not own or lease property within the district or did not have children enrolled in local public schools as violating the Equal Protection Clause.⁵⁴ The Court found that, even if the state had a legitimate interest in restricting school elections to those “primarily interested” in school affairs, the means taken were not sufficiently narrowly tailored to meet this goal.⁵⁵ The law was overinclusive because it “permit[ed] inclusion of many persons who have, at best, a remote and indirect interest, in school affairs” and was underinclusive because it “exclude[ed] others who have a distinct and direct interest in the school meeting decisions.”⁵⁶ Under intermediate scrutiny, therefore, if the fit between the end goal and the means taken to meet that goal is not sufficiently tight, the action is unconstitutional.⁵⁷

C. Equal Protection Jurisprudence

The Fourteenth Amendment’s Equal Protection Clause forbids “any State” from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”⁵⁸ This clause has historically been interpreted to protect classes of “discrete and insular minorities” from unjustifiable

49. RICH, *supra* note 37, § 11:3.

50. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

51. *Craig v. Boren*, 429 U.S. 190, 202 (1976).

52. *Id.*

53. 395 U.S. 621 (1969).

54. *Id.* at 622.

55. *Id.* at 632.

56. *Id.*

57. RICH, *supra* note 37, § 11:3.

58. U.S. CONST. amend. XIV, § 1.

discrimination by the state.⁵⁹ The classes of protected groups are not closed; rather, the Supreme Court has historically responded to social pressures to recognize new suspect and quasi-suspect classifications.⁶⁰

Courts examine four main factors when deciding whether a group merits heightened judicial protection: (1) the immutability of the group's defining characteristic(s), (2) whether the group has been historically subjected to discrimination, (3) underrepresentation of the group in politics and other sectors of society, and (4) whether the group's defining characteristics correspond with its ability to contribute to society.⁶¹ If the Court finds that a group meets these factors, it will subject legislation targeting the group to heightened scrutiny.

Applying these factors, the Supreme Court has found that classifications based on alienage,⁶² nationality,⁶³ and race,⁶⁴ are suspect categories under the Equal Protection Clause and thus are subject to strict scrutiny analysis. In *Johnson v. California*,⁶⁵ for example, the Supreme Court held that strict scrutiny should apply when analyzing the California Department of Correction's unwritten policy of segregating new prisoners' housing facilities by race.⁶⁶ Strict scrutiny is appropriate for cases of racial discrimination, the Court reasoned, in order to "smoke out" illegitimate uses of race by assuring that

59. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152–53 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . .").

60. See RICH, *supra* note 37, § 11:5 (noting the historical tension in the Supreme Court between formalist ideology, which narrowly interprets Equal Protection Clause challenges, and a more "contemporary" approach, which allows for greater flexibility in recognizing new groups that merit heightened protection).

61. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 684, 686 (1973).

62. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." (citation omitted)).

63. See, e.g., *Oyama v. California*, 332 U.S. 633, 636, 647 (1948) (finding that a California law that prevented individuals who were not eligible for American citizenship from buying, selling, or leasing agricultural land unconstitutional under the Equal Protection Clause).

64. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 184, 196 (1964) (denouncing a Florida law that made interracial cohabitation illegal as violating the equal protection clause).

65. 543 U.S. 499 (2005).

66. *Id.* at 509.

[government] is pursuing a goal important enough to warrant use of a highly suspect tool.”⁶⁷ The Court explained that the state would need to demonstrate first, that this policy was enacted to meet a compelling government interest, and second, that the means taken to meet this interest were narrowly tailored.⁶⁸ Although the Court remanded the case for further fact finding without deciding on the constitutionality of the policy at issue, it mused that prison security and discipline might constitute a compelling state interest, and that temporary segregation of new prisoners may be sufficiently narrowly tailored to meet this interest.⁶⁹

The Court has found that some groups are not so inherently suspect as to merit strict scrutiny analysis but are still quasi-suspect and thus merit intermediate scrutiny analysis. For example, in *Frontiero v. Richardson*,⁷⁰ the Court recognized sex as a quasi-suspect classification for the first time.⁷¹ It reasoned that women constitute a protected group because they were subjected to widespread historic and ongoing discrimination, and because sex is an “immutable characteristic” that “bears no relation to the ability to perform or contribute to society.”⁷² The Court examined the history of discrimination against women, noting that women “could [not] hold office, serve on juries, . . . bring suit in their own names, . . . hold or convey property[,] or . . . serve as legal guardians of their own children.”⁷³ It also found that women continued to be subject to widespread discrimination in education, employment, and politics.⁷⁴ Furthermore, the Court held that an individual’s sex is not correlated with their ability to contribute to society, so legislation discriminating on the basis of sex has the “effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”⁷⁵

67. *Id.* at 506 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

68. *Id.* at 505.

69. *Id.* at 515.

70. 411 U.S. 677 (1973).

71. *Id.* at 688.

72. *Id.* at 684–87.

73. *Id.* at 685.

74. *Id.* at 685–86.

75. *Id.* at 686–87.

Finally, the Court has declined to extend any suspect classification status to certain classifications, including age⁷⁶ and wealth, and therefore reviews laws that target these groups under rational basis.⁷⁷ In *Massachusetts Board of Retirement v. Murgia*,⁷⁸ the Court rejected the argument that discrimination on the basis of age implicates the Equal Protection Clause.⁷⁹ In weighing the relevant factors, the Court reasoned that the elderly had not been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness” as to justify heightened protection as a class.⁸⁰ Additionally, the elderly are not a discrete and insular minority because each individual will presumably reach old age during their lifetime.⁸¹ Therefore, the Court found that the factors weighed against declaring age a suspect category.⁸² Likewise, in *San Antonio Independent School District v. Rodriguez*,⁸³ the Court declined to recognize wealth as a protected class, reasoning that people who live in poorer districts constitute “a large, diverse, and amorphous class” bearing “none of the traditional indicia of suspectness.”⁸⁴

D. Due Process Jurisprudence

Courts interpret the Due Process Clause of the Fourteenth Amendment to include a substantive component that prohibits states from infringing on certain fundamental rights.⁸⁵ One of these protected rights is an individual’s interest in liberty.⁸⁶ Although courts have used varying language to describe this right, at its core, an

76. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam) (upholding a law requiring compulsory retirement at fifty and finding that people over fifty did not constitute a protected class).

77. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.”).

78. 427 U.S. 307 (1976) (per curiam).

79. *Id.* at 313.

80. *Id.*

81. *Id.* at 313–14.

82. *Id.* at 314.

83. 411 U.S. 1 (1973).

84. *Id.* at 28.

85. 16A Am. Jur. 2d *Constitutional Law* § 414 (“Fundamental liberties protected by the Due Process Clause of the 14th Amendment include most of the rights enumerated in the Bill of Rights, and, in addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”).

86. *Id.*

individual's liberty interest is the right to be free from government interference in the most private and valued aspects of one's personal life.⁸⁷

The scope of this fundamental right has expanded over time. It was first invoked early on to protect the right to access and use contraceptives.⁸⁸ For example, in *Griswold v. Connecticut*,⁸⁹ the Court found that the question of a married couple using contraceptives "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."⁹⁰ The doctrine has also been developed to include an individual's right to an abortion.⁹¹ In *Roe v. Wade*,⁹² the Court analyzed the far-reaching impacts of pregnancy, including potential physical, social, and psychological harm to the pregnant person.⁹³ Because these outcomes involve the pregnant person's bodily autonomy and most intimate decisions, the Court held that legislation restricting abortion access is subject to heightened scrutiny under the Due Process Clause.⁹⁴ In 2003, the Court expanded this interest to encompass the right of two gay men to

87. *Id.*

88. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

89. 381 U.S. 479 (1965).

90. *Id.* at 485.

91. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 920–21 (1992).

92. 410 U.S. 113 (1973).

93. *Id.* at 153–54.

