

THE TRAGIC COSTS OF “PROTECTING” TRANS YOUTH

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ABSTRACT

I am a 56-year-old Trans woman, lesbian, queer. I didn't understand this growing up, but I can sure remember when first I knew I was different. I was five. I remember the exact moment. It was a sunny September day. I was in kindergarten; the kids were playing by a big tree. The teacher began to divide us up into two groups, one for boys, one for girls. I don't remember why. As the kids began lining up, I was stricken with apprehension. I realized that I was expected to go without question or hesitation to the group of boys. I had done so before unthinkingly, obediently, dutifully, but THIS time, I realized, was different: WHY was I being put in the wrong group? I was the last one to line up. The discomfort and anxiety remained for years.

I know now that I was experiencing gender dysphoria. I didn't have the language, the words; I had never seen or heard or read anything about it. Nobody "groomed" me. My family never spoke of anything remotely related. Ignorance and silence did not protect me from ANYTHING. I couldn't tell my parents. I was too ashamed and afraid. I lived in fear.

I panicked at puberty as my body began to change. I had no one to talk to. I first considered suicide at six. As a young Catholic I knew just thinking about suicide was a mortal sin and I could burn in eternal hell. I was nine when I first planned my suicide; I was thirteen when attempted it. I can't begin to recall all the sleepless nights, the bullying, called a sissy then a "fag" when kids learned that word. My inability to properly express

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assigned gender was noticed and punished. I was bullied continuously for years. I remember laying in the playground dust, fourth grade, encircled, kicked, tasting dirt, my own blood, my tears. It was a "game" called "Smear the Queer" or "Tag the Fag." I hated school. It made me want to die.

*No child should have to experience what I did. Trans children are **children**. They have rights. We cannot pretend these children away; they are being bullied, and persecuted. They need our protection. But we cannot protect what we cannot see. See them. They are real. They exist. They need our support.¹*

INTRODUCTION

In the past few decades, our nation has made substantial progress on the rights of LGBTQ+ people. The legalization of gay marriage in *Obergefell v. Hodges*² in 2015 was transformative for our nation. Just five years later, another huge victory was scored in *Bostock v. Clayton County, Georgia*, when the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 protected gay and transgender people.³

With every gain, backlash often follows.⁴ Three years after *Bostock*, a tsunami of anti-LGBTQ+ bills, and more specifically, anti-Trans bills, littered the nation. Hundreds of bills have been filed since *Bostock*, with over 400 such bills filed in 2023 alone.⁵ Republican-controlled legislatures, thus far, are winning a manufactured war. And things may get worse still.

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that there was no substantive due process right to an abortion in the

1. Jaimie Hileman, July 26, 2023.

2. 576 U.S. 641 (2015).

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

4. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2322 (2023) (Sotomayor, J., dissenting) (“Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women’s rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate.”).

5. Erin Reed, *June Anti-Trans Legislative Risk Map*, ERIN IN THE MORNING (June 25, 2023), <https://www.erininthemorning.com/p/june-anti-trans-legislative-risk> [https://perma.cc/2M2S-XE75]. See also Annette Choi, *Record number of anti-LGBTQ bills have been introduced this year*, CNN (Apr. 6, 2023), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg> [https://perma.cc/S8BX-5R7X].

Constitution, overruling *Roe v. Wade*.⁶ As if to portend a certain kind of future, Justice Clarence Thomas noted in his concurring opinion that while *Dobbs* was limited to abortion, “in future cases, we could reconsider all of this Court’s substantive due process precedents including *Griswold*, *Lawrence*, and *Obergefell*.”⁷ Two of those cases, *Lawrence v. Texas*,⁸ and *Obergefell v. Hodges*,⁹ found constitutionally protected substantive due process rights of liberty and privacy in the intimate relationships of people in LGBTQ+ communities.¹⁰

One year after *Dobbs*, we are headed there. On June 30, 2023, the last day of the Court’s 2023 term and, coincidentally, the last day of Pride month, the Court decided *303 Creative LLC v. Elenis*.¹¹ In that case, a web designer alleged that she received a request from a gay man to design a wedding website for him and his future spouse. The plaintiff alleged that having to do so would violate her freedom of speech by “forc[ing] her to convey messages inconsistent with her belief that marriage should be reserved for unions between one man and one woman.”¹² She sought a pre-enforcement action to prevent the state of Colorado from enforcing its anti-discrimination laws against her.¹³ The Supreme Court agreed with her. In reversing the lower court’s judgment, Justice Gorsuch, writing for the majority, concluded: “[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.”¹⁴ With this decision, many now

6. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); *see Roe v. Wade*, 410 U.S. 113 (1973).

7. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

8. 539 U.S. 558 (2003) (substantive due process right to liberty).

9. 576 U.S. 641 (2015).

10. *Obergefell*, 576 U.S. at 675 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”); *Lawrence*, 539 U.S. at 578 (“The petitioners are entitled to respect for their private lives. . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

11. 143 S. Ct. 2298 (2023).

12. *Id.* at 2308.

13. The alleged client claims he never heard of the plaintiff or her business; never asked her to create anything; is not gay; and has “been happily married to a woman for the last 15 years.” The Associate Press, *Designer in Supreme Court ruling cited client who denies making wedding site request*, NPR (July 1, 2023), <https://www.npr.org/2023/07/01/1185632827/web-designer-supreme-court-gay-couples> [<https://perma.cc/A69G-XR7L>]. Was the Court misled?

14. *303 Creative LLC*, 143 S. Ct. at 2322.

believe that Justice Thomas' hope of rolling back the gains of *Lawrence* and *Obergefell* may be realized sooner than anyone imagined. Justice Sotomayor, in a fiery dissent, noted that “[t]oday, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.”¹⁵ Law scholars have expressed concern as well:

The hostility of a majority of justices to [Obergefell] protecting same-sex marriage is so open that, until they can follow Justice Clarence Thomas's call to overrule that decision, they are determined to strip same-sex couples of civil rights protections that other lawfully married couples enjoy. For many years, the court stopped short of overruling *Roe v. Wade*, until it did in 2022. For many years, the court stopped short of declaring affirmative action unconstitutional, until it did [in 2023]. The same-sex marriage equality decision stands for now, but it should be added to the list of endangered precedents.¹⁶

The decision in *303 Creative LLC* and Justice Thomas's hopeful premonitions will roll back the gains of LGBTQ+ communities. Moreover, there are a dizzying array of newly proposed bills and recently enacted laws specifically targeting LGBTQ+ people generally, and Trans people more specifically. This essay will highlight five areas of this assault. The essay explores the devastating harms—physical, mental, and spiritual—that these laws inflict upon Trans and Gender-Diverse youth (“TGD”),¹⁷ their families, and even educators and medical professionals. We spotlight state laws in the following areas: banning the use of pronouns that do not align with a person's assigned sex at birth; laws and policies making it difficult (and often impossible) to legally change one's name or gender on governmental forms of identification; bans on bathrooms and locker rooms and bans applicable to sports teams; laws banning Trans children from accessing gender-affirming care; and finally, several laws legalizing

15. *Id.* (Sotomayor, J., dissenting).

16. Laurence H. Tribe & Jeffrey B. Abramson, *With Supreme Court LGBTQ decision, marriage equality is at risk: The court's decision demeans our nation's aspirations to equality and inclusion and thereby diminishes us all*, BOSTON GLOBE (June 30, 2023), <https://www.bostonglobe.com/2023/06/30/opinion/supreme-court-lgbtq-equality> [<https://perma.cc/5DHG-PPSF>].

17. While our language is primarily focuses on Trans youth, we want to be clear that we are also including nonbinary/gender diverse youth in this discussion. As a result, we will occasionally use the terms “Trans youth” and “Trans and Gender Diverse youth” (“TGD”) interchangeably. By youth, we mean minors.

government censorship of books and *even the mere mention of sexual orientation or gender identity* in schools.¹⁸

Our last section will highlight the myriad of injuries caused by these laws. Trans children exist. These laws are attempts to demean them, to otherize them, to ban them into oblivion, and to extinguish their identities. These laws are designed to make outcasts of Trans children, and hateful attacks on these children by others is likely to increase.¹⁹ These children exist; they cannot be legislated away. This essay makes the human case that these children deserve to be seen and acknowledged. Stigmatizing these children is not protection. You cannot protect what you cannot see, and these laws are undoubtedly designed to render these children (and indeed, all in the LGBTQ+ communities, their friends, families, and other allies) invisible.

I. NAMES & PRONOUNS

I'm really not sure what to do here. I felt severe dysphoria over my name for most of my childhood, to the point I would refuse to ever say it in public. I started the process of getting it changed a month ago, and I told some of my closest friends, my

18. Notice the hypocrisy here. When it comes to social programs designed to help people access food, shelter, or healthcare, we often hear the cry that Big Brother needs to stay out of people's lives. *C.f., e.g.,* David Cohen & Julia Conley, *Amid House Speaker Chaos, GOP Confess Attack on Social Security, Medicare Still Top Priority*, Common Dreams (Oct. 18, 2023), <https://www.commondreams.org/news/jordan-social-security-medicare;>; Tami Luhby, *Here's why millions of Americans will lose \$3 billion in monthly food stamp benefits starting in March*, CNN (Mar. 1, 2023), <https://www.cnn.com/2023/03/01/politics/food-stamps-pandemic-emergency-allotments/index.html> (; Keya Vakil, *The GOP Wants to Repeal the ACA During a Pandemic. Democrats Are Trying to Expand Coverage*, Copper Courier, (June 30, 2020), <https://coppercourier.com/story/republicans-fight-to-repeal-affordable-care-act-democrats-introduce-expansion/>. The same and similar ideologies conversely support Big Brother's control over what people hear, read, and even what they do with their bodies. *See, e.g.,* James Factora, *Sarah Huckabee Sanders Signed an Executive Order Banning "Woke" Language From State Documents*, Them, (Oct. 20, 2023) <https://www.them.us/story/sarah-huckabee-sanders-executive-order-ban-gender-neutral-words>; Parker Leipzig, *Requests to ban books hit a 21-year high. See which titles were the most challenged*, CNN (Aug. 27, 2023), <https://www.cnn.com/2023/08/27/us/school-library-book-ban-increase-dg/index.html>; David S. Cohen, Greer Donley & Rachel Rebouche, *The Supreme Court's Roe v. Wade Plan Would Condemn Women to Second-Class Citizenship*, Rolling Stone (May 3, 2022), <https://www.rollingstone.com/politics/political-commentary/abortion-supreme-court-roe-vs-wade-equality-1346966/>; Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech*, *Advocacy Group Says*, N.Y. Times (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html>.

19. *See infra* notes 217–218.

family, and had the counselor change my name in the school's database. However, very few people actually respect it. Nearly everybody I'm with still uses my deadname even when I try to tell them not to! Some of my teachers, most of my classmates, even my own entire family!!! What do I do here? It's making me feel even worse about myself²⁰

Once many parents learn the “sex” of a fetus, they immediately default to binary genderisms. As soon as their baby is born, many proud parents are assigning female sounding names to babies assigned female at birth. This is done automatically, without thinking.²¹ In addition to gendered names, we dress the child accordingly—pink for girls and blue for boys. We buy skirts for girls, pants for boys. We raise girls to be dainty and cute; we prepare them to be wives and mothers by teaching them to cook, clean house, wash clothes, and take care of their baby dolls. *We* do this to them without ever stopping to think: what gender biases am I imposing on my child?

Some of these babies will grow into children who realize that they are expected to perform a foreign gender identity. For example, a child, assigned female at birth, knows that he is not a female; he learns that his assigned gender does not align with his actual gender identity. He might get to a point where he wants to begin the social transition to embrace his real gender identity. The first steps in this transition involve changing the things within their control: hair and clothing. When they are ready, they might attempt to change their legally assigned name. Changing one’s name for minors, socially and legally, is difficult.²²

20. Fish_In_A_Bottle, *How do I make people stop using my deadname?*, REDDIT (Feb. 28, 2023), https://www.reddit.com/r/NoStupidQuestions/comments/11ejaug/how_do_i_make_people_stop_using_my_deadname [https://perma.cc/8DSG-SK9Y].

21. “Implicit bias refers to the beliefs and attitudes that affect our understanding, actions and decisions in an unconscious way.” Charlotte Ruhl, *Implicit Bias (Unconscious Bias): Definition & Examples*, SIMPLY PSYCH. (Aug. 2, 2023), <https://www.simplypsychology.org/implicit-bias.html> [https://perma.cc/ZZF8-GBFV].

22. See, e.g., Hannah Schoenbaum, Sean Murphy, *Transgender youth: ‘Forced outing’ bills make schools unsafe*, ASSOCIATED PRESS, (Mar. 22, 2023), <https://apnews.com/article/transgender-students-pronouns-names-ec0b2c5de329d82c563ffb95262935f3>. Changing gender markers on birth certificates or driver’s licenses is also a challenge. States vary in what is allowed. Almost half of states allow one to change gender markers from M or F to M, F, or X; some require proof of surgery to change the gender markers on one or both documents; one state defines gender as sex assigned at birth and does not allow any change. See *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Aug. 23, 2023), https://www.lgbtmap.org/equality-maps/identity_document_laws [https://perma.cc/XBQ2-Q75L].

In all but two states, a minor’s parent or guardian must consent to and support a name change.²³ This requires the child to “out” themselves to their family, which can be a very serious risk: “[A]t least forty percent of [Trans] respondents reported rejection by their parents or other family members because of their gender identity or expression.”²⁴ Some states require those seeking a name change to publish notice in a newspaper.²⁵ This, too, can be very dangerous for Trans youth, who are already vulnerable to physical and mental harassment. Cost can also be a barrier.²⁶ Lacking legal documents that correspond with the child’s personal presentation can interfere with employment and travel. Worse, it can lead to *very* uncomfortable police encounters.²⁷

Once the youth adopts a name, legally or socially, their birth name becomes a “deadname.”²⁸ Words matter. Imagine being called a whore, a bitch, the n-word, the c-word; they all hurt. Names matter, too. Calling a person by their proper name is important. It is respectful. It is validating. It acknowledges one’s existence.

In addition to the name change, pronouns are likely to change as well. Several states have enacted bans and/or severe limitations on a child’s right to be addressed by their preferred pronouns.²⁹ Some reject pronoun use that does not align with gender identity unless the parent consents;³⁰ some

23. Sarah Steadman, *“That Name Is Dead to Me”: Reforming Name Change Laws to Protect Transgender and Nonbinary Youth*, 55 U. MICH. J.L. REFORM 1 (2021).

24. *Id.* at 32.

25. *Id.* at 29-30.

