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## Litigating the Future of Youth's Access to Gender-Affirming Care

Sophia Ureta-Fulan

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# Litigating the Future of Youth's Access to Gender-Affirming Care

SOPHIA URETA-FULAN\*

## ABSTRACT

*Youth should challenge limitations and prohibitions to their pursuit of gender-affirming care under the Americans with Disabilities Act (ADA) and the Equal Protection Clause of the Fourteenth Amendment (EPC). Executive orders in several states have severely limited or prohibited youths' ability to pursue gender-affirming care. These legal schemes and policies restrict access to gender-affirming care in violation of the ADA and the EPC. This paper discusses the need for gender-affirming care, the policy landscape in the United States restricting youths' access to gender-affirming, evaluates arguments to expand the ADA to include coverage of gender dysphoria, and explores potential EPC challenges to state restrictions on such care. This litigation strategy analysis will provide advocates with potential avenues to challenge anti-trans laws and policies to protect and expand youths' access to gender-affirming care in the United States.*

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\*I am a third-year student and Juris Doctor candidate at the University of California, College of the Law, San Francisco (formerly UC Hastings). As a person born and raised in California to immigrant Latin American parents, I recognize the privileges that our state provides our LGBTQ+ community and other minorities. I hope this note brings to light what we can and should do to support the needs of a mostly voiceless minority: transgender youth across the United States seeking recognition and access to care. I would like to thank my loved ones and my *UC Law Constitutional Quarterly* peers for their feedback and support with this work. All mistakes are my own.

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## INTRODUCTION

LGBTQ+ Americans currently face unprecedented rates of hate-crimes with youth in particular being the target of anti-LGBTQ+ legislation and policy across the United States.<sup>1</sup> Executive orders in several states have severely limited or prohibited youth’s ability to pursue gender-affirming care when it should be a fundamental right.<sup>2</sup> This public vitriol has tangible and disturbing results. Recent findings note that LGBTQ+ youth, including transgender and gender fluid youth, face unsettling rates of verbal and

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1. HUM. RTS. CAMPAIGN, ANTI-LGBTQ+ LAWS? KNOW BEFORE YOU GO (Sept. 18, 2023), [https://www.hrc.org/campaigns/national-state-of-emergency-for-lgbtq-americans?\\_ga=2.173937443.1058747656.1709147472-1861780486.1709147472](https://www.hrc.org/campaigns/national-state-of-emergency-for-lgbtq-americans?_ga=2.173937443.1058747656.1709147472-1861780486.1709147472).

2. LGBTQ VICTORY INST., LGBTQ LAWMAKERS IN 16 STATES TO INTRODUCE TRANS REFUGE STATE LAWS; WILL SHIELD TRANS KIDS FROM PENALTIES WHEN SEEKING GENDER-AFFIRMING CARE (May 3, 2022), <https://victoryinstitute.org/news/lgbtq-lawmakers-in-16-states-to-introduce-trans-refuge-state-laws-will-shield-trans-kids-from-penalties-when-seeking-gender-affirming-care/>.

physical harassment.<sup>3</sup> Nearly 60% of LGBTQ+ youth surveyed report experiencing verbal and physical harassment at least once in the prior 30 days.<sup>4</sup> Only one in five youth stated that they told a teacher or staff member about the bullying, but, more importantly, one in four of those youth stated that the adult “didn’t help [them] at all.”<sup>5</sup>

The lack of support for transgender and gender fluid youth culminated in early February 2024 when the LGBTQ+ community was rocked by the death of a 16-year-old non-binary Oklahoma high schooler, Nex Benedict.<sup>6</sup> Nex was attacked and beaten inside their high school bathroom.<sup>7</sup> They succumbed to their injuries and tragically died after their school failed to contact authorities and their local hospital failed to properly administer them care during their initial, post-attack visit.<sup>8</sup> Nex may be alive today if the adults in their life had made efforts to protect them from anti-LGBTQ+ hate. Instead, adults across the nation are causing transgender and gender fluid youth irreparable trauma through their failure to address the harassment these youth face daily and the continuous introduction of legislation limiting their access to gender-affirming care. There are, however, plenty of ways to fight back. This note explores how LGBTQ+ advocates can statutorily and constitutionally protect the right to gender-affirming care regardless of age.

## I. DETAILS ABOUT CURRENT LIMITATIONS TO GENDER-AFFIRMING CARE ACCESS FOR YOUTH IN THE UNITED STATES

In 2022, a report by UCLA School of Law’s Williams Institute estimated that proposed anti-trans legislation jeopardized access to gender-affirming care for approximately 58,000 transgender and gender fluid youth across the nation.<sup>9</sup> “The current wave of legislation seeking to restrict the rights of transgender people began around 2016, with North Carolina’s

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3. HUM. RTS. CAMPAIGN, 2023 LGBTQ+ YOUTH REPORT, [https://reports.hrc.org/2023-lgbtq-youth-report?\\_ga=2.223332123.1648062610.1708979323-1439039062.1708048097#outness-to-family](https://reports.hrc.org/2023-lgbtq-youth-report?_ga=2.223332123.1648062610.1708979323-1439039062.1708048097#outness-to-family) (last visited Mar. 19, 2024).

4. *Id.*

5. *Id.*

6. Jose Soto, *Honoring Nex Benedict, 16-Year-Old Non-Binary High School Student Who Tragically Died After School Beating*, HUM. RTS. CAMPAIGN (Feb. 21, 2024), <https://www.hrc.org/news/honoring-nex-benedict-16-year-old-non-binary-high-school-student-who-tragically-died-after-school-beating>.