94. *Id.* As of March 24, 2022, the constitutional right to abortion, as founded in *Roe, id.* at 153–54, and clarified by *Casey*, 505 U.S. at 845–46, and *June Medical Services v. Russo*, 140 S. Ct. 2103, 2113 (2020), is still intact, notwithstanding the Supreme Court's decision denying injunctive relief in a case challenging a recent Texas law that bans abortions after cardiac activity is detected in the fetus. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (denying injunctive relief); *see also* Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, for Now*, NPR, (Sep. 2, 2021, 12:20 PM), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now> [<https://perma.cc/5PZF-J37S>]. The Supreme Court has also granted certiorari in *Dobbs v. Jackson Women's Health Organization* to determine whether pre-viability prohibitions on abortions are unconstitutional. 141 S. Ct. 2619, 2619–20 (2021). On May 2, 2022, through an unprecedented leak of Supreme Court proceedings, Politico obtained a draft of the *Dobbs* opinion, which indicates the Court is set to overturn *Roe* and *Casey*. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/6K6D-3E6G>]. If left intact, the *Dobbs* decision could call into question other Supreme Court cases that protect the LGBTQ community.

have sex in the privacy of their own home in *Lawrence v. Texas*.⁹⁵ In his opinion, Justice Kennedy advocated for a flexible understanding of liberty, declaring that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁹⁶

Just twelve years later, the Court again relied on fundamental liberty interest language when deciding in *Obergefell v. Hodges*⁹⁷ that states cannot refuse the right of marriage to gay couples.⁹⁸ Justice Kennedy described the choice to marry as a “personal choice[] central to individual dignity and autonomy.”⁹⁹ He acknowledged the role of the Court in recognizing new manifestations of liberty that the founders may not have imagined when writing the Constitution, suggesting that new claims to liberty “must be addressed.”¹⁰⁰ Additionally, Justice Kennedy stressed the judiciary’s role in protecting vulnerable minority groups from the tyranny of the majority and emphasized that the fundamental rights of individuals should be “withdraw[n] . . . from the vicissitudes of political controversy” so as to avoid being subject to the whims of a legislature.¹⁰¹

The right to liberty encompassed in the Due Process Clause is often more nuanced in the context of minors. Courts have historically recognized that, in certain circumstances, minors are more subject to the control of the state than are adults.¹⁰² For example, although minors have the same constitutional right to abortion as adults, the Supreme Court has allowed the state to impose additional burdens, such as requiring parental consent.¹⁰³

However, the fundamental right to liberty is so strong that states must provide minors with the option to bypass parental consent if the

95. 539 U.S. 558 (2003).

96. *Id.* at 579.

97. 576 U.S. 644 (2015).

98. *Id.* at 680.

99. *Id.* at 663.

100. *Id.* at 664.

101. *Id.* at 677.

102. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against government deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’” (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971))).

103. *Hodgson v. Minnesota*, 853 F.2d 1452, 1464 (8th Cir. 1988) (en banc), *aff’d*, 497 U.S. 417 (1990).

judiciary finds that the minor is mature enough to make the decision on their own.¹⁰⁴ For example, in *Carey v. Population Services International*,¹⁰⁵ the Court struck down a statute that prevented the distribution or sale of contraceptives to those under sixteen as unconstitutional.¹⁰⁶ The Court rejected the state's proffered interest in regulating the morality of minors by preventing "promiscuous sexual intercourse"¹⁰⁷ and emphasized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."¹⁰⁸

Lower courts have interpreted the Due Process Clause to protect other aspects of minors' personal liberty. In *Bishop v. Colaw*,¹⁰⁹ for example, the Eighth Circuit considered a school regulation that required male students to keep their hair cut to a certain short length.¹¹⁰ The court struck down the policy, rejecting the school's argument that the policy was needed to prevent other students from being distracted.¹¹¹ In doing so, the court found that the student had a protected interest in governing his own personal appearance, upon which the state could not arbitrarily infringe.¹¹² Therefore, even though courts may sometimes afford minors less protection than adults, the Fourteenth Amendment's Due Process Clause still applies to prevent states from infringing on minors' fundamental liberty interests in many circumstances.

Courts have failed to agree which level of heightened scrutiny applies to personal liberty Due Process Clause claims.¹¹³ The majority opinion in *Griswold* did not name which degree of scrutiny it was

104. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995).

105. 431 U.S. 678 (1977).

106. *Id.* at 681–82.

107. *Id.* at 692–93.

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

109. 450 F.2d 1069 (8th Cir. 1971).

110. *Id.* at 1076–77.

111. *Id.* at 1077.

112. *Id.*

113. See Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 144–45 (2018) (“[F]undamental rights do not trigger strict scrutiny all the time. Indeed, much case law exists applying less than strict scrutiny to such rights.”); Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 342 n.61 (2016) (“I use the term ‘heightened’ rather than strict because in recent decades the Court’s decisions have been somewhat inconsistent on the level of scrutiny that applies to [laws that implicate fundamental rights], sometimes using language suggesting a lower standard than strict scrutiny.”).

applying, although Justice White's concurring opinion called for the application of strict scrutiny.¹¹⁴ The *Carey* Court also did not specify its level of scrutiny, although it noted something "less rigorous than the 'compelling state interest' test" applied to questions of a minor's liberty interest as compared to those of an adult.¹¹⁵ The *Roe* and *Casey* decisions likewise failed to identify the exact degree of heightened scrutiny applied in abortion cases.¹¹⁶ *Lawrence* applied what scholars have come to refer to as "rational basis with bite," whereby the Court purports to apply rational basis review but declines to defer to the state's judgment to the degree normally associated with rational basis review.¹¹⁷ The *Obergefell* Court found that marriage for same-sex couples was a fundamental right without deciding on a level of scrutiny.¹¹⁸

II. ACT 626 SHOULD BE SUBJECT TO, AND FAILS, INTERMEDIATE SCRUTINY UNDER EQUAL PROTECTION AND DUE PROCESS ANALYSES

Courts decide which level of heightened scrutiny applies to a violation of the Equal Protection Clause or the Due Process Clause on a case-by-case basis. Because the Supreme Court has yet to rule on whether transgender individuals constitute a suspect or quasi-suspect class, the degree of scrutiny applied to such cases has not been settled. First, this Part argues that the transgender community should, at a minimum, be considered a quasi-suspect class because they meet the four factors traditionally employed in equal protection jurisprudence to identify a protected classification. This Part also asserts that courts should apply intermediate scrutiny analysis to Act 626 because it discriminates against the transgender community or, in the alternative, discriminates on the basis of sex in violation of the Equal Protection Clause. Second, this Part argues that Act 626 is also subject to intermediate scrutiny under due process analysis because it

114. *Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) (White, J., concurring).

115. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977).

116. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (requiring a "compelling state interest" and that state actions are "narrowly drawn" without naming a specific level of scrutiny); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 971 (1992) (rejecting strict scrutiny but failing to specify an alternative).

117. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003); see also Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072, 2093 (2015) (finding that cases such as *Lawrence* which apply "rational basis with bite" normally do so due to the presence of legislative animus).

118. *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

impermissibly infringes on the fundamental liberty interest in bodily autonomy. Finally, this Part applies intermediate scrutiny analysis to Act 626, and finds that it fails because it is not narrowly tailored to meet an important state interest.

A. *Act 626 Constitutes Discrimination Against a Protected Class Under the Equal Protection Clause*

Over time, the number of protected identities recognized under the Fourteenth Amendment’s Equal Protection Clause has expanded,¹¹⁹ and many courts now recognize transgender individuals as a protected group.¹²⁰ Additionally, some lower courts that have determined that sex-based discrimination includes discrimination against transgender people have likewise applied at least intermediate scrutiny in such cases.¹²¹ For example, in *Grimm*, the Fourth Circuit found that transgender individuals are “at least a quasi-suspect class” and applied intermediate scrutiny.¹²² Similarly, the Ninth Circuit applied a standard of review that is “more than rational basis but less than strict scrutiny” to a case involving discrimination against transgender members of armed forces.¹²³

1. *Act 626 discriminates on the basis of transgender status*

In order for Act 626 to be subjected to heightened scrutiny under the Equal Protection Clause, transgender individuals would need to

119. See RICH, *supra* note 37, § 11:3 (discussing debates within the judiciary regarding which groups should be subject to heightened scrutiny).

120. The Fourth Circuit, Ninth Circuit, and many federal district courts have concluded that transgender people constitute a quasi-suspect class. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (per curiam); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 718–19 (D. Md. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

121. E.g., *Grimm*, 972 F.3d at 608 (applying intermediate scrutiny); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (applying heightened scrutiny); *Glenn v. Brumby*, 663 F.3d 1312, 1315 & n.4 (11th Cir. 2011) (applying intermediate scrutiny); *Smith v. City of Salem*, 378 F.3d 566, 576 (6th Cir. 2004) (applying reasoning akin to intermediate scrutiny without explicitly naming a level of scrutiny).

122. *Grimm*, 972 F.3d at 607.