26. Megan Brodie Maier, *Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, and Oppressive*, 23 U. PA. J.L. & SOC. CHANGE 203, 229 (2020).

27. See Charles Kolodziej, *The Importance of Trans-sensitive Police Policies and Practices*, POLICING PROJECT (Nov. 27, 2019), [https://perma.cc/L5GY-N565](https://www.policingproject.org/news-main/2019/11/27/the-importance-of-trans-sensitive-police-policies#:~:text=Looking%20at%20the%20driver%E2%80%99s%20license%2C%20the%20officer%20may,impersonating%20someone%20else%20or%20driving%20with%20falsified%20identification)].

28. Deadname is defined as “the name that a transgender person was given at birth and no longer uses upon transitioning.” *Deadname*, MERRIAN-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/deadname> [https://perma.cc/LXA9-BAUQ].

29. Eesha Pendharkar, *Pronouns for Trans, Nonbinary Students: The States with Laws That Restrict Them in Schools*, EDUCATION WEEK (June 14, 2023) <https://www.edweek.org/leadership/pronouns-for-trans-nonbinary-students-the-states-with-laws-that-restrict-them-in-schools/2023/06#:~:text=A%20May%202023%20update%20to,student%27s%20sex%20assigned%20at%20birth> [https://perma.cc/66QV-7LGS].

30. See, e.g., S. File 496, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); S.B. 100, 2023 Leg., Reg.

prevent teachers from using pronouns that do not align with the gender identified on school documents;³¹ and some protect employees who misgender students from civil liability.³² Some teachers have also proactively filed their own lawsuits alleging violations of *their* First Amendment right when or if they are told to use a pronoun for a student that does not align with the gender assigned at birth.³³

Proponents claim these laws are designed to protect children.³⁴ Many in the science community disagree. Rather, medical and scientific institutions maintain that allowing Trans youth to change their names (and pronouns), *even if only socially*, is *crucial* to their mental health.³⁵ Studies show that Trans people, often subject to outing, stigmatization, and harassment, are highly vulnerable to depression—and even suicidal ideation—when their chosen names and pronouns are ignored.³⁶ Widening mental health disparities makes children *less* safe.³⁷ Despite this evidence, banning the use of pronouns that do not align the sex assigned at birth continues.³⁸

Sess. (Utah 2023).

31. These prohibitions apply even if the child changes their name legally. *See, e.g.*, H.B. 1069, 2023 Leg., Reg. Sess. (Fla. 2023). Compare S.B. 150, 2023 Leg., Reg. Sess. (Ky. 2023) (“The Kentucky Board of Education or the Kentucky Department of Education shall not require or recommend policies or procedures for the use of pronouns that do not conform to a student’s biological sex.”).

32. *See, e.g.*, H.B. 1269, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

33. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

34. According to Florida State Rep. Joe Harding, “[HB 1557] is about protecting our kids, empowering parents, and ensuring they have the information they need to do their God-given job of raising their child.” News Release, Staff, Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022), <https://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/> [<https://perma.cc/QWA9-RJR7>].

35. *See, e.g.*, Stephen T. Russell, Amanda M. Pollitt, Gu Li, and Arnold H. Grossman, *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503–505 (2018), [https://www.jahonline.org/article/S1054-139X\(18\)30085-5/fulltext](https://www.jahonline.org/article/S1054-139X(18)30085-5/fulltext); *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths In a recent study, researchers found that when transgender youths are allowed to use their chosen names their risk of suicide and depression decreases*, UT NEWS (Mar. 30, 2018), <https://news.utexas.edu/2018/03/30/name-use-matters-for-transgender-youths-mental-health/>.

36. Amanda M. Pollitt, Salvatore Ioverno, Stephen T. Russell, Gu Li, & Arnold H. Grossman, *Predictors and Mental Health Benefits of Chosen Name Use among Transgender Youth*, 53 YOUTH & SOC’Y 320, (2019).

37. Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 504-505 (2018).

38. *See* Jo Yurcaba, *Over 30 new LGBTQ education laws are in effect as students go back to school*, NBC NEWS (Aug. 30, 2023) <https://www.nbcnews.com/nbc-out/out-politics-and-policy/30-new-lgbtq-education-laws-are-effect-students-go-back-school-rcna101897>; *see also Equality Maps:*

II. BATHROOMS³⁹

*I was so shocked and angry when I found out that other students were suing the school to stop the policy of allowing kids like me from using a bathroom that matches our gender identity. I'm lucky to have a supportive family and friends, but most transgender kids I know don't. What happens at school can make or break their world. And being allowed to use the bathrooms we choose is a way to show support and make us feel recognized for who we are.*⁴⁰

Students spend upwards of six hours a day, five days a week in school; at some point, they are going to need to use a bathroom. Trans students, like cisgender students, want to use the restroom that aligns with their gender identity. Many states refuse to let them.

In 2016, North Carolina became the first state to tie restroom access to biological sex.⁴¹ North Carolina eventually backpedaled on this stance a year later after projections revealed a potential loss of billions of dollars in lost tourism and business revenue.⁴² Not to be deterred, other states

Safe Schools Laws, MOVEMENT ADVANCEMENT PROJECT (Sept. 6, 2023), https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination [<https://perma.cc/GR3C-FH37>].

39. Both courts and statutes have treated bathrooms and locker rooms identically in this context; this essay does the same. *See, e.g., A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023) (describing “distinction between bathrooms and locker rooms” as “immaterial”); Fla. Stat. Ann. § 553.865 (West) (banning transgender individuals from using “bathrooms and changing rooms”, the latter including “locker rooms”, that match their gender identity); 34 CFR 106.33 (allowing Title IX funding recipients to provide “separate toilet, locker room, and shower facilities on the basis of sex. . .”).

40. Aidan DeStefano, *My School Was Right to Let Me Use the Bathroom Consistent With Who I Am*, ACLU (May 25, 2018), <https://www.aclu.org/news/lgbtq-rights/my-school-was-right-let-me-use-bathroom-consistent-who-i-am> [<https://perma.cc/9SDW-J9E5>].

41. The Public Facilities Privacy & Security Act was signed into law by then Governor Pat McCrory on March 23, 2016. *See* H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

42. *See, e.g., Emery P. Dalesio & Jonathan Drew, ‘Bathroom Bill’ to Cost North Carolina \$3.76B*, ASSOCIATED PRESS (Mar. 30, 2017), <https://apnews.com/article/north-carolina-economy-raleigh-ringo-starr-e6c7a15d2e16452c8dbc2756fd67b44> [<https://perma.cc/HS96-K5UR>]. After a series of legal maneuvers involving multiple District Courts and the Department of Justice, and the election of a new Governor running on a promise to repeal HB-2, Governor Roy Cooper signed a compromise bill into law that repealed the provision of HB-2 requiring all people to use the bathroom or facilities based on their biological sex. *See* Press Release, Department of Justice, Office of Public Affairs, Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination

continued to pass laws limiting students' bathroom use to biological sex; some schools provide a gender-neutral bathroom option.⁴³ At the time of writing, seven states require children in K-12 schools to use bathrooms based on their biological sex while six states have law or policy defining "sex" in such a way that may affect people's access to bathrooms based on their gender identity.⁴⁴ Conversely, over a third of states prohibit *any* discrimination in schools on the basis of sexual orientation or gender identity.⁴⁵ Access to bathrooms has even made its way into discussions within the judiciary resulting in a circuit split in the federal courts.

In *Grimm v. Gloucester County School Board*,⁴⁶ Trans student Gavin Grimm officially changed his name and began living openly as a Trans male during his freshman year of high school. He was allowed to use the boys' bathroom for over a year, but eventually, some parents complained. The school changed its policy and required Gavin to use the bathroom that

Against Transgender Individuals (May 9, 2016), <https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against>. It continued to allow the prohibition by state and local governments from regulating access to the bathrooms. That power remained with the state legislature, at least until 2020. Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals Bathroom Bill*, CNN (Mar. 30, 2017), <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/> [<https://perma.cc/ZNF8-2NQL>].

43. Kara Arundel, *Some districts are constructing gender-neutral school bathrooms amid national debate*, K-12DIVE (July 22, 2022), <https://www.k12dive.com/news/some-districts-are-constructing-gender-neutral-school-bathrooms-amid-nation/627900>. When schools limit Trans children to gender-neutral bathroom use only, it has been attacked as analogous to the legal racially segregated schools of the pre-Brown v. Bd. of Educ., 347 U.S. 483 (1954), era. See Megan Nicolaysen, Comment, *The Bathroom Stall: How Legal Indecision Regarding Transgender Bathroom Access Has Led to Discrimination*, 61 U. LOUISVILLE L. REV. 175, 187 (2023).

44. See, e.g., *Equality Maps: Bans on Transgender People Using Bathrooms and Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT (Sept. 6, 2023), https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans [<https://perma.cc/PCL7-GE92>]. Kansas became the first state in the nation to define gender based on sex at birth. S.B. 180, 2023-2024 Leg., Reg. Sess. (Kan. 2023); see also Alice Giordano, *Kansas Becomes 1st State to Pass Law Defining Gender as a Person's Sex at Birth*, NTD NEWS (May 1, 2023), https://www.ntd.com/first-state-passes-law-defining-gender-as-a-persons-biological-sex-at-birth_916688.html [<https://perma.cc/583Z-QDAN>].

45. See, e.g., *LGBTQ Youth: School Nondiscrimination Laws & Related Policies*, MOVEMENT ADVANCEMENT PROJECT (June 20, 2023), <https://www.lgbtmap.org/img/maps/citations-schools-nondisc.pdf> [<https://perma.cc/8HV8-CGFV>]. While no state laws specifically guarantee access to bathrooms matching gender identity, nineteen states and the District of Columbia prohibit discrimination in schools on the basis of sexual orientation and gender identity. Most of these states incorporate guidance from state Departments of Education which interprets these nondiscrimination laws to include bathroom access for Trans students. *Id.*

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

aligned with his biological sex, although the school also created a single-stall restroom for students with “gender identity issues.”⁴⁷ Even after obtaining a court order declaring him a male and legally changing the name on his birth certificate, the school refused to allow Gavin to use the correct bathroom. Gavin sued the school for violation of his Equal Protection rights under the Constitution and for violation of Title IX of the Education Amendments Act of 1972 (“Title IX”).⁴⁸ After five years of procedural and political delays (during which time he graduated from high school), Gavin won.⁴⁹ The Fourth Circuit found that the school’s bathroom exclusion policy unconstitutionally discriminated against Gavin because of his sex; it also found, with heavy reliance on *Bostock*, that the school had violated Title IX.⁵⁰

A year later, the Eleventh Circuit, *en banc*, vacated an earlier panel decision finding that a Trans student prohibited from using the bathroom that aligned with his gender identity was likely to prevail on the merits of his motion for a preliminary injunction.⁵¹ In *Adams by and through Kasper v. School Board of St. Johns County*, a Trans male student had used the “male” bathrooms for the first few weeks of school without incident until two students saw him and reported him to school officials. Adams was directed to choose between bathrooms that aligned with his biological sex

47. *Id.* at 593.

48. *Id.* Title IX provides in part:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 U.S.C. § 1681(a).

49. *See* Grimm v. Gloucester County School Board, ACLU (Oct. 6, 2021), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board> [<https://perma.cc/HA4G-TEB6>] (providing a complete history of the case).

50. Grimm, 972 F.3d at 620. The U.S. Supreme Court denied the state’s petition for writ of certiorari. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021). With the state agreeing to pay all of plaintiff’s expenses and attorneys’ fees, the litigation finally came to a close. Press Release, Gloucester County School Board to Pay 1.3 Million to resolve Gavin Grimm’s Case, ACLU (Aug. 26, 2021), <https://www.aclu.org/press-releases/gloucester-county-school-board-pay-13-million-resolve-gavin-grimms-case> [<https://perma.cc/UWS3-F34X>]. Consider a post-*Bostock* decision that granted preliminary injunctions in favor of two Trans male students seeking to use school bathrooms that aligned with their gender identity. In *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023), the Seventh Circuit readopted its rationale from its pre-*Bostock* decision in *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (finding that policies denying students’ right to use the bathroom aligning with their gender identity *could* violate both Title IX and the Equal Protection Clause of the U.S. Constitution and holding that plaintiffs had a strong likelihood of success on the merits).

51. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (*en banc*).

and gender-neutral bathrooms.⁵² Adams sued the school for violations of his right to Equal Protection under the U.S. Constitution; he also brought a Title IX claim. Although the District Court and a panel of the Eleventh Circuit agreed with Adams, the *en banc* Circuit reversed. Defining sex as one's "biological sex," the court found that Adams was not treated differently from other students who were biologically female. Finding that Title IX specifically allows separate toilets, locker rooms, and showers "on the basis of sex," the court then found that separate facilities based on "biological" sex did not violate Title IX.⁵³

The U.S. Supreme Court has not addressed this issue. Recall that *Bostock* found that an employer who fires an employee because the employee is gay or Trans necessarily had to consider the person's sex when making the decision, making it a determination *based* on sex and thus violating Title VII of the Civil Rights Act of 1964.⁵⁴ Although the case was decided under Title VII, Title IX interpretations have historically paralleled Title VII jurisprudence.⁵⁵ Yet *Bostock* was clear that its decision was limited to the law before it and not to other laws prohibiting sex discrimination.⁵⁶ The Eleventh Circuit latched onto this language and noted other ways to distinguish *Bostock* from *Adams*.⁵⁷

It is unknown how the Supreme Court will interpret the Equal Protection clause as it pertains to Trans people in this context. Heightened scrutiny applies but application in given contexts is unknown. Consider separate gender-neutral bathrooms. Will the Court ban these as it did racially segregated schools in our nation's past?⁵⁸

52. *Id.* at 840.

53. In both *Grimm* and in *Adams*, the schools did provide separate bathrooms for LGBTQ+ students. Many have rejected this conciliatory move as unacceptable. *See supra* note 43

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

55. *See, e.g., Grimm*, 972 F.3d at 616; *see also Cannon v. Uni. of Chi.*, 441 U.S. 677, 694-96 (1979).

56. *Bostock*, 140 S. Ct. at 1753 (the Court's ruling does not "purport to address bathrooms, locker rooms, or anything else of the kind").

57. After noting that *Bostock* excluded bathroom consideration from its decision; the court also framed the discriminatory acts in the cases differently. *Bostock*, it found, dealt with whether 'discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.' The issue in *Adams* was whether discrimination based on biological sex necessarily entails discrimination based on transgender status. This difference led to an opposite conclusion. *Adams*, 57 F.4th at 808-09.

58. *See supra* note 43.