7. *Id.*

8. *Id.*

9. Kerith J. Conron, et al., *Prohibiting Gender-Affirming Medical Care For Youth*, UCLA SCH. OF L. WILLIAMS INST., 1, 4 (Mar. 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf>.

‘bathroom bill’ being the most high-profile example from that time.”<sup>10</sup> Although the evolution of society’s perception of the identity of transgender individuals has been vital to innovations in gender-affirming care, access to gender-affirming care for adolescents is dwindling across the United States. Most of the bills introduced in 2022 target trans youth specifically.<sup>11</sup> At the time of this note, at least six states—Alabama, Arkansas, Arizona, Florida, South Dakota, and Utah—have passed or implemented policies restricting gender-affirming care for people under the age of legal majority.<sup>12</sup> And at least twenty-five other states have introduced bills that would similarly restrict medical care for transgender and gender fluid youth.<sup>13</sup>

In response to states enacting restrictions on transgender and gender fluid youths’ access to gender-affirming care, several states have introduced legislation protecting trans kids and their families from proposed penalties.<sup>14</sup> Lawmakers representing sixteen states publicly committed to introducing trans refuge bills.<sup>15</sup> In late 2022, California Governor Newsom signed a bill making California a refuge for minors seeking gender-affirming care.<sup>16</sup> Illinois State Senator Mike Simmons introduced similar legislation making Illinois a sanctuary state for transgender and gender fluid individuals.<sup>17</sup> Both the California and Illinois laws prevent extradition of LGBTQ+ individuals and providers charged under anti-trans laws in other states in the country and ban the enforcement of other states’ anti-trans laws in California and Illinois, respectively.<sup>18</sup> These laws are welcome, but do not solve the larger, rapidly

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10. Sam Levin, *More than 50% of trans and non-binary youth in US considered suicide this year, survey says*, THE GUARDIAN (Dec. 17, 2022, 1:00 PM), <https://www.theguardian.com/us-news/2022/dec/16/us-trans-non-binary-youth-suicide-mental-health>.

11. Anne Branigin & N. Kirkpatrick, *Anti-trans laws are on the rise. Here’s a look where – and what kind.*, WASH. POST (Oct. 14, 2022, 8:00 AM), <https://www.washingtonpost.com/life-style/2022/10/14/anti-trans-bills/>.

12. Kiara Alfonseca, *Map: Where gender-affirming care is being targeted in the US*, ABC NEWS (Feb. 25, 2023, 5:05 AM), <https://abcnews.go.com/US/map-gender-affirming-care-targeted-us/story?id=97443087>.

12. Levin, *supra* note 10.

13. *Id.*

14. LGBTQ VICTORY INST., *supra* note 2.

15. *Id.* (In 2022, “21 LGBTQ lawmakers representing 16 states publicly committed to introduce trans refuge state bills in Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Michigan, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington and West Virginia.”).

16. Ariel Gans, *California set to become a refuge for transgender health care*, CAL MATTERS (Aug. 30, 2022), <https://calmatters.org/politics/california-legislature/2022/08/california-transgender-health-care-refuge/>.

17. Ali Hart, *Bill proposes to make Illinois a sanctuary for trans, gender diverse people*, ILL. EAGLE (Dec. 5, 2022), <https://illinoiseagle.com/2022/12/05/bill-proposes-to-make-illinois-a-sanctuary-for-trans-gender-diverse-people/>.

18. Gans, *supra* note 16; Hart, *supra* note 17.

advancing movement targeting transgender and gender-fluid youth as they try to access gender-affirming care.

In states lacking sympathetic lawmakers, litigation strategies have successfully, temporarily blocked anti-trans policies. For instance, anti-trans policies in Arkansas and Texas were halted through requests for injunctions. In 2021, Arkansas passed the Save Adolescents From Experimentation (SAFE) Act, becoming the first state legislature to ban gender-affirming care for transgender and gender fluid youth.<sup>19</sup> A federal court in *Brandt v. Rutledge* temporarily blocked, and later permanently blocked, enforcement of the SAFE Act under the Equal Protection Clause (EPC).<sup>20</sup>

In 2022, Texas Governor Abbott used his executive power to direct Texas' Department of Family and Protective Services (DFPS) to consider and treat gender-affirming care for transgender and gender fluid youth as child abuse.<sup>21</sup> Transgender, gender fluid youth, and their parents filed *Abbott v. Doe* in response to Governor Abbott and the DFPS Commissioner's administration of said directive.<sup>22</sup> The lawsuit challenged Governor Abbott's directives as violating the Texas Administration Procedure Act, separation-of-powers requirements of the Texas Constitution, and the constitutional rights of transgender and gender fluid youth and their parents.<sup>23</sup> The district court for Travis County issued a temporary injunction partially blocking Abbott's directive in March 2022 after finding that Abbott's policy would do irreparable harm to these youth and their families.<sup>24</sup> The Third Court of Appeals upheld and expanded the injunction, blocking the directive in its entirety, so Governor Abbott and DFPS appealed.<sup>25</sup> Surprisingly, in May 2022,

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19. Arkansas Save Adolescents from Experimentation (Safe) Act (ARK. CODE ANN. § 20–9–1501 to § 20–9–1504), *found unconstitutional by* Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023).