123. *Karnoski*, 926 F.3d at 1201.

first be recognized as a quasi-suspect class. Transgender individuals should be recognized as at least a quasi-suspect class because they meet the four factors articulated in equal protection jurisprudence.¹²⁴ These factors are that the group in question (1) is defined by an immutable characteristic “determined solely by the accident of birth,” (2) has been subject to a history of discrimination, (3) lacks political power due to underrepresentation in government, and (4) is not less able to contribute to society due to its defining characteristic.¹²⁵

First, the transgender community is a discrete group defined by “obvious, immutable, or distinguishing characteristics.”¹²⁶ Being transgender, like being a woman or a person of color, is not a choice—instead, studies show that individuals begin identifying with their gender identity, whether cisgender or transgender, at a young age.¹²⁷ Unlike with malleable categories like wealth and age, the majority of the population is not likely to experience being part of the immutable class of transgender individuals at some point during their lifetime.¹²⁸ In fact, transgender people constitute only 0.6% of the adult American population, far fewer than the 13.7% of the population who are immigrants or the estimated 38.4% who are people of color.¹²⁹

124. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (listing the factors used to identify a protected class).

125. *Id.* (finding that classifications based on wealth did not meet these factors and were not subject to heightened scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (same).

126. *Grimm*, 972 F.3d at 611.

127. See *Most Gender Dysphoria Established by Age 7, Study Finds*, *supra* note 17 (discussing findings from a study that “73% of the transgender women and 78% of the transgender men [from the study] first experienced gender dysphoria by age 7”); Ed Yong, *Young Trans Children Know Who They Are*, ATLANTIC (Jan. 15, 2019), <https://www.theatlantic.com/science/archive/2019/01/young-trans-children-know-who-they-are/580366> [<https://perma.cc/7R8C-33E2>] (examining a study which found that transgender children demonstrate discomfort identifying with the gender they were assigned at birth as young as three years old).

128. See Rachel Minkin & Anna Brown, *Rising Shares of U.S. Adults Know Someone Who Is Transgender or Goes by Gender-Neutral Pronouns*, PEW RSCH. CTR. (July 27, 2021), <https://www.pewresearch.org/fact-tank/2021/07/27/rising-shares-of-u-s-adults-know-someone-who-is-transgender-or-goes-by-gender-neutral-pronouns> [<https://perma.cc/3UGV-QD4T>] (“[G]rowing shares of U.S. adults say they know someone who is transgender or who goes by a gender-neutral pronoun.”).

129. See ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, THE WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans->

Second, like women and people of color, transgender people have historically been subject to and continue to face discrimination in all aspects of life, including in housing,¹³⁰ healthcare,¹³¹ employment,¹³²

Adults-US-Aug-2016.pdf [<https://perma.cc/9E42-SDV8>]; Abby Budiman, Christine Tamir, Lauren Mora & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants> [<https://perma.cc/UTX7-NH6W>]; *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html> [<https://perma.cc/5FYC-SLX9>] (finding that 61.6% of the population of the United States identifies solely as “white”).

130. See, e.g., *Housing and Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> [<https://perma.cc/7CJL-U9K3>] (“One in five transgender people in the United States has been discriminated against when seeking a home, and more than one in ten have been evicted from their homes, because of their gender identity.”); Justin Stabley, *For Transgender People, Finding Housing Has Become Even Harder During the Pandemic*, PBS (Mar. 12, 2021, 5:08 PM), <https://www.pbs.org/newshour/economy/for-transgender-people-finding-housing-has-become-even-harder-during-the-pandemic> [<https://perma.cc/ANF6-BLWW>] (“Between 2016 and 2019, the number of homeless transgender people in the U.S. increased 88 percent”); SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 13* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/MK4W-X84E>] (finding that twenty-three percent of transgender respondents had experienced housing discrimination in the past year and that respondents were four times less likely to own a home than the general U.S. population).

131. See, e.g., JAMES ET AL., *supra* note 130, at 97–98 (showing that two percent of respondents reported that doctors or providers had been physically rough or abusive, eight percent were refused transition related care, three percent were refused any care at all, and twenty-three percent of respondents reported that at some time in the past year they avoided seeking needed healthcare because of a fear of being disrespected or mistreated); Selena Simmons-Duffin, *Transgender Health Protections Reversed by Trump Administration*, NPR (June 12, 2020, 4:46 PM), <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration> [<https://perma.cc/8FGA-5VG3>] (discussing how the Trump administration’s decision to redefine “sex” in the Affordable Care Act as sex assigned at birth made transgender patients vulnerable to discrimination); Kim D. Jaffee, Deirdre A. Shires & Daphna Stroumsa, *Discrimination and Delayed Health Care Among Transgender Women and Men: Implications for Improving Medical Education and Health Care Delivery*, 54 MED. CARE 1010 (finding that 30.8% of transgender participants delayed or did not seek health care due to discrimination).

132. See, e.g., JAMES ET AL., *supra* note 130, at 5 (explaining that the unemployment rate among transgender individuals is three times higher than the general unemployment rate in the United States); LINDSAY MAHOWALD, SHARITA GRUBERG &

and interactions with the criminal justice system.¹³³ For example, one study found that forty-six percent of respondents had been verbally harassed and nine percent had been physically attacked within the last year due to their transgender identity.¹³⁴ As a result of this widespread discrimination, transgender people face unusually high rates of economic instability,¹³⁵ mental illness, and suicide.¹³⁶

Third, transgender individuals are underrepresented in all branches of local, state, and federal government.¹³⁷ It is estimated that, while

JOHN HALPIN, THE CTR FOR AM. PROGRESS, THE STATE OF THE LGBTQ COMMUNITY IN 2020 11 (2020), <https://cdn.americanprogress.org/content/uploads/2020/10/02103624/LGBTQpoll-report.pdf> [<https://perma.cc/QG3F-L52F>] (finding that fifty-three percent of transgender participants expressed that “discrimination moderately or significantly affected their capacity to be hired”).

133. See, e.g., JAMES ET AL., *supra* note 130, at 14 (finding that fifty-seven percent of transgender respondents would feel uncomfortable asking law enforcement for help and fifty-eight percent of transgender respondents were harassed by law enforcement); MAHOWALD ET AL., *supra* note 132, at 4 (stating that fifteen percent of transgender people had been mistreated by law enforcement, including being misgendered or physically or sexually assaulted). See generally CTR. FOR AM. PROGRESS, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice.pdf> [<https://perma.cc/655V-CRRL>].

134. JAMES ET AL., *supra* note 130, at 5.

135. See, e.g., *id.* (showing that twenty-nine percent of transgender respondents were living in poverty and fifteen percent were unemployed, compared to just twelve percent and five percent of the U.S. population, respectively); M. H. MORTON, A. DWORSKY & G. M. SAMUELS, MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AMERICA 12–13 (2017), <https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf> [<https://perma.cc/65U6-ZATB>] (finding that LGBT youth had a 120% higher risk of experiencing homelessness than cisgender and heterosexual youth).

136. See, e.g., JAMES ET AL., *supra* note 130, at 10 (finding that thirty-nine percent of participants “experienced serious psychological distress in the month before completing the survey . . . compared with only 5% of the U.S. population” and that transgender participants were nine times as likely to attempt suicide during their lifetime than the general American population); MAHOWALD ET AL., *supra* note 132, at 9 (stating that sixty-six percent of individuals reported that discrimination based on their transgender status “moderately or significantly affected their psychological well-being”); Russell B. Toomey, Amy K. Syvertsen & Maura Shramko, *Transgender Adolescent Suicide Behavior*, PEDIATRICS, July 2018, at 1 (demonstrating that the suicide rate was 50.8% for transgender boys and 29.9% for transgender girls, as compared with 9.8% for cisgender boys and 17.6% for cisgender girls).