What about Title IX?⁵⁹ Does this language include Trans students? The current answer from the Executive Branch is “yes.” In 2021, the Biden administration issued an Executive Order (“EO”) on ‘Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation.’⁶⁰ Under the EO, agencies were directed to “implement the Supreme Court’s *Bostock* ruling, and fully enforce Title VII of the Civil Rights Act of 1964 and other laws that prohibit discrimination on the basis of gender identity and sexual orientation.”⁶¹ By June of 2022, the Biden administration specifically defined discrimination based on gender identity as discrimination based on sex.⁶² The administration was roundly attacked by almost half of states, with one federal judge in Tennessee granting a preliminary injunction against enforcement.⁶³

The Department of Education has issued proposed amendments to Title IX regulations. The new regulations will make illegal “[d]iscrimination on the basis of sex includ[ing] discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”⁶⁴ Proposed § 106.10 “would also clarify that Title IX prohibits discrimination on the basis of an individual’s gender identity.”⁶⁵ These regulations are currently scheduled to become effective October of 2023.⁶⁶ The regulations propose specific rules for Trans student participation in sports, discussed *infra*.

So, why all this fuss? We have seen arguments that these bans will

59. See *supra* note 48.

60. Exec. Order No. 13,988, 86 C.F.R. § 7023 (2021).

61. Davis J. Villano, Note, *Queer Liberation’s Long March Towards Equality: How LGBTQIA+ Advocates May Seek to Combat the Rise of Anti-LGBTQIA+ State-Level Legislation and Substantiate Broader Lasting Legal Protections in a Post-Bostock World*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 155, 191-92 (2022) (emphasis added).

62. Erica L. Green, *New Biden Rules Would Bar Discrimination Against Transgender Students*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/us/politics/biden-transgender-students-discrimination.html> [<https://perma.cc/D3SH-5EDT>].

63. *Tennessee v. U.S. Dep’t of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022) (granting a petition for preliminary injunctive relief brought by twenty Republican-controlled states). See also Erik Larson, *Judge Blocks Biden Rules for Trans Access to Bathrooms, Sports*, BLOOMBERG LAW (July 17, 2022, 12:32 PM), <https://news.bloomberglaw.com/daily-labor-report/judge-blocks-biden-rules-for-trans-access-to-bathrooms-sports> [<https://perma.cc/XC7X-XNVY>].

64. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022).

65. *Id.*

66. U.S. Dep’t of Educ., *A Timing Update on Title IX Rulemaking*, HOMEROOM (May 26, 2023), <https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/> [<https://perma.cc/HQN9-4XCT>].

protect girls and women from sexual predators, but there is no evidence of any Trans students harming others in bathrooms.⁶⁷ In fact, the evidence shows the opposite: cisgender students harassing Trans students.⁶⁸ Yet, legislatures around the country still pretend that the threat is that transgender students will harass cisgender students, and use this as the primary reason to prevent students from using bathrooms that align with their gender identity.⁶⁹

Another common reason relates to the privacy rights of cisgender students. For example, after defining “sex” as biological sex at birth, the *Adams* court found that “the privacy interests hinge on using the bathroom away from the opposite sex and shielding one’s body from the opposite sex, not using the bathroom in privacy.”⁷⁰ Meanwhile, in the Ninth Circuit, the privacy claims of cisgender parents and students—that school policies allowing Trans students to use the bathrooms that align with their gender identity violated the plaintiffs’ privacy and First Amendment rights—were rejected.⁷¹ Again, courts disagree.

67. Alberto Arenas, Kristin L. Gunckel, & William L. Smith, *7 Reasons for Accommodating Transgender Students at School*, 98 PHI DELTA KAPPAN 20, 21 (2016). See also Megan Nicolaysen, Comment, *The Bathroom Stall: How Legal Indecision Regarding Transgender Bathroom Access Has Led to Discrimination*, 61 U. LOUISVILLE L. REV. 175, 188-89 (2023) (a 2018 study conducted in Massachusetts found that nondiscrimination ordinances did not lead to an increase in criminal activity).

68. Arenas, Gunckel, & Smith, *supra* note 67, at 21. See also Komanduri S. Murty, Bridget Holyfield-Moss, & Ashwin G. Vyas, *Anti-Transgender Bathroom Law Controversy: Protection or Discrimination*, 25 RACE, GENDER, & CLASS 98, 102-3 (2018) (a 2013 study found that 68% of Trans individuals experienced verbal harassment in restrooms).

69. Arkansas Republican state Rep. Mary Bentley, who sponsored the Arkansas’ bathroom ban, said: “Each child in our schools has a right to privacy and to feel safe and to feel comfortable in the bathroom they need to go to.” Andrew DeMillo, *New Arkansas Law Restricts School Bathroom Use by Transgender People*, PBS (Mar. 22, 2023), <https://www.pbs.org/newshour/politics/new-arkansas-law-restricts-school-bathroom-use-by-transgender-people> [<https://perma.cc/MJW6-TMAT>]. See also H.B. 1156, 94th Gen. Assemb., Reg. Sess. (2023) (relevant provisions to be codified at ARK. CODE ANN. §6-21-120 (2023)).

70. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc).

71. In *Parents for Privacy v. Barr*, the court held “[a] policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities does not infringe Fourteenth Amendment privacy or parental rights or First Amendment free exercise rights, nor does it create actionable sex harassment under Title IX.” 949 F.3d 1210, 1240 (9th Cir 2020).

III. K-12 SPORTS

“What is the purpose of high school sports?” asked [Dr. Karissa Niehoff, CEO of the National Federation of State High School Associations]. “It’s the health and safety of participants, as well as developing life skills and citizenship. Is it to win? No. Is it to offer an opportunity? Yes. . . This isn’t just about kids that want to win in athletics. These are kids that just want to feel that their identity is the right one. Why would we say, ‘High school sports are open to everybody but you’?”⁷²

In March of 2020, Idaho became the first state in the nation to enact a Transgender sports ban.⁷³ At the time of writing, twenty-two states have enacted bans that affect K-12 students,⁷⁴ three have pending bills that are likely to be enacted,⁷⁵ and one has achieved an indirect ban by passing a law allowing its State High School Association to enact a ban if it chose to do so, which it promptly did.⁷⁶ A third of Trans youth live in these states.⁷⁷

72. Luke Modrovsky, *Transgender Athletes – Participation, Equity, and Competition*, NAT’L FED’N OF STATE HIGH SCHOOL ASS’NS (May 12, 2022), <https://www.nfhs.org/articles/transgender-athletes-participation-equity-and-competition> [<https://perma.cc/4KS3-HA8D>].

73. IDAHO CODE § 33-6203 (2023). See also Rachel Savage, *Idaho becomes first U.S. state to ban trans athletes*, REUTERS (Mar. 31, 2020), <https://www.reuters.com/article/us-usa-lgbt-lawmaking/idaho-becomes-first-u-s-state-to-ban-trans-athletes-idUSKBN2112AF> [<https://perma.cc/F7MK-Z9DJ>].

74. Bans have been enacted in Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. See *LGBT Youth: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Sept. 19, 2023), https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [<https://perma.cc/3SDZ-FKCW>]. Bans in West Virginia and Idaho have been blocked by court orders. The cases underlying these injunctive relief cases will be discussed *infra* notes 78 and 85 and accompanying text.

75. Ohio, Nebraska, and North Carolina have bans that are currently pending but likely to be enacted. H.B. 6, 135th Gen. Assemb., Reg. Sess. (Ohio 2023); L.B. 575, 108th Leg., 1st Sess. (Neb. 2023); S.B. 631, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

76. Georgia passed a law that enabled the Georgia High School Association to limit student participation in sports to the students’ biological sex, which the Association then promptly did. GA. CODE ANN. § 20-2-316(c)(1)(E)(v) (2022). See also Chuck Johnston, *Georgia High School Association uses new law to implement anti-trans sports ban*, CNN (May 4, 2022), <https://www.cnn.com/2022/05/04/politics/georgia-high-school-transgender-sports-ban/index.html>.

77. See *supra* note 7475. Most of the bans apply throughout grades K-12 although some start in middle school. *Id.* Except for Utah and Wyoming, all the bans include college students. *Id.* Proving one’s “sex” is relevant in these jurisdictions. Proof varies from the production of original birth certificates to what is known as “dispute resolution.” The latter ranges from sworn affidavits to invasive medical physical examination of the student. This will be discussed *infra* notes 87-94 and accompanying text.

Most bans only exclude Trans girls from competing on girls' teams, not Trans boys from competing on boys' teams. The public is told that the bans are designed to protect the rights of “*real*” girls, *i.e.*, to save women's sports. Titles of these laws, like “Save Women's Sports Bill” in West Virginia⁷⁸ or “Fairness in Women's Sports Act” in Idaho, are unabashed in their goals.⁷⁹ These laws typically define sex as biological sex at birth.⁸⁰ Legislators then argue that these bans are necessary to address “a fairness issue for women to be able to achieve their dreams in athletics ... and [are]crucial to preserving women's rights.”⁸¹ The argument that these bans are necessary to preserve women's sports is false, and dozens of women's organizations have vehemently disagreed with contrary rhetoric.⁸²

Students have begun to challenge these bans as violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. Trans students argue that these bans violate the Equal Protection Clause because they treat Trans plaintiffs differently from similarly situated people solely because of their sex assigned at birth;⁸³ similarly, they argue that they are discriminated against on the basis of sex in violation of Title IX.⁸⁴ With one

78. B.P.J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023).

79. H.B. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020).

80. Sports bans often cite the preservation of opportunities for girls and women as a justification, mirroring the language of Title IX but with a qualification that teams must be based on “biological sex.” *See, e.g.*, W. VA. CODE § 18-2-25d (2023) (“Classification of teams according to *biological* sex is necessary to promote equal athletic opportunities for the female sex.”) (emphasis added).

81. *See e.g., Powell's 'Save Women's Sports Act' Passes House Committee*, OHIO HOUSE OF REPRESENTATIVES (May 10, 2023), <https://ohiohouse.gov/news/republican/powells-save-womens-sports-act-passes-house-committee-114654> [<https://perma.cc/KZY8-SFKU>].

82. In a *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, twenty-three women's rights and gender justice organizations wrote a letter advocating full inclusion for transgender girls in athletics. *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, ACLU (Apr. 2, 2019), <https://www.aclu.org/documents/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/EX5Z-W3U9>]. The letter confirms “that nondiscrimination protections for transgender people—including women and girls who are transgender—are not at odds with women's equality or well-being but advance them.” *Id.*

83. Under the Equal Protection clause of the U.S. Constitution, sex-based classifications are quasi-suspect subject to heightened scrutiny. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-441 (1985) ([T]hey “fail[] unless [they are] substantially related to a sufficiently important governmental interest.”).

84. *See supra* note 48. An amendment to Title IX is set to go into effect in October of 2023. *See infra* notes 105–106 and accompanying text on how these proposed changes will positively affect Trans students.

exception to be discussed *infra*, the legal arguments raised in these sports ban cases are virtually identical to those discussed *supra* under bathroom bans. To date, only two federal courts have dealt with the Trans sports ban issue: *Hecox v. Little*⁸⁵ and *B.P.J. v. West Virginia*.⁸⁶

In *Hecox*, a transgender college student challenged Idaho’s sports ban on the grounds that it violated the Equal Protection Clause and Title IX.⁸⁷ In addition, a cisgender high-school student joined the transgender plaintiff in challenging the law’s “dispute resolution” provision, alleging that it discriminated against *all* girls on the basis of sex. Finding the dispute resolution provision particularly troubling, the court granted the plaintiff’s request for injunctive relief.⁸⁸ The court also found “no history of transgender athletes *ever* competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar. . . is required in order to promote ‘sex equality’ or ‘to protect athletic opportunities for females’ in Idaho.”⁸⁹

In *B.P.J.*, an eleven-year-old Trans girl similarly argued that West Virginia’s sports ban violated her rights under the Equal Protection clause and Title IX.⁹⁰ The court did call attention to *explicit* bias expressed by legislators against Trans people,⁹¹ but the bias was not enough, the court ultimately found, to hold the law unconstitutional under the animus

85. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), *aff’d*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023).

86. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023).

87. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020).

88. *Id.* at 943. The District Court found: “If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with the risk and embarrassment of having to ‘verify’ their ‘biological sex’ to play women’s sports. Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho’s law does not restrict individuals who wish to participate on men’s teams.” *Id.* at 944.

89. *Id.* at 978–79 (emphasis added) (quoting IDAHO CODE § 33-6202(12) (2020)). See also Mollie McQuillan, Suzanne Eckes, & Maria Lewis, *A Solution in Search of a Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 MARQ. SPORTS L. REV. 195, 214–222 (2022).

90. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021).

91. *B.P.J.*, 2023 WL 111875 at *4 (“[T]he record before me does reveal that at least one legislator held or implicitly supported private bias against, or moral disapproval of, transgender individuals . . .”).

doctrine.⁹² Although the court initially granted an injunction, the hearing on the merits resulted in a finding that the ban violated neither law.⁹³ A TRO, granted by the Fourth Circuit, is in effect pending an appeal of this ruling.⁹⁴

We could be cynical and suggest that these bans are nothing more than a political stunt by Republican legislatures, particularly given that over half of White evangelical Christians believe that society has “gone too far” in protecting the rights of Trans people.⁹⁵ Some, too, simply refuse to entertain the idea that children can be wrongly gendered. Defining gender on the basis of biological sex, legislators then attempt to scare parents into worrying about what their little girls might see in locker rooms shared with biological boys.⁹⁶ Even some Republican Governors have questioned the need—and true purpose—of these bans.⁹⁷

92. The “animus doctrine” provides that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973). The B.P.J. court found that there was “not a sufficient record of legislative animus [to hold the law unconstitutional].” B.P.J., 2023 WL 111875, at *10.

93. See *id.* (terminating the injunction).

94. See Jackson *ex rel.* B.P.J. v. W. Va. State Bd. of Educ., No. 23-1078, 2023 WL 2803113 (4th Cir. Feb. 22, 2023), refusal to vacate, W. Va. v. Jackson *ex rel.* B.P.J., 143 S. Ct. 889 (2023).

95. See, e.g., Kate Sosin, *How Did Trans People Become a GOP Target? Experts Say It’s All About Keeping Evangelicals Voting*, THE 19TH, (May 17, 2022, 3:15 PM), <https://19thnews.org/2022/05/white-evangelical-voters-gop-anti-trans-bills/> [<https://perma.cc/K9PD-XXUE>]. According to recent Pew Research, 68 percent of White evangelical Christians believe society has gone too far in accepting Trans people. Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious ‘Nones’ in U.S.*, PEW RSCH. CTR. (July 7, 2022), <https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s> [<https://perma.cc/N6NG-7S5A>]. Interestingly, Americans are in favor of sports bans but support Trans rights in all other areas. Kim Parker, Juliana Menasce Horowitz, & Anna Brown, *Americans’ Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), <https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues> [<https://perma.cc/W6WS-DCUX>].