20. See *Brandt*, No. 4:21CV00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023) (finding that the Act discriminates on the basis of gender and against transgender people themselves as a quasi-suspect class). See also Beck Sigman, *Keeping Trans Kids Safe: The Constitutionality of Prohibiting Access to Puberty Blockers*, 71 AM. U.L. REV. F. 173 (2022).

21. *Abbott v. Doe*, No. 03-22-00126-CV, 2022 WL 837956, \*1 (Tex. App., Mar. 21, 2022), *mandamus conditionally granted sub nom.* In re Abbott, 645 S.W.3d 276 (Tex. 2022); HUMAN RIGHTS CAMPAIGN, HUMAN RIGHTS CAMPAIGN: GOV. ABBOTT “CONTINUING HIS CRUSADE TO HARM TRANSGENDER AND NON-BINARY TEXANS” (Feb. 13, 2023), <https://www.hrc.org/press-releases/human-rights-campaign-gov-abbott-continuing-his-crusade-to-harm-transgender-and-non-binary-texans>.

22. *Abbott*, 2022 WL 837956, at \* 1–2; ACLU, Court Cases: *Doe v. Abbott* [sic] (last updated Feb. 8, 2024) <https://www.aclu.org/cases/doe-v-abbott> (last visited Feb. 26, 2023).

23. *Id.*

24. *Id.*

25. *Id.*

the Texas Supreme Court also upheld the injunction, at least in part, and remanded the case.<sup>26</sup> At the time of this note, the case is still active.<sup>27</sup>

In 2022 alone, anti-LGBTQ+ lawmakers filed 155 bills seeking to restrict the lives of trans people, the highest number in the nation's history.<sup>28</sup> Most restrictions on gender-affirming care target people under the age of legal majority, which for most of the U.S. is eighteen years of age.<sup>29</sup> The Associate Director of LGBTQ+ Health and Rights at Advocates for Youth, Armonte Butler, told the *Guardian*, "It's very common for people to say, 'This isn't an issue here. We don't have LGBTQ+ youth here.' This data shows that this is showing up in your communities and in your state. It's across the board."<sup>30</sup> Gender identity-based stigma and rejection can induce internalized stigma and shame, resulting in mental health challenges and a greater risk of anxiety, depression, and suicidality.<sup>31</sup> Treatment of gender dysphoria can reduce depression and suicidality found among transgender and gender fluid youth.<sup>32</sup>

More recently, eleven states—Kansas, Kentucky, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia—introduced over two dozen bills for consideration in the 2023 legislative session that potentially restrict access to gender-affirming care.<sup>33</sup> This note will show that these efforts clash with the advice of major American medical organizations, like the American Psychiatric Association, the American Medical Association, and the American Academy of Pediatrics, and are vulnerable to novel legal challenges.<sup>34</sup> This litigation strategy, as seen in the *Kincaid* holding and the successful injunctions in Texas and other

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26. *Id.*

27. *In re Abbott*, 645 S.W.3d 276 (Tex. 2022); *In re Abbott*, Opinion Regarding Petition for Writ of Mandamus, No. 22-0229, at 11 (May 13, 2022) ("We express no opinion on the pending interlocutory appeal of the district court's temporary injunction or on the merits of the plaintiffs' underlying claims seeking various forms of declaratory and injunctive relief against the Governor, the Commissioner, and DFPS, which remain pending in the district court.").

28. Branigin & Kirkpatrick, *supra* note 11.

29. Alfonseca, *supra* note 12.

30. Levin, *supra* note 10.

31. Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 643 (2022).

32. *Id.*

33. Hannah Schoenbaum, *Republican states aim to restrict transgender health care in first bills of 2023*, PBS NEWS HOUR (Jan. 7, 2023, 2:36 PM), <https://www.pbs.org/newshour/politics/republican-states-aim-to-restrict-transgender-health-care-in-first-bills-of-2023>.

34. *Id.*

states, proves that advocates can employ creative legal strategies to reinstate youths' access to gender-affirming care.<sup>35</sup>

## II. BACKGROUND ON SEX, GENDER, AND GENDER-AFFIRMING CARE

Legislation limiting and prohibiting the availability of gender-affirming care undercuts the identity of transgender and gender fluid youth. These legal impediments only create additional obstacles that transgender and gender fluid youth must navigate alongside society's apparent discomfort with gender non-conforming individuals. As this section will show, the Fourth Circuit's recent decision finding that the Americans with Disabilities Act (ADA)<sup>36</sup> protects individuals with gender dysphoria presents an opportunity for advocates to cite statutory protections for a youth's right to gender-affirming care access.<sup>37</sup> First, we must understand what gender-affirming care and gender dysphoria are and the way they affect people because this underpins why gender dysphoria merits ADA protection.

### A. The Evolution of Society's Understanding of Gender Expression

Gender and sex are distinct terms with different uses.<sup>38</sup> While sex describes the different biological characteristics of females, males, and intersex people,<sup>39</sup> gender contains two interrelated parts: gender identity and gender expression.<sup>40</sup> Gender identity is a person's "internal sense" of being a male, female, or gender fluid—loosely meaning, how one describes oneself along the gender spectrum.<sup>41</sup> Gender expression encompasses a person's behavior and style, as well as, cultural norms of masculinity and femininity.<sup>42</sup> Sex, gender identity, and gender expression intersect and blossom into a myriad of experiences. "Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically

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35. *Williams v. Kincaid*, 45 F.4th 759, 763 (2022), *cert. denied*, 143 S. Ct. 2414 (2023); Schoenbaum, *supra* note 33.

36. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C §§ 12101–12212.

37. *Kincaid*, 45 F.4th at 779–80.

38. WORLD HEALTH ORG., GENDER, [https://www.who.int/europe/health-topics/gender#tab=tab\\_1](https://www.who.int/europe/health-topics/gender#tab=tab_1) (last visited Feb. 25, 2023).

39. *Id.*

40. AM. PSYCHIATRIC ASS'N, DEFINITIONS OF GENDER, SEX, AND SEXUAL ORIENTATION AND PRONOUN USAGE, <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/definitions-and-pronoun-usage> (last visited Feb. 25, 2023).

41. *Id.*

42. *Id.*



associated with the sex to which they were assigned at birth.”<sup>43</sup> “Gender fluidity refers to change over time in a person’s gender expression or gender identity, or both. That change might be in expression, but not identity, or in identity, but not expression. Or both expression and identity might change together. . . . Nonbinary means a person’s gender identity doesn’t fit into strict cultural categories of female or male.”<sup>44</sup>

Gender-affirming care “encompasses a range of social, psychological, behavioral, and medical interventions” that affirm an individual’s gender identity despite conflicts with the gender that society assigned them at birth.<sup>45</sup> Gender-affirming care simply offers ways to harmonize one’s gender identity and gender expression, but “[n]ot everyone who experiences changes in their gender expression or identity identifies as gender-fluid. Nor does everyone desire gender-affirming medical treatment to change their body to better align with their gender identity.”<sup>46</sup> “For some youth, gender fluidity may be a way to explore gender before landing on a more stable gender expression or identity. For others, gender fluidity may continue indefinitely as part of their life experience with gender.”<sup>47</sup>

Social scientists created more inclusive terms for gender non-conforming individuals to reflect society’s evolving understanding of gender and, in turn, gender dysphoria. The Diagnostic and Statistical Manual of Mental Disorders (DSM)—a guide to medical disorders created by the American Psychiatric Association and used by health care professionals in the United States—has consistently focused their ever-changing terminology on the “experience” of transgender individuals.<sup>48</sup> The DSM diagnosis for gender non-conforming individuals first appeared as “transsexualism” in 1980, shifted to “gender identity disorder” in 1994, and became “gender

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43. AM. PSYCHIATRIC ASS’N, UNDERSTANDING TRANSGENDER PEOPLE, GENDER IDENTITY AND GENDER EXPRESSION (Mar. 9, 2023), <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression> (last updated June 6, 2023).

44. Sabra L. Katz-Wise, PhD, *Gender fluidity: What it means and why support matters*, HARV. HEALTH PUBL’G (Dec. 3, 2020), <https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544>.

45. Patrick Boyle, *What is gender-affirming care? Your questions answered*, ASS’N OF AM. MED. COLL. (Apr. 12, 2022), <https://www.aamc.org/news-insights/what-gender-affirming-care-your-questions-answered>.

46. Katz-Wise, *supra* note 44.

47. *Id.*

48. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Publishing, 5th ed. 2013); AM. PSYCHIATRIC ASS’N, *Psychiatrists: Practice: DSM: Frequently Asked Questions*, <https://www.psychiatry.org/psychiatrists/practice/dsm/frequently-asked-questions#:~:text=The%20Diagnostic%20and%20Statistical%20Manual,criteria%20for%20diagnosing%20mental%20disorders> (last visited Feb. 26, 2023).

dysphoria” in the APA’s newest version, the DSM-5, published in 2013.<sup>49</sup> “Dysphoria” in “gender dysphoria” refers to “distress caused by the body and mind not aligning and/or societal marginalization of gender-variant people.”<sup>50</sup> Notably, “transsexualism” and “gender identity disorder” both define the same condition of the body and mind not aligning with societal expectations, but the authors of the DSM-5 renamed this term because of the stigma accompanying previous identity markers.<sup>51</sup> Each DSM describes the “experience” of transgender individuals differently, conveying our society’s increasing acceptance of gender non-conforming individuals over time.<sup>52</sup>

#### B. Gender Dysphoria and the Internal Struggle of Gender Non-Confirming Individuals

To understand the importance of gender-affirming care, it is important to conceptualize the internal, mental struggle transgender and gender fluid individuals face. The “dysphoria” in “gender dysphoria” refers to “distress caused by the body and mind not aligning and/or societal marginalization of gender-variant people.”<sup>53</sup> Transgender and gender fluid individuals who experience gender dysphoria have a “strong dislike of their sexual anatomy, a strong desire to be a different gender, and a strong desire to be treated as that other gender to relieve their discomfort.”<sup>54</sup> Gender dysphoria may inflict great mental distress on individuals due to a lack of physical alignment between the gender they were assigned at birth and their gender presentation, causing society to perceive and treat them as a gender with which they do not identify. The discomfort caused by gender dysphoria may motivate transgender and gender fluid youth to seek gender-affirming care, which “encompasses a range of social, psychological, behavioral, and medical interventions” that affirm each individual’s gender identity—despite conflicts with their gender assigned at birth.<sup>55</sup> Some individuals may change their name.<sup>56</sup> Notably, treatment for young people who experience gender

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49. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA DIAGNOSIS, <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> (last visited Feb. 26, 2023) [hereinafter AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA DIAGNOSIS].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Caroline Miller, *Transgender Kids and Gender Dysphoria*, CHILD MIND INST. (Apr. 14, 2023), <https://childmind.org/article/transgender-teens-gender-dysphoria/>.