137. See *Out for America 2020*, VICTORY INST., <https://victoryinstitute.org/out-for-america-2020> [<https://perma.cc/8Y8M-9LTU>] (“While LGBTQ people are running for office in historic numbers, we remain severely underrepresented at every level of government . . .”).

transgender individuals make up approximately 0.6% of the population, they represent less than 0.007% of government positions.¹³⁸ Therefore, transgender people lack access to the traditional political channels crucial to ensuring that their rights are not infringed. In 2021 alone, over 120 bills were introduced in local and state legislatures to prevent transgender individuals from accessing healthcare, participating in school sports, and using the appropriate restroom facilities.¹³⁹ Many of these bills passed despite public opposition from the transgender community and its advocates.¹⁴⁰

Finally, a person's transgender status is not correlated with their ability to contribute to society.¹⁴¹ Although some transgender people are diagnosed with gender dysphoria, which, if left untreated, may lead to severe mental health issues, this condition is often treated by allowing the transgender individual to transition so that their physical appearance matches their gender identity.¹⁴² In fact, transgender people have successfully contributed to numerous areas of society, such as in politics, art, science, and education.¹⁴³ Based on the four

138. FLORES ET AL., *supra* note 129, at 2; *Out for America 2020*, *supra* note 137 (finding that 4.5% of the U.S. population identifies as LGBTQ but only 0.17% of U.S. elected officials identify as LGBTQ and, of this 0.17%, only 3.9% identify as transgender, gender non-conforming, or two-spirit).

139. Hudson Jr., *supra* note 1.

140. See, e.g., Associated Press, *supra* note 10 (detailing public objections that led to Arkansas Governor Asa Hutchinson's initial veto of the SAFE Act).

141. See German Lopez, *Myth #8: Transgender People are Mentally Ill*, VOX (Nov. 14, 2018, 4:08 PM), <https://www.vox.com/identities/2016/5/13/17938120/transgender-people-mental-illness-health-care> [<https://web.archive.org/web/20220307074336/https://www.vox.com/identities/2016/5/13/17938120/transgender-people-mental-illness-health-care>] (discussing the decision of the American Psychiatric Association to stop referring to being transgender as a mental illness and distinguishing being transgender from having gender dysphoria).

142. *Id.* ("In this way, being trans isn't the medical condition; living as trans is in fact the *treatment* to the medical condition.")

143. See, e.g., Laurel Wamsley, *Rachel Levine Makes History as 1st Openly Trans Federal Official Confirmed by Senate*, NPR (Mar. 24, 2021, 5:35 PM), <https://www.npr.org/2021/03/24/980788146/senate-confirms-rachel-levine-a-transgender-woman-as-assistant-health-secretary> [<https://perma.cc/3A6R-MB7C>] (first openly trans federal official); Frank Olito & Gabbi Shaw, *18 Transgender Celebrities Who are Changing Television*, INSIDER (Jan. 10, 2022, 12:40 PM), <https://www.insider.com/trans-celebrities-in-television-2019-10> [<https://perma.cc/7B85-59QJ>] (first transgender person to win a Golden Globe award); Roberta Kwow, *Transgender Researchers Want to Make an Impact*, SCI. NEWS FOR STUDENTS (May 16, 2019,

factors articulated in equal protection jurisprudence, therefore, transgender individuals qualify for heightened protection as a quasi-suspect group.

Circuit and district courts are also beginning to recognize the transgender community as a protected group based on these four factors.¹⁴⁴ Multiple circuit courts have adopted this reasoning, holding that transgender people constitute at least a quasi-suspect class.¹⁴⁵ For example, in *Grimm v. Gloucester County School Board*,¹⁴⁶ the Fourth Circuit held that transgender people are subject to heightened scrutiny.¹⁴⁷ *Grimm* involved a transgender boy who was refused access to the boys' restroom at his high school.¹⁴⁸ The court analyzed the factors above and found each satisfied.¹⁴⁹ The court in *Grimm* emphasized that the purpose of recognizing new suspect classes under the Equal Protection Clause is to ensure that the judiciary can act to protect minority groups who are unable to effectively advocate for their own rights in traditional political processes—a situation that applies to

5:45 AM), <https://www.sciencenewsforstudents.org/article/transgender-researchers-want-make-impact> [<https://perma.cc/WD4X-9YLU>] (transgender scientists use their knowledge to help future generations of transgender youths); Madeline Will, *Transgender Teachers Speak out on What They Need from School Leaders*, EDUC. WK. (Nov. 11, 2019), <https://www.edweek.org/leadership/transgender-teachers-speak-out-on-what-they-need-from-school-leaders/2019/11> [<https://perma.cc/JB2Q-QERV>] (supporting transgender educators).

144. See cases cited *supra* note 120.

145. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (per curiam). See generally *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (abrogated on other grounds by Ill. Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020)).

146. 972 F.3d 586 (4th Cir. 2020) *cert. denied*, 141 S. Ct. 2878 (2021).

147. *Id.* at 610.

148. *Id.* at 593.

149. *Id.* at 608–09. The court started by reviewing data demonstrating that transgender individuals are subject to disproportionately high rates of harassment, violence, and discrimination in sectors such as education, employment, housing, and healthcare access. *Id.* at 611–12. Next, the court found no relationship between being transgender and being able to contribute to society. *Id.* at 612. It also reasoned that transgender people are a “discrete group with immutable characteristics” because individuals do not choose to become transgender; rather, most people formulate their gender identity, whether transgender or cisgender, at a very early age. *Id.* at 612–13. Finally, transgender people are a minority because they compose only about 0.6% of the adult population and are chronically underrepresented in all branches of local, state, and federal government. *Id.* at 613.

transgender people.¹⁵⁰ The Ninth Circuit, in analyzing an executive memorandum prohibiting transgender people from serving in the military, conducted a similar analysis and concluded that transgender individuals constitute a quasi-suspect class.¹⁵¹ Numerous district courts also found this reasoning persuasive and came to the same conclusion.¹⁵²

State discrimination is unconstitutional under the Fourteenth Amendment's Equal Protection Clause "when it creates 'arbitrary or irrational' distinctions between classes of people out of 'a bare . . . desire to harm a politically unpopular group.'"¹⁵³ Act 626 violates the Equal Protection Clause because, according to the text and legislative history of the Act, it impermissibly targets transgender individuals, who constitute a quasi-suspect class. Act 626 singles out transgender youth by prohibiting the use of puberty blockers, a form of care used by transgender minors to treat gender dysphoria.¹⁵⁴ According to *Bray v. Alexandria Women's Health Clinic*,¹⁵⁵ a presumption exists that a state action intends to target a minority group when the action irrationally disfavors a practice that is "engaged in exclusively or predominantly by a particular class of people."¹⁵⁶ In this case, Act 626 irrationally prohibits the use of puberty blockers only when used "for the purpose of assisting an individual with a gender transition."¹⁵⁷ Representative Lundstrum, the bill's sponsor, clarified during a House debate that the

150. *Id.*; see also *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'").

151. *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (per curiam).

152. See *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 708–20 (D. Md. 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d at 1104, 1119 (N.D. Cal. 2015); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018).

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

154. See *Puberty Blockers*, *supra* note 6. (providing that puberty blockers "help delay unwanted physical changes that don't match someone's gender identity," such as breast growth and facial hair).

155. 506 U.S. 263 (1993).

156. *Id.* at 270.

157. ARK. CODE ANN. § 20-9-1501(11).

bill is “tightly crafted” and does not touch other “healthy procedures” such as precocious puberty.¹⁵⁸

A transgender individual is somebody whose gender is incongruent with their sex assigned at birth; in contrast, a cisgender person’s gender matches their sex assigned at birth.¹⁵⁹ The purpose of gender-affirming care is to minimize the harm caused by the incongruity between one’s gender and sex assigned at birth—a condition referred to as gender dysphoria.¹⁶⁰ Cisgender people do not experience gender dysphoria because their gender identity already aligns with the sex they were assigned at birth.¹⁶¹ Thus, because this Act only targets people experiencing gender dysphoria, it is, by definition, only targeting transgender individuals.

Additionally, Act 626’s timing and legislative history support the conclusion that the Act purposefully singles out transgender youth. Puberty blockers have long been used with little controversy to treat minors for conditions besides gender dysphoria.¹⁶² The Arkansas legislature only took action to prohibit the use of puberty blockers once practitioners started prescribing them to transgender minors in a year where transgender rights were being debated in legislatures

158. *Arkansas Save Adolescents from Experimentation (SAFE) Act: Hearing on H.B. 1570 Before the House*, 2001 Leg., 93rd Sess. (2021) (statement of Rep. Lundstrum).

159. *What is Gender Dysphoria?* AM PSYCH. ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/P9HQ-RWDD>].

160. Gender dysphoria is the “psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.” *Id.*

161. *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYC. ASS’N, 832, 833 (2015) [hereinafter *APA Transgender and Gender Nonconforming Guidelines*].