96. House Representative Greg Steube (R-Fla.), author of the national sports ban passed by House Republicans in April of 2023, has stated flatly that “parents do not want *biological men* in locker rooms with their daughters.” Scott Wong, *House Republicans Pass Transgender Sports Ban For Schools*, NBC NEWS (Apr. 20, 2023, 12:00 PM), <https://www.nbcnews.com/politics/congress/house-republicans-poised-pass-transgender-sports-ban-schools-rcna80102> [<https://perma.cc/79BK-X96S>]. House Representative Lisa McClain (R-MI) has stated that “young girls are being exposed to male genitalia and have to undress themselves and expose their own bodies to these biological males . . . [i]t’s beyond disgusting . . . [m]akes me sick to my stomach.” *Id.*

97. In vetoing Utah’s sports ban, Gov. Spencer Cox noted the extremely high levels of suicidality among Trans youth; he also expressed doubt that the legislation was necessary given that there were only four Trans students out of 75,000 playing sports. Letter from Spencer Cox, Governor of Utah, *Why I’m Vetoing HB11* (Mar. 22, 2022), <https://governor.utah.gov/2022/03/24/gov-cox-why-im-vetoing->

—So, onto the science—do Trans women naturally have an inherent advantage over cisgender women? Do biological factors exist that make it unfair for Trans girls to compete against cisgender girls in K-12 sports? Do those factors justify bans? In short: no. First: the purpose of K-12 sports, as Dr. Niehoff’s words illustrate, is to encourage development, education, and well-being, not to ensure that the playing field is perfectly “level;” they provide “an opportunity to develop a connection with teammates and the school community, in addition to social, emotional, physical and cognitive development.”⁹⁸ Second, these decisions have been made based on studies of adult athletes who have *already completed puberty before transitioning*. In the aggregate, those studies show that Trans women often have physical advantages.⁹⁹ But studies *also* show that if Trans students are allowed access to gender-affirming medical care, including puberty blockers, testosterone blockers, and/or hormone replacement therapy (“HRT”), this will significantly reduce any inherent strength or speed advantages that Trans women may have over cisgender women in physical contests.¹⁰⁰ And before puberty, there *is* no difference in testosterone levels¹⁰¹ or athletic

hb11 [<https://perma.cc/FAX6-K2XW>].

98. Luke Modrovsky, *Transgender Athletes – Participation, Equity, and Competition*, NAT’L FED’N OF STATE HIGH SCH. ASS’NS (May 12, 2022), <https://www.nfhs.org/articles/transgender-athletes-participation-equity-and-competition> [<https://perma.cc/MMH5-KZU9>].

99. Timothy A. Roberts et al., *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications For Sporting Organizations and Legislators*, 55 BRIT. J. SPORTS MED. 577 (2021), <https://bjsm.bmj.com/content/bjsports/55/11/577.full.pdf> [<https://perma.cc/U5PP-5HXB>].

100. See, e.g., Joanna Harper, Emma O’Donnell, Behzad Sorouri Khorashad, Hilary McDermott, & Gemma L. Witcomb, *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength, and Haemoglobin?*, 55 BRIT. J. SPORTS MED. 865 (2021), <https://bjsm.bmj.com/content/55/15/865> [<https://perma.cc/K732-W8U7>]. Additionally, higher levels of hemoglobin are indicative of greater oxygen delivery to cells, which aids athletic performance. Nikki Reisher, *Measuring Hemoglobin – A New Way to Determine Athletic Performance*, UNIV. OF DEL. BMEG442: ENG’G EXERCISE & SPORTS (Apr. 6, 2017), <https://sites.udel.edu/coe-engex/2017/04/06/measuring-hemoglobin-a-new-way-to-determine-athletic-performance> [<https://perma.cc/6QDY-656E>]. Hemoglobin levels are completely equalized after as little as four months on HRT. This is relevant because cisgender women tend to have lower hemoglobin levels than Trans women who have completed male puberty. *Supra* Harper et al., 55 BRIT. J. SPORTS MED. 865 (2021).

101. “There is a wide sex difference in circulating testosterone concentrations and a reproducible dose-response relationship between circulating testosterone and muscle mass and strength as well as circulating hemoglobin in both men and women. These dichotomies largely account for the sex differences in muscle mass and strength and circulating hemoglobin levels that result in at least an 8% to 12% ergogenic advantage in men.” David J. Handelsman, Angelica L. Hirschberg, & Stephane Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*,

performance between boys and girls.¹⁰² Trans girls on puberty blockers have negligible testosterone levels long past the natural starting point of puberty.¹⁰³

There is no definitive scientific evidence that Trans women always have a competitive advantage, but there *is* evidence that any competitive advantage Trans women may have over cisgender women can be significantly reduced—if not eliminated—with puberty blockers, testosterone blockers, and HRT.¹⁰⁴ And even if postpubescent Trans girls may have a nontrivial competitive advantage—again, this is not clearly established—this does not justify these bans. Studies demonstrating “average” advantages simply should not be used to justify blanket bans that discriminate solely on the basis of gender identity. Total bans on Trans athletes playing on sports teams that align with their gender identity—regardless of their age, receipt of gender-affirming care, testosterone levels, or physical build—should be flatly rejected. If legislators are worried about Trans youth post-puberty, there is another option: the approach we see in the newly proposed amendments to Title IX.

The Biden Administration has made it clear that it rejects total bans. It offers, instead, a case-by-case analysis. In April of 2023 the Department of Education proposed an amendment to Title IX which would provide significant protection for Trans student-athletes.¹⁰⁵ Additionally, the new

39 ENDOCRINE REV. 803 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6391653> [<https://perma.cc/Q733-P766>].

102. See *id.* See also Jonathon W. Senefeld, Doriane Lambelet Coleman, Patrick W. Johnson, Rickey E. Carter, Andrew J. Clayburn, & Michael J. Joyner, Letter, *Divergence in Timing and Magnitude of Testosterone Levels Between Male and Female Youths*, 324 JAMA NETWORK 99 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2767852> [<https://perma.cc/S96V-FUXB>].

103. See Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams> [<https://perma.cc/QJ3K-SNFL>].

104. See Rodrigo Pérez Ortega, *World Athletics Banned Transgender Women From Competing. Does Science Support the Rule?*, SCIENCE (Apr. 4, 2023), <https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule> [<https://perma.cc/JCR8-FFPH>]; Roberts, *supra* note 100; Harper et al., *supra* note 99. Note that athletic performance is tied to physiological factors—like testosterone levels—that are merely *correlated* with sex, rather than inextricably linked to it. See, e.g., Handelsman et al, *supra* note 101.

105. SEE NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE: SEX-RELATED ELIGIBILITY CRITERIA FOR MALE AND FEMALE ATHLETIC TEAMS, 88 FED. REG. 22,860 (PROPOSED APR. 6, 2023) (TO BE CODIFIED AT 34 C.F.R. PT. 106).

rule would prevent schools from implementing blanket bans at all; rather, the revised language requires a substantial relation to an educational objective and looks at whether the requirement imposes the least harm possible to achieve the objective.¹⁰⁶ The proposed amendment provides:

§ 106.41 Athletics. (b)(2) If a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) Be substantially related to the achievement of an important educational objective; and (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.¹⁰⁷

This language is scheduled to become effective in October of 2023.¹⁰⁸ While some might reject this as a compromise that still discriminates against Trans athletes, we believe in incremental steps. And this is a giant step in support of Trans youth playing on teams that align with their gender identity.

IV. GENDER AFFIRMING CARE

In 2020, it was absolutely unimaginable that a state could categorically ban health care that was accepted by every major medical association that people relied on for periods of time. No state even passed a single piece of legislation through one legislative chamber. Then in 2023, we have 21 states that have banned care. [T]he landscape of care has been so catastrophically eroded.¹⁰⁹

106. *Id.* at 22,877. The proposed regulation offers examples of objectives that *are not* valid, like “communicating...moral disapproval of the transgender...identity,” but no examples of things that might be acceptable. The regulation does not explicitly foreclose on the possibility of allowing some sex-related criteria for elementary- and middle-school students, but the Department of Education warns that it will be virtually impossible for any such criteria imposed before the high-school level to pass muster given the science. *Id.* at 22,872.

107. *Id.* at 22,891.

108. See U.S. Dep’t of Educ., *supra* note 66.

109. Dahlia Lithwick, *How Anti-Trans Legislation Took Over State-Level Governments*, SLATE (June 13, 2023, 10:30 AM), (quoting Chase Strangio, Deputy Director for Transgender Justice at the ACLU’s LGBT and HIV Project), <https://slate.com/news-and-politics/2023/06/anti-trans-legislation-how-takeover-happened.html> [<https://perma.cc/Y5TS-LJWX>].

Successful gender transitioning involves the intersection of three domains: social, medical, and legal.¹¹⁰ The first two, social and medical, are often collectively referred to as gender-affirming care (“GAC”).¹¹¹ GAC can be generally defined as medical, psychological, and social support provided to individuals who are transgender, non-binary, or gender expansive[.]”¹¹² It is a network of services designed to help transgender and nonbinary people live safe and healthy lives.¹¹³ “Some people who are transgender will experience ‘gender dysphoria,’ which refers to psychological distress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.”¹¹⁴ But whether one suffers from gender dysphoria or not, GAC is critical to the mental health and well-being of our Trans youth.¹¹⁵

GAC includes supporting a person’s gender-affirming hairstyles and clothing, respecting their chosen name and pronouns, and allowing them to use bathrooms and locker rooms that align with their gender identity. It can include puberty blockers, or hormone replacement therapies (“HRT”) to decrease or increase testosterone and estrogen levels. It can also include surgery. There are three categories: facial surgery, “top” surgery which focuses on the chest area; and “bottom” surgery – the most invasive – which

110. AM. PSYCH. ASS’N, APA RESOLUTION ON GENDER IDENTITY CHANGE EFFORTS 1 (2021), <https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf> [<https://perma.cc/H7X5-XBJN>].

111. *Get the Facts on Gender-Affirming Care*, HUM. RTS. CAMPAIGN (July 25, 2023), <https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care> [<https://perma.cc/WLB9-PKLG>].

112. Mira Miller, *What is Gender-Affirming Care?*, VERYWELL HEALTH (June 2, 2023), <https://www.verywellhealth.com/what-is-gender-affirming-care-7506151> [<https://perma.cc/67MF-GM9F>].

113. U.S. DEP’T OF HEALTH AND HUM. RES. OFF. OF POPULATION AFFS., GENDER-AFFIRMING CARE AND YOUNG PEOPLE (2023), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf> [<https://perma.cc/BRH9-4N7S>]. See also *Get the Facts on Gender-Affirming Care*, *supra* note 111.

114. *What is Gender Dysphoria*, AM. PSYCH. ASS’N (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/F9YS-KJLR>]. There is a diagnostic category in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (“DSM–5”) that provides separate criteria for children, adolescents, and adults. *Id.*

115. Amy E. Green, Jonah P. DeChants, Myeshia N. Price, & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643 (2022), <https://doi.org/https://doi.org/10.1016/j.jadohealth.2021.10.036> [<https://perma.cc/7HRQ-HVDY>].

focuses on changing the genitalia.¹¹⁶ As the Human Rights Campaign explains:

Transgender and non-binary people typically do not have gender-affirming surgeries before the age of 18. In some rare exceptions, 16 or 17 year-olds have received gender-affirming surgeries in order to reduce the impacts of significant gender dysphoria, including anxiety, depression, and suicidality. However, this is limited to those for whom the surgery is deemed clinically necessary after discussions with both their parents and doctors, and who have been consistent and persistent in their gender identity for years, have been taking gender-affirming hormones for some time, who have undergone informed consent discussions and have approvals from both their parents and doctors, and who otherwise meet standards of care criteria....

In all cases, regardless of the age of the patient, gender-affirming surgeries are only performed after multiple discussions with both mental health providers and physicians (including endocrinologists and/or surgeons) to determine if surgery is the appropriate course of action.¹¹⁷

Discussions round proposed bans on GAC for minors has focused on claims that these treatment modalities are “new” and “experimental.”¹¹⁸ They are not. The nation’s first interdisciplinary university-based Gender Identity Clinic was established at Johns Hopkins University in 1966.¹¹⁹ The

116. U.S. DEP’T OF HEALTH AND HUM. RES. OFF. OF POPULATION AFFS., *supra* note 113.

117. *Get the Facts on Gender-Affirming Care*, <https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care>, *supra* note 111112; see also Robin Respaut & Chad Terhune, *Putting numbers on the rise in children seeking gender care*, REUTERS (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-data> [<https://perma.cc/3PSA-DJS6>].

118. David Chen, *Missouri to Restrict Medical Care for Transgender Adults, Citing Consumer Protection Law*, N.Y. TIMES (Apr. 14, 2023), <https://www.nytimes.com/2023/04/14/us/missouri-transgender-health-care.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/UT75-AAK3>].

119. G. Samantha Rosenthal, *Gender-Affirming Care Has a Long History in the US – and Not Just for Transgender People*, CONVERSATION (Mar. 27, 2023), <https://theconversation.com/gender-affirming-care-has-a-long-history-in-the-us-and-not-just-for-transgender-people-201752>

World Professional Association for Transgender Health (WPATH) publishes the Standards of Care for the Health of Transgender and Gender Diverse People; now in its eighth iteration. The Standards are based on “the best available science with input from over 100 global medical professionals and experts and represents best-practice guidelines for the provision of gender-affirming healthcare.”¹²⁰ Their studies show that the GAC supports are based on decades of research, not considered experimental.¹²¹ The Department of Health and Human Services states that “[f]or transgender and nonbinary children and adolescents, early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent to focus on social transitions and can increase their confidence while navigating the healthcare system.”¹²² Virtually all major United States health organizations, including the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, the American Psychiatric Association, and The American Academy of Child & Adolescent Psychiatry agree.¹²³ Blocking access to GAC will “*increase youths’ risk for suicidal ideation and other negative mental health outcomes.*”¹²⁴

[<https://perma.cc/BH5V-BH69>].

120. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, USPATH AND WPATH CONFIRM GENDER-AFFIRMING HEALTH CARE IS NOT EXPERIMENTAL; CONDEMNS LEGISLATION ASSERTING OTHERWISE (2023), https://wpath.org/media/cms/Documents/Public%20Policies/2023/USPATH_WPATH%20Response%20to%20AG%20Bailey%20Emergency%20Regulation%2003.22.2023.pdf [https://perma.cc/RFJ3-T55P].