55. Boyle, *supra* note 45.

56. *Id.*

dysphoria focuses on addressing anxiety and depression to reduce the distress caused by the misalignment of their gender identity.<sup>57</sup>

Medical treatment can validate transgender and gender-fluid youth's experiences as they explore and embrace their identity, while not requiring irreversible procedures take place. "For young people who are still deciding whether they want to make a physical transition, hormone treatments to delay puberty are an option."<sup>58</sup> This treatment limits the development of "mature characteristics, like a deeper voice or breasts," physical changes that can make kids with gender dysphoria feel worse about their gender identities.<sup>59</sup> This treatment is particularly vital because it gives the young person more time to make decisions about other options available to them that can help their gender identity and gender expression better align—such as further hormone therapy or surgery in adulthood.<sup>60</sup> Several major national medical associations have called gender-affirming care treatments "medically necessary," safe, and effective because of their measurable effect on mental health, the key source of discomfort and distress in trans people.<sup>61</sup> Therefore, limiting access to gender-affirming care undercuts the identity of transgender and gender fluid individuals by forcing them to live in a bodily representation of their gender misalignment, resulting in measurable and avoidable mental health disorders and mental anguish.

The Fourth Circuit recently decided in *Williams v. Kincaid* that the ADA, a federal statute, requires gender-affirming care be accessible to transgender individuals despite state statutes asserting the contrary.<sup>62</sup> This decision speaks to one direction the judiciary system may land with respect to legal protections for transgender and gender fluid individuals in states restricting access to gender-affirming care. The Fourth Circuit court's ruling suggests a more expansive view of the ADA is appropriate for people diagnosed with "gender dysphoria."<sup>63</sup> Advocates should refer to this holding in their legal challenges to legislation limiting or prohibiting access to gender-affirming care for youth in this country.

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57. Miller, *supra* note 54.

58. *Id.*

59. *Id.*

60. *Id.*; see also Boyle, *supra* note 45.

61. Alfonseca, *supra* note 12.

62. Devan Cole, *Federal appeals court says Americans with Disabilities Act protections cover 'gender dysphoria,' handing a win to trans people*, CNN (Aug. 16, 2022, 7:17 PM), <https://www.cnn.com/2022/08/16/politics/americans-with-disabilities-act-transgender-gender-dysphoria/index.html>; see also *Kincaid*, 45 F.4th at 779–80.

63. *Kincaid*, 45 F.4th at 779–80.

### III. HOW THE AMERICANS WITH DISABILITIES ACT (ADA) CAN PROTECT ACCESS TO GENDER-AFFIRMING CARE

This section explains why Title II of the ADA presents an opportunity to protect minors' access to gender-affirming care across the country. First, it explores the way the ADA protects individuals living with disabilities from discrimination. This sub-section also assesses the ADA's definition and incorporation of HIV and AIDS, which have visible and invisible symptoms similar to gender dysphoria. The next sub-section acknowledges this strategy's potential limitations: the requirement of a formal medical diagnosis of gender dysphoria is a double-edged sword and the ADA contains an ambiguous, and potentially problematic, list of excluded conditions. Lastly, examination of *Williams v. Kincaid* provides a blueprint for potential ADA challenges on behalf of transgender and gender fluid youth seeking gender-affirming care in states prohibiting access.

#### A. How Advocates Should Approach the ADA

The ADA protects individuals living with disabilities from discrimination.<sup>64</sup> It does so in many ways, but there are two important parts that this sub-section focuses on. First, the ADA and case law work together to define the conditions the ADA covers. Additionally, the ADA protects individuals with covered conditions from discrimination by requiring modification of state and local services and programs, like health care, so that persons with covered disabilities receive meaningful access.<sup>65</sup>

Under the ADA, a person with a disability is someone who “has a physical or mental impairment that substantially limits one or more major life activities, has a history or record of such an impairment (such as cancer that is in remission), or is perceived by others as having such an impairment (such as a person who has scars from a severe burn).”<sup>66</sup> Since there is no legal test or criteria outlined to guide judges, courts evaluate on a case-by-case basis whether a person is “substantially” limited by their mental or physical

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64. U.S. DEP'T OF JUST., C.R. DIV., AM. WITH DISABILITIES ACT, <https://www.ada.gov/> (last visited Feb. 26, 2023); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101.

65. 42 U.S.C. § 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); U.S. DEP'T OF JUST., C.R. DIV., AM. WITH DISABILITIES ACT, ST. & LOC. GOV'T, <https://www.ada.gov/topics/title-ii/#:~:text=other%20government%20business,General%20Requirement,programs%2C%20services%2C%20and%20activities> (last visited Mar. 20, 2024) [hereinafter ADA, ST. & LOC. GOV'T].