162. David C. Call, Mamatha Challa & Cynthia J. Telingator, *Providing Affirmative Care to Transgender and Gender Diverse Youth: Disparities, Interventions, and Outcomes*, CURRENT PSYCHIATRY REPS., VOL. 23, ARTICLE 33, at 33 (2021) (noting that puberty blockers have been used for years to treat disorders such as precocious puberty without any long-term side effects). For example, Gonadoreline—a popular gonadotropin-releasing hormone agonist—has been available for medical use since at least 1978. J. Bain, J. P. Moskowitz & J. J. Clapp, *LH and FSH Response to Gonadotropin Releasing Hormone (GnRH) in Normospermic, Oligospermic and Azoospermic Men*, 1 SYS. BIOLOGY IN REPROD. MED. 147 (1978) (analyzing the effects of GnRH on various types of subfertility in men). Histrelin, another type of GnRH, was approved for use by the FDA in 2007 for the treatment of precocious puberty. *Drug Approval Package: Supprelin LA*, U.S. FOOD & DRUG ADMIN. (Dec. 2, 2008), https://www.accessdata.fda.gov/drugsatfda_docs/nda/2007/022058_supprelin_la_toc.cfm [<https://perma.cc/T3TN-2WUW>].

across the country.¹⁶³ The debates in the legislature regarding this bill centered almost exclusively around whether transgender youth should have access to gender-affirming care.¹⁶⁴ For example, during a house debate on Act 626, a supporter of the bill quoted passages from the Bible prohibiting cross-dressing, while opponents argued that transgender minors would feel targeted by this bill and would likely experience adverse mental health results. Together, these facts demonstrate that the law was passed to target transgender minors, a quasi-suspect classification, and thus is subject to intermediate scrutiny.¹⁶⁵

2. *Act 626 discriminates on the basis of sex*

Even if transgender individuals were not recognized as a quasi-suspect class, Act 626 is still subject to, and fails, equal protection analysis because courts are increasingly understanding that sex-based discrimination encompasses discrimination against transgender people. Specifically, the Act violates the Equal Protection Clause because it punishes transgender individuals for failing to conform to gender norms and stereotypes.

163. See Carla M. Lopez, Daniel Solomon, Susan D. Boulware & Emily Christison-Lagay, *Trends in the “Off-Label” Use of GnRH Agonists Among Pediatric Patients in the United States*, 57 CLINICAL PEDIATRICS 1432, 1433–34 (2018) (noting that the use of GnRH for purposes other than those approved by the FDA, such as to treat gender dysphoria, increased more than three-fold from 2013 to 2016); Hudson Jr., *supra* note 1 (noting that 120 bills concerning trans rights have been introduced in state legislatures during the 2021 legislative session).

164. See, e.g., *Arkansas Save Adolescents from Experimentation (SAFE) Act: Hearing on H.B. 1570 Before the House*, 2001 Leg., 93rd Sess. (2021) (statement of Rep. Lundstrum) (acknowledging that transgender children likely feel targeted by this legislation); *id.* (statement of Rep. Ferguson) (arguing that this bill would be harmful to the mental health of transgender children); *id.* (statement of Rep. Bentley) (“A woman shall not wear anything that pertains to a man, nor shall a man put on a woman’s garments. For all who do so are an abomination to the Lord your God.” (quoting *Deuteronomy* 22:5)); *id.* (statement of Rep. Clowney) (discussing the percentage of transgender youth in Arkansas and the corresponding suicide rates); *id.* (statement of Rep. McCullough) (arguing that this bill is being introduced out of fear and misunderstanding of the transgender community).

165. CaSandra Glover, *Pride Month and a Reflection on Arkansas’s Recent Passage of Anti-Transgender Legislation*, ARK. ADVOCS. FOR CHILD. & FAMS., <https://www.aradvocates.org/pride-month-and-a-reflection-on-arkansas-recent-passage-of-anti-transgender-legislation> [https://perma.cc/NC5A-WTA5] (arguing that the Arkansas bill targets transgender youths).

The Court first reached the conclusion that discrimination against transgender people constitutes discrimination on the basis of sex in 2020 in *Bostock v. Clayton County*.¹⁶⁶ This case involved Title VII discrimination claims made by employees fired for being gay or transgender.¹⁶⁷ The Court found that the employers had discriminated on the basis of sex because it is “impossible to discriminate against a person for being [gay]¹⁶⁸ or transgender without discriminating against that individual based on sex.”¹⁶⁹ It explained that “[a]n employer who fires an individual for being [gay] or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”¹⁷⁰ The Court also rejected the employers’ argument that they had not discriminated on the basis of sex because they equally discriminated against both men and women.¹⁷¹ It reasoned that “an employer who intentionally fires a . . . transgender employee in part because of that individual’s sex violates the law even if the employer is willing to subject all male and female . . . transgender employees to the same rule.”¹⁷²

Even though the Court decided *Bostock* in the statutory context of Title VII, its main holding—that discrimination against LGBTQ individuals constitutes discrimination on the basis of sex—logically applies to Equal Protection Clause claims as well.¹⁷³ While Title VII focuses on individuals and the Equal Protection Clause focuses on

166. 140 S. Ct. 1731 (2020).

167. *Id.* at 1737–38.

168. The original quote uses the language “homosexual.” However, many LGBTQ people now find this term offensive and outdated. *See, e.g., GLAAD Media Reference Guide—11th Edition—Glossary of Terms: LGBTQ*, GLAAD, <https://www.glaad.org/reference/terms> [<https://perma.cc/EK5Y-GU8T>] (listing “homosexual” under “Terms to Avoid” and noting that using “gay” or “lesbian” is the “best practice”). Therefore, the term “homosexual” will be replaced with “gay” throughout the Comment.

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

170. *Id.* at 1737.

171. *Id.* at 1744.

172. *Id.*

173. *See generally* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (abrogated on other grounds by Ill. Republican Party v. Pritzker, 973 F.3d 760 (7th Cir. 2020)); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

groups, both prohibit, generally, “discrimination on the basis of sex.”¹⁷⁴ An employer who discriminates against an individual transgender employee is treating that employee differently based on the sex they were assigned at birth.¹⁷⁵ In the same way, a state legislature that adopts a law singling out transgender people for disparate treatment is also treating the class of transgender individuals differently based on the sex they were assigned at birth.¹⁷⁶ Thus, the distinction between discriminating against an individual in the Title VII context and discriminating against a group in the Equal Protection Clause context is immaterial.¹⁷⁷ A hypothetical example from *Bostock* helps to illustrate this point:

[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. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.¹⁷⁸

174. 42 U.S.C. § 2000e-2(a) (“It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”); *Frontiero v. Richardson*, 411 U.S. 677, 683, 687 (1973) (acknowledging prior caselaw has noted that the Equal Protection Clause and Title VII of the Civil Rights Act of 1964 both prohibit discrimination on the basis of sex).

175. See *Bostock*, 140 S. Ct. at 1741 (finding that the employer is penalizing an employee for traits that it would otherwise tolerate in an employee born with those traits).

176. See Letter from Libby Skarin, Campaigns Director, ACLU of North Dakota, to Chairwoman Larson and Members of the Senate Judiciary Committee (Mar. 16, 2021), https://www.legis.nd.gov/assembly/67-2021/testimony/SJUD-1298-20210316-9211-A-SKARIN_ELIZABETH.pdf [<https://perma.cc/DZ7N-M8L2>] (seeking to block the passage of a North Dakota bill that would prevent transgender students from participating in public school athletic activities).

177. Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 572 (2016) (“[T]he showing a plaintiff must make to recover under antidiscrimination statutes mirrors the showing under the Equal Protection Clause and, therefore, these statutory sex discrimination cases inform the equal protection analysis.”).

178. *Bostock*, 140 S. Ct. at 1741–42.

Furthermore, decisions based on sex stereotypes are not a legitimate state goal.¹⁷⁹ When an actor discriminates against transgender individuals, they are punishing that individual for failing to conform to the gender roles that are consistent with the individual's sex.¹⁸⁰ Thus, even if the actor penalizes both transgender women and transgender men, they are still impermissibly discriminating on the basis of sex in both the context of Title VII and the Equal Protection Clause.¹⁸¹

To date, the Fourth, Sixth, Seventh, and Eleventh Circuits have adopted this interpretation of the Equal Protection Clause.¹⁸² For example, in *Grimm*, the Fourth Circuit found that a school discriminated on the basis of sex against a transgender student by preventing him from using the bathroom that corresponded with his gender identity.¹⁸³ The court reasoned that the school's policy created a sex-based classification by insisting that students must use the bathroom corresponding with the sex listed on the student's birth

179. See *United States v. Virginia*, 518 U.S. 515, 549–50 (1996) (rejecting Virginia's argument that a military school for women could justifiably have major distinctions in pedagogy compared to a military school for men due to the "important differences between men and women in learning and developmental needs" as based on impermissible sex stereotypes); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690, 1692, 1700–01 (2017) (holding that an immigration rule that made it easier for female United States citizens to have their child born abroad naturalized was unconstitutional because it was based on the stereotype that women maintain closer ties with their children than men); *Orr v. Orr*, 440 U.S. 268, 283 (1979) ("Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.").

180. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (9th Cir. 2020) (agreeing with the district court's decision that discrimination against transgender individual "punish[es] transgender persons for gender non-conformity, thereby relying on sex stereotypes"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (finding that the School District's bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently").

181. See *Barry*, *supra* note 177, at 569 ("Transgender people, by definition, have gender identities that do not align with their assigned sex at birth . . . [t]herefore, transgender classifications necessarily implicate sex: the assigned sex with which the transgender person does not identify, and another sex with which the person does identify.").

182. See generally *Grimm*, 972 F.3d 586; *Whitaker*, 858 F.3d 1034; *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

183. *Grimm*, 972 F.3d at 608–09.

certificate.¹⁸⁴ Furthermore, the school's policy unlawfully relied on sex stereotypes by punishing transgender individuals who failed to conform to such expectations.¹⁸⁵

Because Act 626 discriminates against transgender individuals, it also impermissibly discriminates on the basis of sex by punishing transgender individuals for seeking medical care that does not align with their sex assigned at birth.¹⁸⁶ Because Act 626 prohibits the use of puberty blockers only when used to treat gender dysphoria, the state is specifically discriminating against transgender individuals for their refusal to conform to gender stereotypes and norms.¹⁸⁷ The expectation, for example, for an individual assigned female at birth is that they will have a female gender identity and expression.¹⁸⁸ This manifests as they go through puberty and acquire traits typically associated with women, such as breasts and menstruation.¹⁸⁹ A transgender boy defies this expectation, which is based on gender stereotypes, by seeking access to puberty blockers for the purpose of preventing his body from undergoing these feminizing changes.¹⁹⁰

The fact that the Act prohibits both transgender youth assigned male at birth and transgender youth assigned female at birth from accessing puberty blockers for the purpose of gender affirmation is not a defense.¹⁹¹ When an actor subjects a transgender individual to disparate treatment, the actor is punishing the individual for failing to

184. *Id.* at 608.

185. *Id.*

186. ARK. CODE ANN. §§ 20-9-1502(a)-(c) (2021) (providing that “[a] physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age” while expressly permitting other procedures for non-gender transition purposes).

187. 2021 Ark. Acts 626 § 2(6)(A)(ii); ARK. CODE ANN. §§ 20-9-1502(a), (c)(1)-(4) (explaining that the use of puberty blockers as “gender transition procedures” are prohibited unless used to treat infections, injuries, disorders, and diseases).

188. See *APA Transgender and Gender Nonconforming Guidelines*, *supra* note 161, at 833.

189. Sujita Kumar Kar, Ananya Choudhury & Abhishek Pratap Singh, *Understanding Normal Development of Adolescent Sexuality: A Bumpy Ride*, 8 J. HUM. REPROD. SCIS. 70, 71 (2015).

190. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2166 (2021).

191. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020) (finding discrimination even where “an employer who intentionally fires an individual [gay] or transgender employee in part because of that individual’s sex violates the law even if the employer is willing to subject all male and female [gay] or transgender employees to the same rule”).

conform to gender stereotypes.¹⁹² Thus, even if the actor equally discriminates against transgender women and transgender men, the actor is still making decisions based on sex stereotypes and thus is still impermissibly discriminating on the basis of sex.¹⁹³ In cases involving denying transgender individuals access to the bathroom that corresponds with their gender identity, for example, courts have rejected the argument that, because transgender men and transgender women are equally denied access, it cannot amount to sex discrimination.¹⁹⁴ Thus, Act 626 constitutes discrimination against transgender youth on the basis of sex, and is subject to intermediate scrutiny under due process jurisprudence.¹⁹⁵

B. Access to Gender-Affirming Puberty Blockers Implicates the Fundamental Right to Liberty Under the Due Process Clause

Act 626 infringes upon the fundamental right to liberty guaranteed by the Fourteenth Amendment's Due Process Clause.¹⁹⁶ The concept of a Due Process Clause liberty interest has evolved and expanded over time to allow for increasing individual freedoms.¹⁹⁷ These freedoms center around an individual's right to make "personal choices central to individual dignity and autonomy" free from state interference.¹⁹⁸ The issue of being denied access to gender-affirming care fits squarely

192. See *Grimm v. Gloucester Cnty.*, 972 F.3d 586, 608 (2020) (agreeing with the district court's decision that discrimination against transgender individual "punish[es] transgender persons for gender non-conformity, thereby relying on sex stereotypes"); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 972 F.3d 1034, 1051 (2017) (finding that the School District's bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently").

193. *Grimm*, 972 F.3d at 608 (explaining that discriminating on the basis of gender non-conformity is inherently based on sex stereotypes).

194. *Id.* at 608–09; *Whitaker*, 972 F.3d at 1051; see also *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (demonstrating that protections afforded to everyone cannot be denied to transgender people); *Smith v. City of Salem*, 378 F.3d 566, 574–75 (2004) (equating discrimination against a transgender person who does not act in accordance with their "gender" to discrimination against a cisgender person who fails to act according to sex stereotypes).

195. See *Grimm*, 972 F.3d at 607–08, 610 (applying intermediate scrutiny to a case of discrimination on the basis of transgender status and on the basis of sex).

196. *Infra* Section II.C.

197. *Supra* Section I.D.

198. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

within this scope of individual dignity and autonomy.¹⁹⁹ Like laws that barred gay people from marrying,²⁰⁰ minors from accessing contraceptives,²⁰¹ and male students from wearing their hair long,²⁰² Act 626 infringes upon the right of transgender minors to make decisions concerning their own bodies.

Laws that prohibit transgender youth from making decisions about their gender identity likewise constitute government overreach into one of the most intimate and private areas of an individual's life. In *Obergefell*, for example, Justice Kennedy reasoned, “[I]ike choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”²⁰³ He explained that laws barring same-sex marriage impermissibly infringed on the “right of privacy” protected by the Due Process Clause.²⁰⁴ The Due Process Clause protects such significant decisions from government interference to prevent the majority from using legislation to discriminate against an unpopular minority group.²⁰⁵

Act 626 implicates the ability of transgender minors to decide their gender identity, which is one component of personal appearance.²⁰⁶ The court in *Bishop v. Colaw*²⁰⁷ specifically found that students' right to govern their personal appearance was protected because the Constitution guaranteed “the right of every individual to the possession and control of [their] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of

199. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015).

200. See *Obergefell*, 576 U.S. at 653–54 (explaining that Michigan, Kentucky, Ohio, and Tennessee barred same-sex marriage).

201. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681 (1977).

202. *Bishop v. Colaw*, 450 F.2d 1069, 1070–71 (8th Cir. 1971).

203. *Obergefell*, 576 U.S. at 666.

204. *Id.* at 665–66.

205. See *id.* at 663 (explaining that the Due Process Clause also protects “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).

206. See Carolyn Jackson & Jo Warin, *The Importance of Gender as an Aspect of Identity at Key Transition Points in Compulsory Education*, 26 BRITISH EDUC. RSCH. J. 375, 379 (2000) (discussing how “gender is a fundamental aspect of a person's self-concept” and the way that a person relates with others in society).

207. 450 F.2d 1069 (8th Cir. 1971).

law.”²⁰⁸ Moreover, gender identity is an aspect of self even more private and crucial to one’s bodily autonomy than one’s personal appearance and thus arguably warrants even stronger protection from government interference.²⁰⁹ Therefore, Act 626 implicates the Due Process Clause and is subject to heightened scrutiny.²¹⁰

C. Act 626 Fails the Intermediate Scrutiny Test

Because Act 626 targets a quasi-suspect class and implicates fundamental liberty interests, it must pass intermediate scrutiny to avoid being struck down as unconstitutional. Act 626 does not meet the intermediate scrutiny standard for two reasons. First, Arkansas does not have an important interest in preventing youth from making irreversible decisions. Second, even if Arkansas has an important interest in protecting the health of its youth, Act 626 is not narrowly tailored to advance this interest.