121. *Id.*

122. U.S. DEP’T OF HEALTH AND HUM. RES. OFF. OF POPULATION AFFS., *supra* note 113 .

123. Katherine L. Kraschel, Alexander Chen, Jack L. Turban, & I. Glenn Cohen, *Legislation Restricting Gender-Affirming Care for Transgender Youth: Politics Eclipse Healthcare*, 3 CELL REPS. MED. 100719 (Aug. 16, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9418844/> [https://perma.cc/7Q4W-ZTCQ] (“[R]elevant professional organizations including The American Medical Association, The American Academy of Pediatrics, The American Psychiatric Association, and The American Academy of Child & Adolescent Psychiatry have explicitly voiced opposition to these laws. These proposed bills and laws share common flaws—they are based on false claims about standards of care and health outcomes for people with gender dysphoria, and they are based on inaccurate, biased, and misleading representations of the evidence base.”). *See also* Cecile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY AND UROLOGY 877 (Dec. 18, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5182227> [https://perma.cc/68WA-2KPA] (National Institute of Health and the National Library of Medicine find puberty blockers and gender-affirming hormone therapy have been labeled “medically necessary”).

124. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, AACAP STATEMENT RESPONDING TO EFFORTS TO BAN EVIDENCE-BASED CARE FOR TRANSGENDER AND GENDER DIVERSE YOUTH (2019), https://www.aacap.org/AACAP/Latest_News/AACAP_Statement_Responding_to_Efforts-

Despite this, almost half of all states now ban GAC for minors.¹²⁵ These laws often threaten families, with parents facing charges of child abuse and loss of child custody for seeking GAC for their children; some families have fled their states in search of a sanctuary for their children;¹²⁶ some laws impose criminal penalties on medical professionals for providing medically necessary GAC to their patients.¹²⁷

Courts, again, vary. In *Williams ex rel. L.W. v. Skrmetti*¹²⁸ the Sixth Circuit Court of Appeals allowed a ban on puberty blockers and hormone therapies for trans minors to take effect.¹²⁹ If upheld on the merits, it would create a split in the circuits, as all other courts have blocked the GAC bans.¹³⁰ Additionally, in *Brandt v. Rutledge*,¹³¹ an Arkansas federal District Court granted a preliminary injunction on Arkansas’ GAC ban in 2021; the same Court then granted a permanent injunction in 2023.¹³² The case is on appeal, and has been granted an initial hearing *en banc* by the Eighth Circuit.¹³³

What is needed, given the scientific and medical consensus, are not bans

to_ban_Evidence-Based_Care_for_Transgender_and_Gender_Diverse.aspx [https://perma.cc/MMU7-XJT9] (emphasis added).

125. Sophie Putka Rachel Robertson, & Kristina Fiore, *These States Have Banned Youth Gender-Affirming Care*, MEDPAGE TODAY, (May 9, 2023), <https://www.medpagetoday.com/special-reports/exclusives/104425> [https://perma.cc/FNV2-ZY9V]. Interestingly, the bans are typically limited to Trans kids; cisgender and intersex kids may still have these procedures. Kate Sosin, *Most State Bans on Gender-Affirming Care for Trans Youth Still Allow Controversial Intersex Surgery*, PBS (Mar. 23, 2023), <https://www.pbs.org/newshour/health/most-state-bans-on-gender-affirming-care-for-trans-youth-still-allow-controversial-intersex-surgery> [https://perma.cc/PZ7P-PPCA].

126. See, e.g., Sara Ernst, *Texas families with trans kids are leaving the state*, NPR (Mar. 26, 2023, 4:35 PM), <https://www.npr.org/2022/04/27/1095099695/texas-families-with-trans-kids-are-leaving-the-state>. April 27, 2022; Nicole Tam, *Iowa Family Plans to Move out of State over New Transgender Laws*, KCCI DES MOINES (Mar. 26, 2023), <https://www.kcci.com/article/iowa-family-plans-move-out-of-state-transgender-laws/43420719> [https://perma.cc/5U26-VDZG].

127. Putka, Robertson, & Fiore, *supra* note 125.

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

129. Rebekah Riess, Jessica Jordan, & Zoe Sottile, *Federal Appeals Court Allows Tennessee Ban on Gender-Affirming Care for Transgender Minors to Take Effect*, CNN (July 8, 2023), <https://www.cnn.com/2023/07/08/politics/tennessee-gender-affirming-care-ban> [https://perma.cc/LK38-PHRZ].

130. See *Williams ex rel. L.W. v. Skrmetti*, No. 3:23-CV-00376, 2023 WL 4232308 (M.D. Tenn. June 28, 2023) (“To the Court’s knowledge, every court to consider preliminarily enjoining a ban on gender-affirming care for minors has found that such a ban is likely unconstitutional.”).

131. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021).

132. *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023).

133. Order, *Brandt v. Rutledge* (8th Cir. 2023) (No. 23-2681), <https://arkansasag.gov/wp-content/uploads/2023-10-06-8th-Circuit-Brant-En-Banc-Review-Order.pdf>.

on GAC, or criminalization of physicians treating Trans youth, but blanket protections for bodily autonomy enshrined in law to guarantee that Trans Americans, especially Trans children, have access to the lifesaving care they need and deserve.¹³⁴ Instead, we are watching a cascading decrease in access across states with Republican legislatures.¹³⁵

V. BOOKS & DON'T SAY GAY

*“What matters most to me is that my students have the ability to hear six or seven opinions on one topic and come up with their own thesis, supported with evidence, and come up with an independent conclusion,” said Superintendent Dr. Akil Ross. “Sometimes there’s going to be topics you agree with, and there’s going to be topics you disagree with. Academic freedom says even if you disagree, there’ll be another opinion presented to our children. Our democracy needs that.”*¹³⁶

*“We cannot become critical thinkers without being uncomfortable in some way,” one student declared while directly addressing the Lexington-Richland board. “If students can’t learn these things in a safe space, like school, how are they—we—meant to make good decisions and think critically?”*¹³⁷

A. Books:

During the 2022-2023 year, almost half of all states banned books in K-12 public schools, with Texas, Florida, and Missouri leading the charge.¹³⁸ These bans do not specifically mention the Trans community or even the LGBTQ+ communities. Rather, the language more broadly bans images,

134. Grace Panetta, *Lawmakers in Blue States Are Linking Protections for Abortion and Gender-Affirming Care*, 19TH, (June 9, 2023), <https://19thnews.org/2023/06/abortion-trans-health-care-shield-laws/> [https://perma.cc/KDT7-AWME].

135. *Id.*

136. Brooke Leigh Howard, *Ta-Nehisi Coates Crashes School Board Meeting Over Banning His Book*, DAILY BEAST (July 18, 2023), <https://www.thedailybeast.com/ta-nehisi-coates-shows-up-to-school-meeting-over-banning-his-book?source=email&via=desktop> [https://perma.cc/65BD-G37L].

137. *Id.* See also The Learning Network, *What Students Are Saying About Banning Books From School Libraries*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/learning/students-book-bans.html#commentsContainer> [https://perma.cc/2X9J-4P8Y].

138. See Kasey Meehan & Johnathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools> [https://perma.cc/DCC6-BUDH].

drawings, and sometimes even narratives and descriptions of explicit sexual material and/or content.¹³⁹ A Florida statute concerning “Harmful materials; sale or distribution to minors or using minors in production prohibited; penalty –” provides, in relevant part:

- (3) A person may not knowingly sell, rent, or loan for monetary consideration to a minor:
 - (a) Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
 - (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in s. 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.¹⁴⁰

This language has been used by school districts to ban books that have nothing to do with sexual excitement or sexual conduct.¹⁴¹ In some cases, the books are pulled by the school itself; increasingly however, laws and/or school policies allow parents to challenge the books. Once challenged, the book is pulled from the shelves with a determination made at some later point, maybe, regarding whether the book should be reshelved.¹⁴² Between

139. See MO. REV. STAT. § 573.550 (2022) (making it a class-A misdemeanor for librarians or teachers to provide “explicit sexual material” to a student). See also H.B. 374, 2022 Leg., Gen. Sess. (Utah 2022) (limiting the bans to sensitive materials, defined elsewhere in the law as pornographic or indecent). See generally Meehan & Friedman, *supra* note 138.

140. FLA. STAT. § 847.012.

141. See, e.g., PEN Am. Ctr., Inc., v. Escambia Cnty. Sch. Dist., No. 3:23-CV-10385, 2023 WL 3493959 (N.D. Fla. May 17, 2023).

142. See, e.g., ECPS MEDIA SERVS., ECPS REQUEST FOR RECONSIDERATION OF EDUCATIONAL MEDIA (2022),

<https://fl50010989.schoolwires.net/cms/lib/FL50010989/Centricity/Domain/1117/3956663523069756775.pdf> [<https://perma.cc/PB3R-YDK8>]. Books, so challenged, are required to be pulled. See Kai Davis, *Escambia County schools must remove challenged books within 5 days under new rule*, WEARTV (Jun 21, 2023), <https://weartv.com/news/local/escambia-county-schools-must-remove-challenged-books->

July 1 and December 31 of 2022, over 1,400 books were removed from school libraries and classrooms.¹⁴³ Some laws do not actually ban anything, but have a chilling effect on what remains on shelves. Tennessee’s law requires schools to catalog and make the materials available for parental review.¹⁴⁴ Intended or not, the onerous effort involved to meet this requirement has led to “wholesale bans” where “entire classrooms and school libraries have been suspended, closed, or emptied of books.”¹⁴⁵

These bans have disproportionately affected books that include LGBTQ+ characters or themes.¹⁴⁶ These bans are raising questions about potential violations of the First Amendment of the U.S. Constitution. Laws limiting the content of speech or discriminating based on viewpoint are subject to strict scrutiny under the U.S. Constitution.¹⁴⁷ Thus, to the extent “content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹⁴⁸

The Supreme Court last visited government book-banning in 1982. In *Board of Education v. Pico*,¹⁴⁹ a conservative parent group requested the removal of nine books from two of the school district’s libraries. The school

within-5-days-under-new-rule.

143. Meehan & Friedman, *supra* note 138.

144. Tennessee passed S.B. 2407 (the “Age-Appropriate Materials Act of 2022”), which requires public schools to post lists of materials online. S.B. 2407, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022) (codified at TENN. CODE §§ 49-6-3801–3803).

145. Meehan & Friedman, *supra* note 138. “These ‘wholesale bans’ generally involve culling large numbers of books previously available to students following directives to teachers and librarians under threat of punishment from newly enacted state laws.” *Id.* “This is largely because teachers and librarians in several states have been directed to catalog entire collections for public scrutiny within short timeframes, under threat of punishment from new, vague laws.” *Id.*

146. After describing a ‘relentless’ conservative ‘crusade to constrict children’s freedom to read[,]’ Pen America noted that book bans increased by almost 30% in the 2022-2023 academic year alone. Martin Pengelly, *Book bans in US public schools increase by 28% in six months, Pen report finds*, GUARDIAN (Apr. 20, 2023), <https://www.theguardian.com/books/2023/apr/20/book-bans-us-public-schools-increase-pen-america> [https://perma.cc/42AK-58WP]. Of the books banned, 260 (30%) discuss race, racism, or include people of color; 229 (26%) have LGBTQ+ characters or themes; 68 of the 229 books banned for LGBTQ+ themes include transgender characters, accounting for 8% of all banned books counted. *Id.*

147. *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015) (“Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny.”).

148. *Id.* at 168 (2015). *See also*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

149. *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

board removed the books, justifying removal on the grounds that the books were “anti-American, anti-Christian, and anti-Sem[i]tic, and just plain filthy.”¹⁵⁰ A group of students sued the school district for violation of their First Amendment right to receive information and ideas.¹⁵¹ Agreeing that the students have a right to receive information, Justice Brennan noted that the right was not unfettered:

Whether petitioners' removal of books from the libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. Local school boards may not remove books from school libraries simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁵²

Since *Pico*, courts around the nation have not been clear on what *Pico* allows and if or how it applies.¹⁵³ It is clear that most books being pulled under these recent bans are not sexually explicit.¹⁵⁴ Sharing books

150. *Id.* at 857.

151. *Id.*

152. *Id.* (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

153. The Fifth Circuit applied *Pico* in *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 186 (5th Cir. 1995). The Eleventh Circuit applied but did not explicitly adopt *Pico* in *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009). Some courts have used a standard established in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* was not a book ban; rather it allowed schools to restrict *curricula* if doing so would be “reasonably related to legitimate pedagogical concerns.” *Id.* Some scholars have attacked how *Pico* is applied, misapplied, or not applied at all by the courts. See, e.g., Ryan L. Schroeder, *How to Ban A Book and Get Away with It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 378–83 (2021).

154. For example, “When Aidan Became a Brother” is a book about a Trans boy and contains nothing sexual or sexually explicit. The book was still banned. See Michael Schaub, *Florida School District Bans 3 LGBTQ+ Books*, KIRKUS (Feb. 20, 2023), <https://www.kirkusreviews.com/news-and-features/articles/florida-school-district-bans-3-lgbtq-books/#:~:text=And%20Tango%20Makes%20Three%20and,the%20literary%20nonprofit%20PEN%20America> [<https://perma.cc/WWY7-FUEP>]; When Aidan Became a Brother Praise Sheet, LEE & LOW BOOKS, https://www.leeandlow.com/uploads/loaded_document/1416/When_Aidan_Became_a_Brother_Praise_Sheet.pdf. In Missouri, a school board overwhelmingly voted to ban the book “Cats vs. Robots, Volume 1: This is War.” The book explains why coding is fun and it attempts to explain STEM applications. There is a single nonbinary character. There is no sexually explicit material in the book at all. The book was still banned. Marleah Campbell, *Independence School District bans book with nonbinary character*, KCTV5 (July 18, 2022), <https://www.kctv5.com/2022/07/19/independence-school-district-bans-book-with-nonbinary-character/> [<https://perma.cc/K4AF-AH5U>]; *Cats vs. Robots #1: This is War*, GOODREADS, <https://www.goodreads.com/book/show/37505593-this-is-war>. See also *Top 13 Most Challenged Books of 2022*, AM. LIBR. ASS'N (Apr. 21, 2023), <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10> [<https://perma.cc/2WUT->

containing sexually explicit material with minors has been illegal for decades.¹⁵⁵ So what is going on with this new initiative to ban material already previously banned? And why is it that the interpretation of whether the material is sexually explicit seems to always focus on material involving people in LGBTQ+ communities and people of color?¹⁵⁶

This is a poorly veiled ruse to deflect attention from the real goals of these laws: a blatant censorship of content and viewpoints with which the detractors disagree. It is one thing for a parent to prohibit their child from reading a particular book; it is quite another for that same parent to ban a book for all students. Removing books that discuss the existence of LGBTQ+ people is an attempt to erase the lived experiences of those people. And this move has the added punch of trying to otherize and ostracize the very children the laws and policies are allegedly designed to protect. Students, parents, and teachers have spoken against these bans;¹⁵⁷ Librarians have spoken against these bans.¹⁵⁸ Former President of the United States Barack Obama has rallied against these bans.¹⁵⁹

KB75] (books claimed to be sexually explicit).