66. U.S. DEP'T OF JUST., C.R. DIV., INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT, <https://www.ada.gov/topics/intro-to-ada/> (last visited Feb. 26, 2023); 42 U.S.C. §§ 12102(2).

impairment.<sup>67</sup> The ADA definition for “disability” describes a condition that hinders the person’s ability to perform “major life activities,” meaning activities that we do daily, including unconscious functions like regulating the body’s internal processes.<sup>68</sup> The ADA gives some examples of major life activities for courts to consider. For example, if a person experiences difficulty performing certain functions, like “seeing, hearing, talking, walking, climbing, or lifting,” then they cannot perform many basic tasks and are considered substantially limited in their ability to navigate the world.<sup>69</sup> Some qualifying conditions are psycho-social, which can make certain social roles more difficult. For example, attention deficit disorders can impact a child’s ability to learn and read in school, while adults with depression have difficulty remaining employed or doing work around the house.<sup>70</sup>

It is important to note the ADA also covers “invisible disabilities.”<sup>71</sup> An invisible disability is “a physical, mental or neurological condition that is not visible from the outside, yet can limit or challenge a person’s movements, senses, or activities.”<sup>72</sup> HIV and AIDS are conditions with symptoms that could categorize them as invisible or visible disabilities. A visible manifestation would be the physical symptoms of illnesses associated with these diagnoses.<sup>73</sup> Internalizing stigma and discrimination tied to their diagnosis can cause invisible symptoms like depression or anxiety.<sup>74</sup>

The Court in *Bragdon v. Abbott* agreed when it recognized HIV as a covered condition under the ADA regardless of whether symptoms are visible and invisible. Justice Kennedy’s majority opinion stated that “HIV infection must be regarded as a physiological disorder with a constant and detrimental effect,” whether or not the person exhibits symptoms because the condition “satisfies the statutory and regulatory definition of a physical

67. U.S. DEP’T OF HEALTH AND HUM. SER., OFF. FOR C.R., YOUR RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT (June 2000 – revised June 2006), <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/ada.pdf> (“Whether a particular condition constitutes a disability within the meaning of the ADA requires a case-by-case determination.”); 42 U.S.C. § 12102(2)(A).

68. 42 U.S.C. §§ 12102(1)-(2).

69. U.S. DEP’T OF JUST., C.R. DIV., INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT: “WHAT DOES MAJOR LIFE ACTIVITIES MEAN?”, <https://www.ada.gov/topics/intro-to-ada/> (last visited Feb. 26, 2023) [hereinafter ADA, “WHAT DOES MAJOR LIFE ACTIVITIES MEAN?”]; 42 U.S.C. § 12102(2).

70. ADA, “WHAT DOES MAJOR LIFE ACTIVITIES MEAN?”; 42 U.S.C. § 12102(2).

71. INVISIBLE DISABILITIES ASS’N, *What is an invisible Disability*, <https://invisibledisabilities.org/what-is-an-invisible-disability/> (last visited Mar. 20, 2024).

72. *Id.*

73. *Id.*

74. *Id.*; AM. WITH DISABILITIES ACT, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND PERSONS WITH HIV/AIDS, [https://archive.ada.gov/hiv/ada\\_qa\\_hiv.htm](https://archive.ada.gov/hiv/ada_qa_hiv.htm) (last visited Feb. 26, 2023) [hereinafter ADA, PERSONS WITH HIV/AIDS].

impairment during every stage of the disease.”<sup>75</sup> The Court clarified that Congress’s choice to list functions that a disability can impair, like hearing or walking, represents a non-exhaustive “representative list,” which opens the door to argue for other impaired functions.<sup>76</sup> Just as the APA did not include gender dysphoria as its own medical condition until the DSM-5,<sup>77</sup> the Court also noted that HIV was “not included in the list of specific disorders constituting physical impairments, in part because HIV was not identified as the cause of AIDS until 1983.”<sup>78</sup> It did not matter, according to the majority, whether the person with HIV did or did not exhibit symptoms because the condition constitutes a physical impairment to major life activities, like pregnancy.<sup>79</sup> If the ADA can cover conditions like HIV and AIDS that can present visibly and invisibly, then advocates should assert that gender dysphoria similarly presents both visible and invisible symptoms that merit ADA coverage.

Advocates should also consider using the ADA to protect gender-affirming care for youth because the ADA, as a federal statute, preempts state and local policies and legislation. Specifically, Title II of the ADA applies to state and local services, programs, and activities, including health care.<sup>80</sup> This anti-discrimination statute requires state and local government to modify policies, practices, and procedures where needed “to make sure that a person with a disability can access the state/local government’s programs, services, or activities.”<sup>81</sup> Accordingly, if the ADA covers gender dysphoria, then state or local policies restricting an individuals’ access to gender-affirming care—despite their diagnosis with gender dysphoria—would be unlawful and open to legal challenge.

## B. Potential Issues Associated with the Pursuit of ADA Coverage for

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75. 524 U.S. 624, 637 (1998). Justice Ginsburg described HIV in her concurrence as a disease that “inevitably pervades life’s choices: education, employment, family and financial undertakings,” and therefore merited ADA protections. *Id.* at 656 (Ginsburg, J., concurring). The discomfort caused by gender dysphoria can likewise pervade all of a transgender or gender fluid youth’s life.

76. *Id.* at 638 (plurality opinion).

77. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA DIAGNOSIS, *supra* note 49.

78. *Braddon*, 524 U.S. at 633.

79. *Id.* at 642; *id.* at 646; *id.* at 656 (Ginsburg, J., concurring) (agreeing that “[n]o rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible.”). *See also* INVISIBLE DISABILITIES ASS’N, *supra* note 71.

80. 42 U.S.C. § 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); ADA, ST. & LOC. GOV’T, *supra* note 65.

81. 42 U.S.C. § 12132; ADA, ST. & LOC. GOV’T, *supra* note 65; *see supra* Section II(A).