1. Even if Arkansas has an important interest in protecting its youth, it does not have an important interest in preventing youth from making irreversible decisions

The first step in an intermediate scrutiny inquiry is to ask whether the state has an “exceedingly persuasive” interest at stake.²¹¹ According to the legislative findings contained in the Act and other legislative history, Arkansas has two purported interests: preventing youth from being subjected to unsafe medical procedures²¹² and preventing youth from making serious irreversible decisions.²¹³

208. *Id.* at 1075 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

209. *Id.*

210. See *supra* Section I.B (explaining that the Supreme Court applies heightened scrutiny when a state treads on a fundamental liberty interest in violation of the Due Process Clause).

211. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996), which explains that a state must have an “exceedingly persuasive” interest to survive intermediate scrutiny).

212. The bill details that the General Assembly is concerned that practitioners are prescribing puberty-blocking drugs to minors “despite the lack of any long-term longitudinal studies evaluating the risks and benefits of using these drugs for the treatment of such distress or gender transition.” 2021 Ark. Acts 626 § 2(6)(A)–(B).

213. *Id.* §§ 2(1), 2(14); see also *Arkansas Save Adolescents from Experimentation (SAFE) Act: Hearing on H.B. 1570 Before the House*, 2001 Leg., 93rd Sess. (2021) (statement of Rep. Lundstrum) (“We need to protect children from changing their sex before they’re eighteen years old because, guess what, we’ve all done some things when we’re

Arkansas arguably has an important interest in safeguarding the health of youth. The Supreme Court has long recognized the power of states to regulate the health and safety of its residents.²¹⁴ Arkansas's action to regulate a medical procedure, therefore, falls within this long line of precedent.

Arkansas's purported interest in preventing youth from making irreversible decisions, however, is not implicated by the portion of this Act that bars access to puberty blockers. Courts have traditionally curbed the liberty of minors in certain limited circumstances. For example, in *Bellotti v. Baird*,²¹⁵ the Supreme Court declared that "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."²¹⁶ Today, state and federal governments validly regulate the conduct of minors in many ways, such as by preventing minors from buying alcohol²¹⁷ or tobacco products²¹⁸ and by requiring parental notification for an abortion.²¹⁹

However, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."²²⁰ In this case, Arkansas's concern about minors making serious, permanent decisions is misplaced because the use of puberty blockers is completely reversible.²²¹ Once an individual stops taking puberty blockers, they will simply go through puberty of the sex that is consistent with their sex organs.²²² Treatment can be stopped any time without any serious health consequences.²²³ Therefore, while Arkansas may have a legitimate interest in protecting the health and safety of

under eighteen that we probably shouldn't have done and the children of Arkansas deserve to be protected.").

214. See *supra* notes 39–43 and accompanying text.

215. 443 U.S. 622 (1979).

216. *Id.* at 635.

217. U.S. CONST. amend. XXI (repealing the Nineteenth Amendment and giving power to states to regulate the sale and consumption of alcohol).

218. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (discussing the uncontested principle that states have an interest in preventing minors from using tobacco products).

219. *Hodgson v. Minnesota*, 853 F.2d 1452, 1463–64 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990).

220. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

221. *Turban et al.*, *supra* note 19, at 2 ("GnRHa therapy is unique among gender-affirming medical interventions in that the resultant pubertal suppression is fully reversible, with the resumption of endogenous puberty after their discontinuation.").

222. *Puberty Blockers*, *supra* note 6.

223. *Id.*

minors, Arkansas's alleged interest in stopping children from making irreversible decisions fails upon closer investigation.

2. *Act 626 is not narrowly tailored to meet Arkansas's interest in protecting youth because it exposes children to harm*

The second step of intermediate scrutiny asks whether the means taken by Arkansas to reach its important interest in protecting minors' health are sufficiently narrowly tailored.²²⁴ Act 626 is both overinclusive and underinclusive and consequently fails to meet intermediate scrutiny. Act 626 is underinclusive because it does not bar the use of puberty blockers by minors in all cases, prohibiting them only when used to treat gender dysphoria.²²⁵ If the use of puberty blockers were actually harmful to children, it would presumably be harmful to all children regardless of their sex or transgender status.²²⁶ The fact that the same drugs are used to treat precocious puberty and gender dysphoria supports this conclusion.²²⁷ Moreover, medical professionals prescribe puberty blockers to treat precocious puberty at a much younger age, on average, than to treat gender dysphoria, thus implicating the health of transgender children for a much shorter time

224. See RICH, *supra* note 37, § 11:6 (noting that not all substantive due process cases can be analyzed in terms of simply rational basis review or strict scrutiny).

225. ARK. CODE ANN. § 20-9-1501(6)(B) (2021).

226. See Reardon, *supra* note 12 (discussing how puberty blockers have been used safely to treat precocious puberty for decades and recent studies showing that their use to treat transgender youth for gender dysphoria are yielding similar results).

227. The most common hormones used to treat precocious puberty, leuprolide acetate and histrelin, are also the most common used to treat gender dysphoric transgender youth. Johanna Olson-Kennedy, Stephen M. Rosenthal, Jennifer Hastings & Linda Wesp, *Health Considerations for Gender Non-Conforming Children and Transgender Adolescents*, U.C.S.F. TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/youth> [<https://perma.cc/A6RV-NCM8>]. These drugs are being used to treat transgender youth "off-label," meaning that, although the drugs themselves have FDA approval, they have not been officially approved for the purpose of treating gender dysphoria. Natalie G. Allen, Kanthi Bangalore Krishna & Peter A. Lee, *Use of Gonadotropin-Releasing Hormone Analogs in Children*, 33 CURRENT OP. PEDIATRICS 442, 442-43 (2021). However, "the term 'off-label' does not imply an improper, illegal, contraindicated, or investigational use." American Academy of Pediatrics, *Off-Label Use of Drugs in Children*, 133 PEDIATRICS 563, 563 (2014). In fact, the prescription of off-label drugs is a commonly accepted medical practice. David C. Radley, Stan N. Finkelstein & Randall S. Stafford, *Off-Label Prescribing Among Office-Based Physicians*, 166 ARCH INTERNAL MED. 1021, 1025 (2006) (finding that "about 21% of all estimated uses for commonly prescribed medications were off-label").

period.²²⁸ The American Academy of Pediatrics recommends that “[e]vidence, not label indication, remains the gold standard from which practitioners should draw when making therapeutic decisions for their patients.”²²⁹ As the use of puberty blockers to treat gender dysphoria becomes more common, more studies are being published that suggest that puberty blockers are just as safe when used to treat gender dysphoria as when used to treat precocious puberty.²³⁰ Therefore, Act 626 is underinclusive because it purports to protect all children from the negative impacts of using puberty blockers, but only prevents transgender youth from having access.

The Act is also overinclusive because it prohibits a form of care that the medical community largely accepts as safe and beneficial. For Act 626 to be narrowly tailored, it would need to restrict only forms of care which harm children.²³¹ The American Academy of Child &

228. Lopez et al., *supra* note 163, at 1433 (“The average age at the time of implant placement for an off-label indication was 11.7 years . . . whereas the average among children with precocious puberty was 8.33 years.”).

229. American Academy of Pediatrics, *supra* note 227, at 566.

230. See Call et al., *supra* note 162, at 4; Lynn Rew, Cara C. Young, Maria Monge & Roxanne Bogucka, *Review: Puberty Blockers for Transgender and Gender Diverse Youth – A Critical Review of the Literature*, 26 CHILD & ADOLESCENT MENTAL HEALTH, 3, 12 (2021); see also Turban et al., *supra* note 19, at 7 (showing that access to puberty blockers “is associated with lower odds of lifetime suicidal ideation”); Luke R. Allen, Laurel B. Watson, Anna M. Egan & Christine N. Moser, *Well-Being and Suicidality Among Transgender Youth After Gender-Affirming Hormones*, 7 CLINICAL PRAC. PEDIATRIC PSYCH. 302, 302 (2019) (“[G]ender affirming hormones are a valuable medical intervention with promising psychosocial outcomes for transgender youth”); THE TREVOR PROJECT, THE TREVOR PROJECT RESEARCH BRIEF: GENDER-AFFIRMING CARE FOR YOUTH 2–3 (2020), <https://www.thetrevorproject.org/wp-content/uploads/2021/08/Gender-Affirming-Care-January-2020.pdf> [<https://perma.cc/BN5U-DZ7W>] (noting that in addition to being ethical and medically necessary, “[p]ubertal suppression is associated with decreased behavioral and emotional problems as well as decreased depressive symptoms”). But see G.G.F. Ramos, A.C.S. Mengal, C.A.T. Daltro, P.T. Cutrim, E. Zlotnik & A.P.A. Beck, *Systematic Review: Puberty Suppression with GnRH Analogues in Adolescents with Gender Incongruity*, 44 J. ENDOCRINOLOGICAL INVESTIGATION 1151, 1152 (2021) (describing the lack of data on the safety of using puberty blockers to treat gender dysphoria).