155. See 18 U.S.C. § 1470 (criminalizing the transfer of obscene material to minors). See also *Miller v. California*, 413 U.S. 15 (1973) (establishing the standard for criminal prosecution of obscenity).

156. The American Library Association noted the increased requests by parents and parent organizations in 2022 to ban books. These numbers and the list of the Top 13 Most Challenged Books of 2022 are evidence of a growing, well-organized, conservative political movement, the goals of which include *removing books about race, history, gender identity, sexuality, and reproductive health* from America's public and school libraries that do not meet their approval.

Censorship by the Numbers, AM. LIBR. ASS'N (Apr. 20, 2023), <https://www.ala.org/advocacy/bbooks/by-the-numbers> [<https://perma.cc/S3BQ-ZZ6S>] (emphasis added). See also Claire Savage, *Librarians train to fight book bans*, PANTAGRAPH (June 25, 2023), https://pantagraph.com/librarians-train-to-fight-book-bans/article_ea0d1204-1b4f-5993-b535-c66b60f79ca2.html [<https://perma.cc/6N2J-4JGU>].

157. The Learning Network, *supra* note 137 (“If I had books with LGBT+ characters or were about real LGBT+ people, my feelings would have been validated much earlier. . . . *Queer and trans experiences are valid and normal and literature that shows that is incredibly important.*”) (emphasis added). See also *Complaint, Equality Florida v. DeSantis*, No. 4:22CV00134 (N.D. Fla. 2022).

158. See, e.g., Claire Savage, *Librarians Train to Defend Intellectual Freedom and Fight Book Bans at Chicago Conference*, AP NEWS (June 23, 2023), <https://apnews.com/article/book-ban-library-censorship-weekend-fd6b313bffe81190b3e8e0fb69eb97a1> [<https://perma.cc/E3UX-H49P>] (“School librarian Jamie Gregory has been called a ‘pedophile’ and ‘groomer,’ bombarded with private messages threatening harm, accused of distributing pornography in schools, and had her personal address posted on social media.”).

159. See *President Obama Extends Support to American Librarians in an Open Letter*, AM. LIBR. ASS'N (July 17, 2023), <https://www.ala.org/news/press-releases/2023/07/president-obama-extends-support-american-librarians-open-letter> [<https://perma.cc/SZ3W-K4LK>].

B. Don't Say Gay

There have also been a flurry of laws passed to limit and even prohibit discussion, instruction, and reference to topics involving sexual orientation, and gender identity.¹⁶⁰ One of the first such laws was Florida's Parental Rights in Education law, commonly known as “Don't Say Gay.” Although originally signed into law by Florida Governor Ron DeSantis in March of 2022, the law was expanded in 2023.¹⁶¹ The Florida law provides, in relevant part:

Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8...If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards¹⁶²

Ten states have similar laws.¹⁶³ Four such states, Louisiana, Mississippi, Oklahoma, and Texas, enacted what were called “no promo homo” laws in the 1980s and 1990s.¹⁶⁴ The remaining states, Alabama, Arkansas, Florida, Indiana, Iowa, and Kentucky, adopted their bans in 2022 and 2023.¹⁶⁵ Florida is quoted above. Examples of other laws include those enacted in Alabama, Iowa, and Kentucky. Alabama provides that “An individual or group of individuals providing classroom instruction to students in kindergarten through the fifth grade at a public K-12 school shall not engage in classroom discussion or provide classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or

160. FLA. STAT. § 1001.42.

161. Kiara Alfonseca, *So-called 'Don't Say Gay' rules expanded through 12th grade in Florida*, ABC NEWS (Apr. 19, 2023), <https://abcnews.go.com/Politics/called-dont-gay-rules-expanded-12th-grade-florida/story?id=98691183> [<https://perma.cc/XC8S-Z63J>].

162. Fla. Stat. Ann. § 1001.42(8)(c) (West 2022).

163. See *LGBTQ Youth: LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT (Aug. 16, 2023), <https://www.lgbtmap.org/img/maps/citations-curricular-laws.pdf> [<https://perma.cc/FSB8-PP2X>].

164. See, e.g., “No Promo Homo” Laws: Harmful and Outdated, EQUAL. TEX., <https://www.equalitytexas.org/no-promo-homo-laws> [<https://perma.cc/7KNZ-ZSNK>] (Oklahoma (1987), Louisiana (1987), Texas (1991) and Mississippi (1998)).

165. ALA. CODE § 16-40A-5(A) (2023); Ark. Code Ann. § 6-16-157(c) (West 2023); FLA. STAT. § 1001.42; IND. CODE § 20-30-17-2 (2023); IOWA CODE § 279.80 (2023); Ky. Rev. Stat. Ann. § 158.1415(1)(d)(2) (West 2023).

developmentally appropriate for students in accordance with state standards.”¹⁶⁶ Iowa provides that “[a] school district shall not provide any program, curriculum, test, survey, questionnaire, promotion or instruction related to gender identity or sexual orientation to students in kindergarten through grade six.”¹⁶⁷ Kentucky bans “any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation.”¹⁶⁸ Some school boards ban anything deemed “controversial.”¹⁶⁹

Judicial attacks on the merits in these cases have yet to make their way through the judicial pipeline. Several actions for injunctive relief have been filed around the nation.¹⁷⁰ The two key challenges we have seen so far have been around the vagueness of the laws and the fact that these laws treat LGBTQ people differently than others under the Equal Protection Clause of

166. ALA. CODE § 16-40A-5(A) (2023).

167. IOWA CODE § 279.80 (2023).

168. Ky. Rev. Stat. Ann. § 158.1415(1)(d)(2) (West 2023).

169. Alex Bollinger, *Teacher fired for speaking out against school banning the song “Rainbowland,”* LGBTQ NATION (July 14, 2023), <https://www.lgbtqnation.com/2023/07/teacher-fired-for-speaking-out-against-school-banning-the-song-rainbowland/> [<https://perma.cc/K569-486V>] (school banned “Rainbowland,” written by Dolly Parton and Miley Cyrus, from an elementary school concert because “it could be deemed controversial”).

170. Federal challenges have been filed in Florida and Indiana. *See* M.A. v. Fla. State Bd. of Educ., No. 4:22-CV-134-AW-MJF, 2023 WL 2631071 (N.D. Fla. Feb. 15, 2023); Complaint, *Smiley v. Jenner*, No. 1:23-cv-1001 (S.D. Ind. June 9, 2023). These laws have not been limited to banning discussion or mention of LGBTQ+ or gender identity generally. We are witnessing parallel attacks on what legislators are targeting as “woke agendas” and “critical race theory” allegedly taught in K-12 schools. Critical Race Theory was developed by legal academic scholars for use in law schools evaluating laws and it is not taught in K-12 schools. *See* Kevin Brown, *Critical Race Theory Explained by One of the Original Participants*, 98 N.Y.U. L. REV. ONLINE 91 (2023). Moreover, Republican legislatures (and Governors) have used the term to embark upon massively unjustified bans. The book, *Ruby Bridges Goes to School*, tells the true story of six-year-old Ruby Bridges, the first African American to integrate an elementary school in New Orleans. The book has been banned for depicting “white people as dangerous or oppressive or people of color as weak and oppressed” and “teaches children ‘victim mentality.’” Additional support for this particular ban and similar bans around the country follow the overused narrative that “[a]nytime that anything is taught that makes a child feel ashamed over something he or she has no control over – like his skin color or gender – then critical race theory is being taught.” EURPublisher01, *Ruby Bridges Children’s Book Now Labeled ‘Critical Race Theory’ By Parent Groups in Tenn.* (Video), EURWEB (July 8, 2021), <https://blackamericaweb.com/2021/07/08/ruby-bridges-childrens-book-critical-race-theory-tennessee> [<https://perma.cc/J6SU-355G>]. *See also* Elle, *A Black Astronaut? Discussed with Children? The Horror!*, KIDLIT UNDERGROUND (Sept. 5, 2020), <https://kidlitunderground.wordpress.com/2020/09/05/a-black-astronaut-discussed-with-children-the-horror/> [<https://perma.cc/3YSC-7G3W>] (banned book told the story of a six-year-old Ron McNair, who would grow up to become an Astronaut and, sadly, die on the Challenger NASA mission in 1986, as he faces the challenges of getting a library card in the segregated community of his childhood).

the Fourteenth Amendment.¹⁷¹

Invalidation of a law for vagueness is based on “a fundamental principle in our legal system [] that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”¹⁷² This will often require looking at two issues: first, whether the ordinary person understands what the law forbids or requires; and second, whether the law is written such that it authorizes or encourages arbitrary and capricious enforcement.¹⁷³ Florida’s Don’t Say Gay law violates both principles. The law does not define terms like “instruction,”¹⁷⁴ “sexual orientation,” “gender identity,”¹⁷⁵ “age-appropriate,” or “developmentally appropriate,” or “third parties.” Teachers in Florida have expressed great dismay at the lack of clarity provided; they have complained that vagueness of the law has created a chilling effect on what they can say and do.¹⁷⁶ These laws have also been challenged for their potential for arbitrary and capricious enforcement.¹⁷⁷

171. See Second Amended Complaint, *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-CV-134-AW-MJF, 2022 WL 17487863 at 101 (N.D. Fla. Oct. 22, 2022) (vagueness); *Id.* at 106 (Equal Protection).

172. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

173. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary or discriminatory enforcement.”).

174. FLA. STAT. ANN. § 1001.42(8)(c) (West 2022). Vagueness is an issue in all these laws. An Indiana law provides that “[a] school, an employee or staff member of a school, or a third-party vendor used by a school to provide instruction may not provide any instruction to a student in prekindergarten through grade 3 on human sexuality.” IND. CODE § 20-30-17-2 (2023). A public-school teacher has raised questions about what exactly is prohibited, including whether any interaction between a teacher and student, qualifies as “instruction.” See Complaint at 5, *Smiley v. Jenner*, No. 1:23-cv-1001 (S.D. Ind. June 9, 2023), https://www.aclu-in.org/sites/default/files/field_documents/dkt_1_-_complaint_12.pdf [<https://perma.cc/S3CP-QWMS>].

175. Can a child assigned the female gender at birth who unexpectedly starts menstruating at school go to a school employee and ask for an explanation and assistance without violating the law? Fabiola Cineas, *Don’t say ‘period’: How Florida Republicans are taking aim at basic sex education*, VOX (Mar. 24, 2023), <https://www.vox.com/policy/2023/3/24/23649277/dont-say-period-florida-republicans-restricting-sex-education> [<https://perma.cc/7DMB-GTSU>].

176. Melissa Block, *Teachers fear the chilling effect of Florida’s so-called ‘Don’t Say Gay’ law*, NPR (Mar. 30, 2022), <https://www.npr.org/2022/03/30/1089462508/teachers-fear-the-chilling-effect-of-floridas-so-called-dont-say-gay-law> [<https://perma.cc/T8EF-KGDN>]; Michael Sainato, *It’s had a chilling effect’: Florida teachers anxious about ‘don’t say gay’ bill*, THE GUARDIAN (Aug. 31, 2022), <https://www.theguardian.com/us-news/2022/aug/31/florida-dont-say-gay-bill-teachers-lgbtq> [<https://perma.cc/8ANW-GGEY>]; Anthony Izaguirre & Adriana Gomez Licon, *‘Don’t Say Gay’ law brings worry, confusion to Florida schools*, PBS (Aug. 15, 2022), <https://www.pbs.org/newshour/education/dont-say-gay-law-brings-worry-confusion-to-florida-schools> [<https://perma.cc/DZ5Y-QRXW>].

177. Second Amended Complaint, *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-CV-134, 2022 WL

In one case, *M.A. v. Florida State Board of Education*,¹⁷⁸ an LGBTQ+ elementary-school art teacher “no longer asks students to draw their families, out of concern that he might violate the law if students talk about their own LGBT families or ask about his family. He no longer speaks out against discriminatory comments in class (for example, when a student derisively calls another’s artwork ‘gay’); [and] he does not keep a picture of him and his husband on his desk, even though other teachers keep photos of their opposite-sex spouse[.]”¹⁷⁹ Gay parents were told by one of their children that the child does not “believe he can talk about their family at school anymore;”¹⁸⁰ in another instance, a student plaintiff tried to start a Gay-Straight Alliance at his school, but no teacher was willing to risk punishment by serving as faculty advisor.¹⁸¹

None of these plaintiffs are sure what the law actually prohibits, but all of them have self-censored or suffered consequences in anticipation of enforcement. Moreover, as the complaint demonstrates, no one is fearful of inadvertent mentions of *heterosexuality*. This suggests that the potential for arbitrary and capricious enforcement can run deep—so deep that teachers are quitting their jobs in fear of making mistakes that violate the law.¹⁸² Given that teachers can have their licenses suspended or revoked, and they can be fired, the chilling effect is real.¹⁸³

Students also allege that these laws violate their Equal Protection rights under the US Constitution. In *M.A. v. Florida State Board of Education*, student plaintiffs have cited instances where they were allegedly “told to

17487863_¶ 63 (N.D.Fla Oct. 27, 2022).

178. *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-CV-134-AW-MJF, 2023 WL 2631071 (N.D. Fla. Feb. 15, 2023).

179. Brief for Appellants, *M.A. v. Fla. State Bd. of Educ.*, No. 23-10866-B, 2023 WL 3815397 at *26 (11th Cir. May 31, 2023).

180. *Id.* at 10.

181. See Second Amended Complaint, *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-CV-134, 2022 WL 17487863_¶ 77–78 (N.D.Fla. Oct. 27, 2022).

182. See Hannah Natanson, *This Florida teacher married a woman. Now she’s not a teacher anymore*, WASH. POST (May 19, 2022), <https://www.washingtonpost.com/education/2022/05/19/gay-florida-teacher-desantis-lgbtq/> [<https://perma.cc/PQM2-H98M>].