### Gender Dysphoria

There are two potential pitfalls of the ADA strategy to acknowledge. First, transgender and gender fluid youth who choose to pursue gender-affirming care can only access treatment under the ADA if they provide proof of a formal gender dysphoria diagnosis.<sup>82</sup> This medical requirement is the reason “the Gender Dysphoria diagnosis functions as a double-edged sword.”<sup>83</sup> On one hand, requiring a medical diagnosis of gender dysphoria creates an avenue for transgender and gender fluid youth to pursue statutorily protected gender-affirming care. On the other hand, requiring a medical diagnosis, wherein one must “prove” that they are “disabled” prior to allowing individuals access to treatment can be demoralizing for a community of people who strive for acceptance. So, while the requirement provides an avenue for treatment, it also potentially stigmatizes individuals by categorizing them as mentally ill.<sup>84</sup> Although, based on emerging case law, LGBTQ+ advocates should continue to consider pursuit of ADA challenges to state and local actions limiting access to this fundamental right for transgender folks.

Second, the ADA statute explicitly excludes certain sexual behaviors and gender conditions from coverage. As previously mentioned, the statute specifically excludes “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders.”<sup>85</sup> The medical establishment and our society have moved on from, and rejected, these outdated concepts, but these words remain in the ADA. Despite these conditions seeming to implicate gender dysphoria due to their connection to gender identity, the decision in *Williams v. Kincaid* shows how advocates can distinguish gender dysphoria from the list above.

#### C. The Kincaid Holding and Expanding ADA Coverage to Gender Dysphoria Treatment

The Fourth Circuit’s ruling in *Williams v. Kincaid* is significant because it provides strategies that advocates can use to show that the ADA covers “gender dysphoria,” and should, therefore, protect youths’ access to gender-affirming care.<sup>86</sup> Although this case’s facts are unique and its analysis relies on the double-edge sword of medical diagnosis, its textualist arguments and commentary on the ADA’s legislative history are more widely applicable.

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82. Boyle, *supra* note 45.

83. Miller, *supra* note 54; *see also* Boyle, *supra* note 45.

84. Miller, *supra* note 54.

85. 42 U.S.C.A. § 12211 (West).

86. *Kincaid*, 45 F.4th at 779–80; Cole, *supra* note 62.

In *Kincaid*, Ms. Kesha Williams, a transgender woman, sued Sheriff Kincaid, a deputy, and a prison nurse who worked at the Fairfax County Adult Detention Center for violating her constitutionally protected civil rights as provided by the Constitution, the ADA, the Rehabilitation Act, and Virginia common law.<sup>87</sup> The abuse began after Ms. Williams disclosed to the nurse that she was transgender.<sup>88</sup> The prison deputies, who initially assigned her to women's housing, "quickly moved her to men's housing when they learned that she was transgender."<sup>89</sup> The nurse then took away the hormone medications that Ms. Williams had been prescribed to treat her gender dysphoria for fifteen years prior to incarceration.<sup>90</sup> The prison authorities rationalized their actions by asserting that because Ms. Williams "had not undergone transfeminine bottom surgery," she was still a man.<sup>91</sup> Over the six months Ms. Williams was incarcerated, deputies intentionally misgendered her and allowed other inmates to harass her.<sup>92</sup>

The Fourth Circuit court made specific choices about how to interpret the ADA which significantly changed the outcome of the case. The *Kincaid* court found that "courts must construe the ADA's exclusions narrowly."<sup>93</sup> Despite the statute's exclusions including the phrase "other sexual behavior disorders," the judges limited their inquiry because the statute "does not define the term 'gender identity disorders' and does not mention gender dysphoria at all."<sup>94</sup> The court also pointed out that at least one of the defendants "[did] not dispute that gender dysphoria falls within that definition," which implies that they too found nothing in the text to prevent this conclusion.<sup>95</sup> Therefore, by narrowing the scope of its inquiry to *only* the conditions on the exclusion list and contextualizing their analysis within the entire statute, the Fourth Circuit found that the text of the ADA covers gender dysphoria as a protected condition. Advocates should view this textualist argument as a particularly powerful tool when litigants face increasingly conservative courts.

The court then analyzed the ADA's legislative history and found that its drafters could not have intended to exclude gender dysphoria from ADA coverage. First, the medical community had not sufficiently documented the struggles of transgender individuals during the statute's inception. Second,

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87. *Kincaid*, 45 F.4th at 763.

88. *Id.* at 764.

89. *Id.* at 763.

90. *Id.* at 764.

91. *Id.*

92. 42 U.S.C. § 12211.

93. *Kincaid*, 45 F.4th at 766.

94. *Id.* at 769.

95. *Id.* at 766.



as a result, the medical community did not have a diagnosis for gender dysphoria and did not yet understand the side effects and implications of this condition. The court wrote that when Congress drafted the ADA in 1990, “the medical community did not acknowledge gender dysphoria either as an independent diagnosis or as a subset of any other condition.”<sup>96</sup> Instead, gender dysphoria existed as a class of disorders then characterized as “gender identity disorders,” which marked being transgender as consequence of mental illness.<sup>97</sup> Yet, in 2013, the American Psychiatric Association removed “gender identity disorder” and “added the diagnosis of ‘gender dysphoria,’” to the DSM-5, making gender dysphoria its own medical condition.<sup>98</sup> The DSM-5 “defines ‘gender dysphoria’ as the ‘*clinically significant distress*’ felt by some of those who experience ‘an incongruence between their gender identity and their assigned sex.’”<sup>99</sup> The judges ultimately concluded that “if a transgender person does not experience ‘*clinically significant distress*,’ she could not be diagnosed as having gender dysphoria under the DSM-5.”<sup>100</sup> Therefore, the Fourth Circuit found that Congress did not exclude gender dysphoria from ADA coverage because the condition and its symptoms had not yet been identified.