231. This Comment does not intend to suggest or imply that the use of other forms of gender-affirming care prohibited by the Act, such as hormone therapy or surgery, are unsafe for minors. These forms of care are simply outside of the scope of this Comment and thus are not discussed in detail.

Adolescent Psychiatry,²³² American Psychological Association,²³³ American Academy of Pediatrics,²³⁴ American Medical Association,²³⁵ Endocrine Society,²³⁶ World Professional Association for Transgender Health,²³⁷ and American College of Obstetricians and Gynecologists²³⁸ have all issued statements and guidance supporting the use of puberty blockers to treat gender dysphoria in transgender minors.²³⁹ An increasing number of medical studies also supports the finding that using puberty blockers for this purpose is safe and beneficial.²⁴⁰ Additionally, the effects of puberty blockers are completely reversible, so individuals may choose to stop treatment at any time without negative effects.²⁴¹ Act 626's prohibition on puberty blockers is not

232. AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender Diverse Youth, AM. ACAD. CHILD & ADOLESCENT PSYCH. (Nov. 8, 2019), https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx [https://web.archive.org/web/20220317173633/https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx].

233. APA Transgender and Gender Nonconforming Guidelines, *supra* note 161, at 843.

234. HUM. RTS. CAMPAIGN, SUPPORTING & CARING FOR TRANSGENDER CHILDREN 12 (2016), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/documents/SupportingCaringforTransChildren.pdf> [<https://perma.cc/WZR6-4LZT>] (citing David A. Levine, *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 PEDIATRICS 297, 308 (July 2013)).

235. AM. MED. ASS'N, HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf> [<https://perma.cc/4J33-ETMB>].

236. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3870 (2017).

237. WORLD PRO. ASS'N OF TRANSGENDER HEALTH, *supra* note 7, at 14, 18.

238. Comm. on Gynecologic Prac. & Comm. on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, *Health Care for Transgender and Gender Diverse Individuals*, 137 OBSTETRICS & GYNECOLOGY 75, 76 (2021), (supporting guidance on medical care of transgender adolescents by the World Professional Association for Transgender Health, Endocrine Society, and Pediatric Endocrine Society).

239. AACAP Statement Responding to Efforts to Ban Evidence-Based Care for Transgender and Gender Diverse Youth, *supra* note 238; APA Transgender and Gender Nonconforming Guidelines, *supra* note 161; HUM. RTS. CAMPAIGN, *supra* note 234; AM. MED. ASS'N, *supra* note 235; Hembree et al., *supra* note 236; WORLD PRO. ASS'N OF TRANSGENDER HEALTH, *supra* note 7; *Health Care for Transgender and Gender Diverse Individuals*, *supra* note 238.

240. See Turban et al., *supra* note 19; Allen et al., *supra* note 230; THE TREVOR PROJECT, *supra* note 230, at 2; Rew et al., *supra* note 230; Call et al., *supra* note 188.

241. *Puberty Blockers*, *supra* note 6; *supra* notes 221–23 and accompanying text.

narrowly tailored to meet Arkansas's purported interests in protecting the health of children.

On the contrary, Act 626 exposes transgender children to more harm, undermining Arkansas's justification that the Act helps protect children. Unfortunately, transgender youth experience significantly higher rates of mental health challenges and suicidal ideation than cisgender youth.²⁴² Recent studies on gender-affirming care are increasingly finding that the use of puberty blockers "is associated with decreased behavioral and emotional problems as well as decreased depressive symptoms."²⁴³ In 2014, a long-term longitudinal study evaluated the use of puberty blockers to treat gender dysphoria and found that their use provides transgender youth "the opportunity to develop into well-functioning young adults" by alleviating the symptoms of gender dysphoria and improving psychological functioning.²⁴⁴ Recent studies, which found that transgender youth who had access to puberty blockers had lower odds of lifetime suicidal ideation, further support these findings.²⁴⁵ Consequently, by impeding transgender children's access to puberty blockers, Act 626 puts children at a higher risk for mental health issues and suicidal ideation, which is clearly contrary to Arkansas's purported interest in protecting children from harm.

242. THE TREVOR PROJECT, *supra* note 230, at 1 ("[A]ccording to The Trevor Project's 2019 National Survey on LGBTQ Youth Mental Health, 54% of transgender and non-binary youth reported seriously considering suicide in the last year, and 29% made a suicide attempt.").

243. *Id.* at 2 ("Gender-affirming care has been shown to reduce suicidal ideation and attempts in transgender individuals"); Ramos, *supra* note 230, at 1152, 1157 (compiling the results of eleven studies and finding the use of puberty blockers "promising" to improve mental health outcomes of transgender youth); Rew, *supra* note 230, at 3 (reviewing 211 articles and nine research studies and finding that the use of puberty blockers for transgender youth resulted in "decreased suicidality in adulthood, improved affect and psychological functioning, and improved social life"); Call et al., *supra* note 162, at 4 (noting that puberty blockers have been used for years without any long-term side effects).

244. Annelou L.C. de Vries, Jenifer K. McGuire, Thomas D. Steensma, Eva C.F. Wagenaar, Theo A.H. Doreleijers & Peggy T. Cohen-Kettenis, *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, PEDIATRICS, Oct. 2014, at 1.

245. Turban, *supra* note 19, at 5; THE TREVOR PROJECT, *supra* note 230; Ramos, *supra* note 230, at 1156; Rew, *supra* note 230, at 9–10; Call et al., *supra* note 162.

CONCLUSION

The United States is enduring an unprecedented onslaught of state legislatures proposing and passing anti-transgender legislation. In this context, the Arkansas Legislature passed Act 626, which prohibits transgender youth from accessing gender-affirming healthcare.²⁴⁶ Act 626 is unconstitutional under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment because it constitutes discrimination on the basis of sex and transgender status and infringes on the personal liberty interests of transgender youth. Thus, it is subject to, and fails, intermediate scrutiny.

Far from protecting minors, the Act is unconstitutional because it causes harm to transgender minors. Studies consistently demonstrate that the rates of mental health issues and suicidal ideation are significantly higher in transgender and gender nonconforming youth than in cisgender youth.²⁴⁷ Access to gender-affirming care, such as puberty blockers, has a large positive impact on these outcomes.²⁴⁸ Legislation like Act 626 is not only unconstitutional; it also harms transgender minors and their families, forcing them to take extreme measures to get access to the medical care they need.²⁴⁹ Rather than passing legislation that regulates transgender bodies, we need measures that empower and support transgender youth and their right to make their own decisions.

Although this Comment focuses specifically on access to puberty blockers for transgender youth, its findings are more widely applicable. In the future, legislation that discriminates against and infringes on the liberty interests of transgender individuals should be subject to heightened scrutiny under Equal Protection Clause and Due Process Clause analysis. This will ensure that an unpopular and often-targeted class will not be subject to the biases of state and local legislatures. It is time for the judiciary to take up its position once again as guardian of

246. Hudson Jr., *supra* note 1 (explaining that states have filed over 120 anti-trans bills in 2021).

247. *See, e.g.*, THE TREVOR PROJECT, *supra* note 230, at 3 (explaining that transgender and/or nonbinary individuals experience higher rates of mental health challenges than their cisgender peers).

248. *Id.* (noting gender-affirming care reduces suicidal ideation).

249. *See, e.g.*, Lisa Selin Davis, *Transgender Children and Their Parents Struggle to Cope with Restrictive Laws*, CNN (June 22, 2021, 9:22 AM), <https://www.cnn.com/2021/06/14/health/trans-kids-care-state-bans-wellness/index.html> [<https://perma.cc/LFY6-DP36>] (describing how some families relocate to different states to access gender-affirming medical treatment for their transgender children).

the politically powerless minority to ensure that all individuals can realize the constitutional promise of freedom.