183. Hannah Natanson, *Florida bans teaching about gender identity in all public schools*, WASH. POST (Apr. 19, 2023), <https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality/> [<https://perma.cc/JT9U-CZ5M>]. Teachers have been fired (and have had the police called on them) for allegedly violating Don’t Say Gay bans. Kiara Alfonseca, *Teachers, librarians targeted by angry parents over LGBTQ books speak out*, ABC NEWS (May 19, 2023), <https://abcnews-go-com.cdn.ampproject.org/c/s/abcnews.go.com/amp/US/teachers-librarians-targeted-angry-parents-lgbtq-books-speak/story?id=99390577> [<https://perma.cc/6GRB-RVNK>].

keep LGBT behavior ‘behind closed doors,’ in which they were told that a school no longer had a plan to address anti-LGBT bullying targeting a transgender child, and in which teachers and officials treated LGBT parents differently than parents in opposite-sex marriages.”¹⁸⁴ These plaintiffs have also alleged that the School Board, “abandoned its commitment to recognizing LGBT history and offering education on LGBT issues”¹⁸⁵ in violation of their Equal Protection rights. This case was dismissed for lack of standing.¹⁸⁶ An appeal is pending.¹⁸⁷

Legislatures and Governors tout these bans as necessary to protect children and to support and affirm parental rights to control their children’s education.¹⁸⁸ This rhetoric is a lie. Ignoring the life and lived experience of students walking in the building and sitting in classrooms does not protect children. One Trans parent recently shared “when different kinds of families, including LGBTQ families, are discussed in the classroom, it helps children in those families feel included. ‘And when you take this away, it creates some type of secret...’ which can impact children’s mental health.”¹⁸⁹ These laws also take away a safe space for these children to talk to their teachers.¹⁹⁰ A Florida student has alleged that they were told by

184. See Brief for Appellants, *M.A. v. Fla. State Bd. of Educ.*, No. 23-10866-B, 2023 WL 3815397, at *43–44 (11th Cir. May 31, 2023) (internal citations omitted).

185. *Id.*

186. See *M.A. v. Fla. State Bd. of Educ.*, No. 4:22-CV-134-AW-MJF, 2023 WL 2631071 (N.D. Fla. Feb. 15, 2023) (dismissing the case for lack of standing). The standing doctrine is a legal requirement that plaintiff have an actual “case” or “controversy” to satisfy the requirements of Article III of the Constitution. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–562 (1992) (internal citations omitted) (discussing standing requirements).

187. See generally Brief for Appellants, *supra* note 179.

188. After signing H.B. 1557, Governor DeSantis stated: “Parents’ rights have been increasingly under assault around the nation, but in Florida we stand up for the rights of parents and the fundamental role they play in the education of their children.” Press Release, FLGOV.COM, Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022), <https://www.flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education>. See also John Russell, *Brave mother blasts school board for proposed policy to out trans students*, LGBTQ NATION (July 14, 2023), <https://www.lgbtqnation.com/2023/07/brave-mother-mom-blasts-school-board-for-proposed-policy-to-out-trans-students> [https://perma.cc/73P4-YGW3].

189. Rachel Hatzipanagos, *After Florida passes bill, LGBTQ parents ask: Which parents’ rights?*, WASH. POST (May 9, 2022), <https://www.washingtonpost.com/nation/2022/05/09/lgbtq-parents-dont-say-gay/> [https://perma.cc/T9S5-59M4].

190. John Russell, *supra* note 188 (“The kicker is, my kid’s lucky...When they go home, they have a family that loves and supports them, a family that doesn’t believe their identity is a mental illness...Not all kids have that support at home...How dare you propose taking away the one lifeline that a kid might have with a trusted teacher? How dare you propose taking away the ability for a teacher to be that lifeline? Shame on you.”).

administrators that they “were not sure how to handle bullying incidents going forward under the new legal requirements.” Does this law allow bullying of LGBTQ+ students to go unaddressed?¹⁹¹ Medical and other professional associations have decried these laws as harmful and antithetical to healthy maturation.¹⁹² And exactly which parental rights are being supported here?¹⁹³ Are we only focused on the parental rights of Republican conservatives and the religious right?¹⁹⁴ Don’t the voices of *all parents matter*?¹⁹⁵ And what of the collateral damage; i.e., damage to teachers who are LGBTQ+? Think about the disrespect and marginalization these teachers have to deal with from their own students.¹⁹⁶

191. See Brief for Appellants, *M.A. v. Fla. State Bd. of Educ.*, No. 23-10866-B, 2023 WL 3815397 at *13 (11th Cir. May 31, 2023). LGBTQ parents also report ostracization and “worse treatment from school personnel, with teachers and administrators no longer speaking with them on the same terms as opposite-sex parents.” *Id.* at *13–14.

192. See, e.g., Elizabeth J. Meyer, *How ‘Don’t Say Gay’ and Parental Rights Laws Can Harm Students*, PSYCH. TODAY (Mar. 6, 2022), <https://www.psychologytoday.com/us/blog/gender-and-schooling/202203/how-don-t-say-gay-and-parental-rights-laws-can-harm-students> [<https://perma.cc/L7EU-E8HH>]; Press Release, AM. PSYCH. ASS’N, *APA president condemns Florida’s ‘Don’t Say Gay’ bill* (Mar. 9, 2022), <https://www.apa.org/news/press/releases/2022/03/florida-dont-say-gay>.

193. Hatzipanagos, *supra* note 189; see also Kendall Ross, ‘*What parents are they supporting?:’ Moms speak out against ‘Don’t Say Gay’ law*, ABC NEWS (Mar. 30, 2022), <https://abcnews.go.com/US/parents-supporting-moms-speak-dont-gay-law/story?id=83727469> [<https://perma.cc/LM26-XUCS>].

194. Jason Lemon, *72 Percent of Protestant Pastors View Trans Identity as ‘Immoral’: Poll*, NEWSWEEK (Mar. 17, 2021), <https://www.newsweek.com/72-percent-protestant-pastors-view-trans-identity-immoral-poll-1576938> [<https://perma.cc/WV7M-66FZ>]; see also Jeff McMillian, Kavish Harjai, & Kimberlee Kruesi, *Many transgender health bills come from a handful of far-right interest groups*, AP NEWS (May 20, 2023), <https://apnews.com/article/transgender-health-model-legislation-5cc4a7cb4ab69150f670d06fd0f361ab> [<https://perma.cc/4Z5V-M9JG>].

195. See Alex Cooper, *Poll: over 60% of American Oppose ‘Don’t Say Gay’ Bills*, ADVOCATE (Mar. 14, 2022), <https://www.advocate.com/news/2022/3/14/poll-over-60-percent-americans-oppose-dont-say-gay-bills> [<https://perma.cc/6N5R-8342>]; Meredith Deliso, *6 in 10 Americans oppose laws prohibiting LGBTQ lessons in elementary school: POLL*, ABC NEWS (Mar. 13, 2022), <https://abcnews.go.com/Politics/10-americans-oppose-laws-prohibiting-lgbtq-lessons-elementary/story?id=83393478> [<https://perma.cc/4Z5V-M9JG>]; see also Ewan Palmer, *Majority of Americans Think Prejudice Against LGBTQ+ Community Is a Problem*, NEWSWEEK (June 15, 2023), <https://www.newsweek.com/lgbtq-prejudice-problem-poll-serious-quinnipiac-1806851> [<https://perma.cc/YSF7-7H8J>].

196. These laws attempt to render LGBTQ+ teachers irrelevant, invisible, and therefore not worthy of respect. See Scottie Andrew, *‘I don’t want to talk to the gay one’: LGBTQ teachers say they are fighting erasure in their own classrooms*, CNN (June 12, 2023), <https://www.cnn.com/2023/06/12/us/lgbtq-teachers-intolerance-classrooms-ccc> [<https://perma.cc/FAX9-VTQL>].

VI. THE PAINFUL IRONY OF “PROTECTION”

Because my daughter might need puberty blockers in the next few months, I am temporarily relocating out of state with her and my other child. Her father will stay behind to continue working in Texas. We all intend to return and reunite in our home once it is safe for [our daughter] to receive this care in the state. . . I am heartbroken to have to take my children away from their home and their father, even temporarily. But I know that Texas is not a safe place for my daughter if this law forbids her access to this care. . . My husband will continue to live in our house in Texas and I will keep my residency and professional license in Texas. Texas is our home. My husband and I want to continue to live and raise our children in the communities they have spent their whole lives in. We hope that once this law is struck down our family can be reunited in our home again.¹⁹⁷

A study published in June of 2022 found that approximately 0.5% of adults in the United States identify as Transgender while 1.4% of youth between the ages of thirteen and seventeen so identify.¹⁹⁸ Notwithstanding this small number, over 400 anti-Trans bills were proposed in various states in 2023 alone, a significant increase from just one year earlier.¹⁹⁹ And with those laws came a substantial increase in Anti-LGBTQ+ rhetoric, harassment, vandalism, and assaults on these populations.²⁰⁰

We have highlighted the cacophony of laws targeted towards the destruction of Trans and Gender-Diverse youth just in the last year. There

197. Plaintiff’s Verified Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief, Declaration of Mary Moe, *Loe v. State*, No. D-1-GN-23-003616 (Tex. D.C. – Travis Cnty. [201st] July 12, 2023). See also John Riley, *Parents of Transgender Youth Sue Texas Over Health Care Bans*, METRO WEEKLY (July 21, 2023), <https://www.metroweekly.com/2023/07/parents-of-transgender-youth-sue-texas-over-health-care-ban> [<https://perma.cc/83T8-Z8GH>] (complaint for *Loe v. State*).

198. Jody L. Herman, Andrew R. Flores, & Kathryn K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf> [<https://perma.cc/4FQN-395E>].

199. See *supra* note 5.

200. ADL, *Year in Review: Anti-LGBTQ+ Hate & Extremism Incidents, 2022-2023*, ADL (June 22, 2023), <https://www.adl.org/resources/report/year-review-anti-lgbtq-hate-extremism-incidents-2022-2023> [<https://perma.cc/6XBX-B7AT>]; see also Josh Margolin, *Calls for violence against LGBTQ people intensify, DHS report says*, ABC7 (May 16, 2023), <https://abc7.com/calls-for-violence-against-lgbtq-people-intensify-dhs-report-says/13252503/> [<https://perma.cc/A3NK-CU8N>].

is no reason to believe that these targeted attempts at erasure have ceased. Heaping onto this blatant strangulation of Trans youth are other societal stressors. Consider all the media attention involving companies walking back their support of Trans people,²⁰¹ companies removing Pride merchandise from stores,²⁰² governments canceling Pride parades,²⁰³ and governments severely restricting drag shows.²⁰⁴ And that's not all.

Trans youth are among the most vulnerable people in America. They are at high risk of rejection from their families; indeed, outing and familial rejection is the largest reason for housing insecurity among all LGBTQ+ youth.²⁰⁵ Almost half of homeless youth are part of the LGBTQ+ community. And most are unhoused because parents have rejected their sexual orientation and/or gender identity; have abused their children, shamed them, told them they will burn in hell, and have threatened conversion therapy; and some have simply kicked their children out of the home.²⁰⁶ TGD youth are also “at a higher risk of being victims of violence . . . compared to their peers[;] about 27% of transgender students

201. Dennis Romero, *Anheuser-Busch CEO Says Bud Light Partnership with Trans Influencer Wasn't Meant to Divide*, NBC (Apr. 14, 2023), <https://www.nbcnews.com/nbc-out/out-news/anheuser-busch-bud-light-dylan-mulvaney-trans-influencer-rcna79810> [<https://perma.cc/HZX6-F94X>].

202. Kerry Breen, *Republican Attorneys General Issue Letter to Target About Pride Merchandise*, CBS (July 7, 2023), <https://www.cbsnews.com/news/republican-attorneys-general-issue-letter-to-target-about-pride-merchandise/> [<https://perma.cc/FQ98-2M5Q>].

203. Marina Pitofsky, *Fear and Hostility: DeSantis Legislation Prompts Florida Cities to Cancel, Restrict Pride Events*, NBC (June 2, 2023), <https://www.usatoday.com/story/news/politics/2023/06/02/desantis-florida-pride-lgbtq/70280199007/> [<https://perma.cc/EPJ7-UPLX>]. There was an explosion of hate and extremism during Pride Month 2023; this was significant increase as compared to previous years. Amelia Hansford, *Anti-LGBTQ+ Hate and Extremism Spiked During Pride Month 2023, Report Finds*, PINK NEWS (July 14, 2023), <https://www.thepinknews.com/2023/07/14/glaad-hate-extremism-hate-pride-month-2023/> [<https://perma.cc/5VW4-WXFH>].

204. Shawna Mizelle & Dave Alsop, *Tennessee becomes first state in 2023 to restrict drag performances*, CNN (Mar. 3, 2023), <https://www.cnn.com/2023/03/02/politics/tennessee-ban-drag-show-performances-governor/index.html> [<https://perma.cc/W7WW-3UP3>].

205. Patti Neighmond, *Home But Not Safe, South LGBTQ Young People Face Rejection From Families in Lockdown*, NPR (May 17, 2020), <https://www.npr.org/sections/health-shots/2020/05/17/856090474/home-but-not-safe-some-lgbtq-young-people-face-rejection-from-families-in-lockdo> [<https://perma.cc/XGD3-QK63>]; see also Alex Abramovich, *Preventing, Reducing and Ending LGBTQ2S Youth Homelessness: The Need for Targeted Strategies Institute for Mental Health Policy Research*, 4 SOCIAL INCLUSION, 86 (2016).

206. Claire Thornton, *'Rejected Solely Because of Your Identity': Homeless LGBTQ Youths Face Unique Challenges*, USA TODAY (June 2, 2023), <https://www.usatoday.com/story/news/nation/2023/06/02/lgbtq-homeless-youths-family-rejection/11535821002/> [<https://perma.cc/UE8Z-9WLC>].

said they feel unsafe at school compared to 5% of cisgender males and 7% of cisgender females . . . [and] over 26% of transgender teens have experienced physical dating violence, compared to 6% of cisgender males and 9% of cisgender females.”²⁰⁷

Trans children are relentlessly bullied and harassed by their peers.²⁰⁸ Almost half of all of these children, 43%, have been bullied while on school grounds; this compares to 18% of cisgender students. Nearly a third, 29%, of Trans children have been threatened and/or injured with a weapon. This compares to 7% of cisgender students.²⁰⁹ Bullying in cyberspace is believed to be extremely high for Trans students as well, though the numbers there are harder to capture.²¹⁰ Heterosexual youth are much more likely to report such bullying to their parents; Trans children, often fearful of their parents (or their school’s response), do not.²¹¹

In addition to the external psychological harms of stigma, humiliation, and social rejection foisted upon these students, there is undeniable evidence of internalized psychological and physical harms, including depression, non-suicidal self-injury (like cutting oneself), urinary tract infections, and infections or pathology of the kidneys or bladder that result from insufficient hydration and avoiding the school bathrooms.²¹²

207. Melissa Jenco, *Study: Transgender Teens at Higher Risk of Violence, Suicide Attempts*, AM. ACAD. PEDIATRICS (Jan. 24, 2019), <https://publications.aap.org/aapnews/news/14054> [<https://perma.cc/87JU-4J7T>]. See also Amit Paley, *National Survey on LGBTQ Youth Mental Health 2020*, TREVOR PROJECT (2020), <https://www.thetrevorproject.org/survey-2020/?section=Introduction> [<https://perma.cc/Q7EE-9GLN>] (1 in 3 LGBTQ youth report that they have been physically threatened or harmed in their lifetime due to their sexual orientation or gender identity).

208. JO YURCABA, *SEXUAL ASSAULT, HARASSMENT, BULLYING: TRANS STUDENTS SAY THEY’RE TARGETED AT SCHOOL*.

One student said the harassment he has experienced combined with hostile rhetoric coming from a school board member has created an “unhealthy” environment, NBC (Dec. 14, 2021, 3:40 AM), <https://www.nbcnews.com/nbc-out/out-news/sexual-assault-harassment-bullying-trans-students-say-targeted-school-rcna7803>; Madeleine Roberts, *New CDC Data Shows LGBTQ Youth are More Likely to be Bullied Than Straight Cisgender Youth*, HUMAN RIGHTS CAMPAIGN, (August 26, 2020), <https://www.nbcnews.com/nbc-out/out-news/sexual-assault-harassment-bullying-trans-students-say-targeted-school-rcna7803> [<https://perma.cc/K6JA-RFTR>].

209. Roberts, *supra* note 208.

210. Roberto L. Abreu & Maureen C. Kenny, *Cyberbullying and LGBTQ Youth: A Systematic Literature Review and Recommendations for Prevention and Intervention*, 11 J. CHILD & ADOLESCENT TRAUMA 81 (2017).

211. *Id.*

212. See Paley, *supra* note 207. A 2015 survey found that “59% of Trans people have avoided bathrooms . . . because they feared confrontations in public restrooms at work, at school, or in other places. 12% report that they have been harassed, attacked, or sexually assaulted in a bathroom in the last year. 31% have avoided drinking or eating so that they did not need to use the restroom in the last year. 8%

Depression, suicidal ideation, and worst of all, actual suicide attempts, occur in much higher percentages than for cisgender students.²¹³ For example, 53% of those who have seriously considered suicide are TGD youth; this compares to 33% of cisgender youth.²¹⁴ Furthermore, the constant barrage of information on the news, social media, in schools, are all converging on TGD youth like a perfect storm. “Nearly 1 in 3 LGBTQ young people said their mental health is poor either ‘most of the time’ or ‘always’ because of policies and legislation that takes aim at their sexual orientation or gender identity, according to a report which analyzed survey responses from more than 28,000 LGBTQ young people ages 13 to 24 across the U.S.”²¹⁵ This is catastrophic.

The targeting of these children is akin to stochastic terrorism. Stochastic terrorism is “the public demonization of a person or group resulting in the incitement of a violent act, which is statistically probable but whose specifics cannot be predicted.”²¹⁶ It has been ‘reported that in 2022 far-right extremists committed more than 300 percent more anti-LGBTQ+ acts than the previous year, which ‘strongly’ correlates with subsequent violence against gays and transgender people.’²¹⁷ There was also a significant increase in hate and extremism during Pride Month 2023 as compared to

report having a kidney or urinary tract infection, or another kidney-related medical issue, from avoiding restrooms in the last year.” German Lopez, *The Largest Survey of Transgender People Yet Shows the Dangers of Bathroom Hysteria*, VOX (July 12, 2016), <https://www.vox.com/2016/7/12/12161210/transgender-bathroom-survey> [<https://perma.cc/2VGD-72WP>].

213. Shoshana K. Goldberg & Thee Santos, *Fact Sheet: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS (Mar. 18, 2021), <https://www.americanprogress.org/article/fact-sheet-importance-sports-participation-transgender-youth/> [<https://perma.cc/T35U-Q4NT>]. A 2021 study found that nearly 44% of transgender youth reported considering suicide in the previous year, compared to 16% of cisgender youth. *Id.* at n.3 (citing *Youth Risk Behavior Survey*, CDC (last accessed Jan. 2021), <https://www.cdc.gov/healthyyouth/data/yrbs/data.htm>).

214. Tori B. Powell, *45% of LGBTQ Youth Seriously Considered Suicide in the Past Year, Trevor Project Survey Finds*, CBS (May 4, 2022), <https://www.cbsnews.com/news/lgbtq-youth-suicide-the-trevor-project-mental-health-2022> [<https://perma.cc/9H72-UDAG>].

215. Brooke Migdon, *More than 30 percent of LGBTQ youth attribute poor mental health to anti-LGBTQ laws*, THE HILL (May 1, 2023), <https://thehill.com/policy/healthcare/3982005-more-than-30-percent-of-lgbtq-youth-attribute-poor-mental-health-to-anti-lgbtq-laws> [<https://perma.cc/7W6F-SB7W>].

216. *Stochastic Terrorism*, DICTIONARY.COM, <https://www.dictionary.com/browse/stochastic-terrorism> [<https://perma.cc/XNS8-4QYT>]. See also Paley, *supra* note 207.

217. Christopher Wiggins, *Pride Month Saw Increase in Anti-LGBTQ+ Backlash: Report*, ADVOCATE (July 17, 2023), <https://www.advocate.com/news/pride-month-increase-lgbtq-backlash> [<https://perma.cc/T7T6-7GC3>].

previous years.²¹⁸ We are setting these youths up for extinction.

Families are moving out of state because their children can no longer access care, or because they are threatened with child abuse charges if they try to help their child obtain medically necessary gender-affirming care. This is, in effect, forced migration, and is both a national and international problem. “[A]mong 84 million people {globally} who are currently forcibly displaced worldwide, LGBT persons are particularly vulnerable and marginalized...fleeing persecution and socio-economic exclusion.”²¹⁹ There is no such thing as sheltering in place, here. Staying “home” means losing access to healthcare and legal recognition, to say nothing of the lost opportunity to live openly and authentically. Families know the statistics. They know that if they do not flee and seek sanctuary, their children risk depression, or even death. As one parent of a twelve-year-old Trans daughter said about a planned relocation from Texas to Washington: “It’s my job to continue to keep her safe.” The move will be sad, the parent continued, “but it is what we have to do[.]”²²⁰ One small-town Florida family, concerned for the health and safety of their transgender daughter, took her out of school and “sent her to a boarding school in Canada.”²²¹ One cannot but be reminded of British citizens sending their children to safety in Canada during the Nazi Blitz.²²²

Some estimate the number of Americans already displaced by targeted discriminatory legislation and the inherent threat thereof to be as high as

218. Hansford, *supra* note 201.

219. *Forcibly Displaced LGBT Persons Face Major Challenges in Search of Safe Haven*, UNITED NATIONS OFF. HIGH COMM’R (May 16, 2022), <https://www.ohchr.org/en/statements/2022/05/forcibly-displaced-lgbt-persons-face-major-challenges-search-safe-haven> [https://perma.cc/7FNQ-AXQB].

220. Bram Sable-Smith, *Medical Exiles: Families Flee States Amid Crackdown on Transgender Care*, MO. INDEP. (June 26, 2023), <https://missouriindependent.com/2023/06/26/medical-exiles-families-flee-states-amid-crackdown-on-transgender-care> [https://perma.cc/LH3T-RCS4]; Marc Ramirez, *As State Laws Target Transgender Children, Families Flee and Become “Political Refugees,”* USA TODAY (Oct. 29, 2022), <https://www.usatoday.com/story/news/nation/2022/10/29/transgender-children-families-flee-states-restricting-rights/10547110002/> [https://perma.cc/336G-YGSK]; Sara Ernst, *Texas Families with Trans Kids are Leaving the State*, NPR (Apr. 27, 2022), <https://www.npr.org/2022/04/27/1095099695/texas-families-with-trans-kids-are-leaving-the-state> [https://perma.cc/Q9CS-DE7Z].

221. Talib Visram, *Run Out of Florida’: How Ron DeSantis’s Anti-Trans Laws are Pushing Families Out*, FAST CO. (July 5, 2023), <https://www.fastcompany.com/90917072/florida-anti-trans-laws-youth-desantis-medical-refugee> [https://perma.cc/N289-RLMA].

222. John D. Reid, *WW2 British Child Evacuees to Canada: Researching WW2 British Child Evacuees to Canada*, JOHN D REID (last visited Oct. 22, 2023), <https://www.johndreid.com/ww2-british-child-evacuees-to-canada/> [https://perma.cc/7RZT-ELAJ].

260,000 as of mid-June 2023.²²³ Trans youth and their families, fleeing states with punitive laws in fear of discrimination and reprisal have become a domestic and international issue.²²⁴ These marginalized people have become refugees in their own country. Even some medical caretakers are fleeing oppressive Republican states.²²⁵

There are near universal medical and scientific calls for laws and policies that support Trans youth.²²⁶ The American Academy of Pediatrics states that any ‘discrimination based on gender identity or expression, real or perceived, is damaging to the socioemotional health of children, families, and society’²²⁷ The American College of Osteopathic Pediatricians goes further:

On review of this law, [banning gender affirming care,] we can only conclude that this law is an extremely dangerous piece of legislation that will place an already very vulnerable population of pediatric patients at increasing risk of further physical and psychological harm.”²²⁸

These bans are not protecting Trans youth; worse, they risk killing them.

223. Erin Reed, *US Internal Refugee Crisis: 130-260k Trans People Have Already Fled*, ERIN MORNING (June 13, 2023), <https://www.erininthemorning.com/p/us-internal-refugee-crisis-130-260k> [https://perma.cc/7WBP-7DGH].

224. Anya Zoledziowski, *There’s a New Group Helping Trans People Flee the US*, VICE (Apr. 10, 2023), <https://www.vice.com/en/article/5d9p73/trans-asylum-transport-group> [https://perma.cc/H884-ALRP].

225. William Melhado, *Doctors treating trans kids are leaving Texas, exacerbating healthcare crisis*, MSN (July 2023), <https://www.msn.com/en-us/health/other/doctors-treating-trans-kids-are-leaving-texas-exacerbating-healthcare-crisis/ar-AA1dYneq?ocid=socialshare&cvid=85b23e6a1f7f44879e3c1dc1020131ba&ei=46> [https://perma.cc/7PMG-H2YH].

226. See *supra* notes and accompanying text.

227. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AM. ACAD. PEDIATRICS (Oct. 1, 2018), <https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected> [https://perma.cc/7YA6-R8VC].

228. *ACOP Statement Against Anti-Transgender Health Laws in State Legislation*, AM. COLL. OSTEOPATHIC PEDIATRICIANS (Apr. 27, 2021), <https://acoped.org/acop-statement-against-anti-transgender-health-laws-in-state-legislation/> [https://perma.cc/353F-2L94].

CONCLUSION

Despite the many civil rights gains of Trans and gender-diverse Americans and the LGBTQ+ community in the United States, including the decriminalization of their very existence, their relationships, their families, and their bodies, we are reminded by the legislative onslaught of 2023 that such gains are seldom uninterrupted and subject to the ebb and flow of monumental victories and reactionary setbacks. “Slow and steady wins the race” is good advice for those with the strength to win by perseverance alone, but in the here and now, willpower and effort are not enough to carry the day and deliver full equality and recognition under the law for TGD folk, not to the extent it has for the rest of LGBTQ+ America, let alone the American ideal. We must recognize this now, when calls for justice and equality are met with derision and scorn, and a dismissive characterization of “special rights;” as if some Americans are, by their very nature, undeserving or unworthy of the same constitutional consideration given others; as if hoping for better, *demanding* better, is the very definition of audacity. How can anyone think otherwise when nineteen U.S. states have adopted bills targeting TGD children? How else are we to view the anti-TGD bills of 2023, criminalizing people not for their actions but for who they are?

No, Trans and queer Americans must still consistently and persistently demonstrate and argue for the right to exist—for their basic humanity—and must continue to seek allies across every political, religious, and cultural spectrum to continue this painfully slow punctuated equilibrium of one *Bostock* forward, ten steps back. The Transgender Law Center and the National Center for Transgender Rights have declared that “our survival is revolutionary!” and they are right.²²⁹ The history of the resilience of the Trans and LGBTQ+ communities, their families, and allies, is truly an epic and quintessentially American story of an underdog overcoming huge odds and entrenched opposition. But it is a tale yet to be told fully, and the battle for control of the narrative rages on. There is no rest for the weary, and constant vigilance is the only defense to reactionary backlash.

We have discussed the use of bathrooms; playing on sports teams in K-12 schools; medically necessary gender-affirming care; and the recognition

229. *About Us*, TRANSGENDER L. CTR., <https://transgenderlawcenter.org/about> (last visited Oct. 21, 2023).

of one's name and pronouns. We have also talked about book bans and the censorship of educational material in public schools. In every case, we have demonstrated a few things: 1) There is no truth to the toxic narratives that the red states hide behind. Trans children are not attacking children in bathrooms; 2) they are not exposing themselves indecently to other children; 3) competitive advantages in sports are not really a thing. K-12 sports are about fostering virtues like teamwork and perseverance, to promote wellness and inclusion, not winning. Moreover, physical advantages are nonexistent pre-puberty, and can be completely mitigated once it begins. Medical professionals and associations are in near-universal agreement that the government should not interfere with the doctor/patient relationship, and that GAC, including recognition of the existence of Trans youth, is lifesaving and necessary. This is vital to the mental health, growth, and well-being of these children. We have also laid bare the tragic harms that result when the law denies the validity—the *humanity*—of these children.

We stand on the precipice, now. But we remain hopeful that people like you, like *us*, will work to stop us from crossing the threshold; to pull us back from the brink of a disaster that threatens to rend the very soul of our nation in two; to help us course-correct toward a brighter tomorrow. We are hopeful that we can do better. We are hopeful for a new era for recognition and validation for gender and sexual minorities in these (occasionally) United States. The “arc of the moral universe is long, but it bends towards justice.”²³⁰ Sooner would be better than later. Lives are at stake.

230. *Martin Luther King, Jr. Quotes*, GOODREADS, <https://www.goodreads.com/quotes/646750-let-us-realize-the-arc-of-the-moral-universe-is> [<https://perma.cc/D9HQ-SD4Q>] (last visited Sept. 25, 2023).