Advocates successfully argued in *Kincaid*, that gender dysphoria “result[s] from physical impairments” that are treated through gender-affirming care, such as hormone therapy.<sup>101</sup> This treatment interacts with “major life activities” because it interferes with the body’s internal processes. A recent study has indicated gender-affirming hormone therapy “may have important effects on cardiovascular risk and bone health” in individuals.<sup>102</sup> Thus, needing gender-affirming care to treat gender dysphoria amounts to a “disability” under the ADA and requires an accommodation in light of state-by-state restrictions to gender-affirming care access.

The secondary symptoms of gender dysphoria may provide another avenue for advocates to expand ADA coverage to include access to gender-affirming care.<sup>103</sup> Transgender and gender fluid youths have a predisposition

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96. *Id.* at 767 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021)).

97. *Id.*

98. *Id.* at 767.

99. *Id.* at 767–68 (quoting the DSM-5 at 451–53 (emphasis added)); see Br. of Amici Curiae, The disAbility Law Center, et al. in Supp. of Appellant at 9.

100. *Kincaid*, 45 F.4th at 766 (citing DSM-5 at 453 (emphasis added)).

101. *Id.* at 770.

102. Nyein Chan Swe, *The effects of gender-affirming hormone therapy on cardiovascular and skeletal health: A literature review*, 13 METABOLISM OPEN 100173 (Mar. 3, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8907681/pdf/main.pdf>.

103. AMERICAN PSYCH. ASS’N, APA DICTIONARY OF PSYCHOLOGY: SECONDARY SYMPTOMS (Apr. 19, 2018), <https://dictionary.apa.org/secondary-symptoms> (last visited Feb. 12, 2024).

to depression, anxiety, and suicidality, which are all clearly secondary effects of untreated gender dysphoria.<sup>104</sup> Transgender and gender fluid youth are at higher risk for depression, thoughts of suicide, and attempting suicide in comparison to their cisgender and heterosexual counterparts.<sup>105</sup> “Suicide is the second leading cause of death among adolescents in the United States,”<sup>106</sup> with 60% of transgender and gender nonconforming young people engaging in self-harm.<sup>107</sup> In December 2022, The Trevor Project, a non-profit dedicated to LGBTQ+ youth suicide prevention, reported alarmingly high rates of suicidal ideation among transgender and gender fluid youth, such as 56% in Texas, 54% in Florida, 50% in New York, and numerous others.<sup>108</sup> Data indicates that 50% of LGBTQ youth considered suicide in the past year, with 18% attempting suicide in the past year.<sup>109</sup> Dr. Myeshia Price, Senior Research Scientist at The Trevor Project, said, “it is crucial to note that these rates vary widely based on the way LGBTQ youth are treated.”<sup>110</sup> Dr. Amy Green of The Trevor Project also noted, “[the Trevor Project’s researchers] have found, now year over year, that greater levels of support and acceptance is associated with dramatically lower rates of attempting suicide.”<sup>111</sup> Dr. Green additionally pointed out gender-affirming care plays a “powerful role” in reducing suicide attempts among transgender and gender fluid youth.<sup>112</sup>

Similarly, individuals pursuing gender-affirming care may be limited in one or more major life activities by their use of hormone blockers, puberty blockers, or surgery. As previously mentioned, the ADA requires state and local government to modify policies, practices, and procedures so that a person with a disability can access public spaces, or places of “public accommodation”—such as, state and local government programs, services, or

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(defining secondary symptoms as “symptoms that are not a direct result of a disorder but are associated with or incidental to those that are (e.g., social avoidance accompanying obsessive-compulsive disorder.”).

104. THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH, 5–9 (2022), [https://www.thetrevorproject.org/survey-2022/assets/static/trevor01\\_2022survey\\_final.pdf](https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf).

105. *Id.*; Green, *supra* note 31.

106. Brian C. Thomas, et al., *Suicidality Disparities Between Transgender and Cisgender Adolescents*, 144 J. OF AM. ACAD. OF PEDIATRICS 1, 2 (2019).

107. Dawn Ennis, *Largest Survey of Transgender And Nonbinary Youth Says More than Half Seriously Considered Suicide*, FORBES (July 15, 2020, 9:00 AM), <https://www.forbes.com/sites/dawnstaceyennis/2020/07/15/largest-survey-of-transgender-and-nonbinary-youth-says-more-than-half-seriously-considered-suicide/?sh=3b3017f53404>.

108. Levin, *supra* note 10.

109. THE TREVOR PROJECT, 2022 NATIONAL SURVEY, *supra* note 104, at 4–7.

110. *Id.*

111. Ennis, *supra* note 107.

112. *Id.*

activities.”<sup>113</sup> Further, since hospitals and doctor’s offices, where gender-affirming care is pursued, are places of “public accommodation,” the ADA should preempt state and local restrictions on gender-affirming care per Title II.<sup>114</sup> Lastly, discrimination is defined by the ADA as “the failure to give a person with a disability the equal opportunity to use or enjoy the public accommodation’s goods, services, or facilities.”<sup>115</sup> Therefore, any denial of gender-affirming care deemed medically necessary for the treatment of a diagnosed disability by a health care professional, like gender-affirming care, should be considered an ADA violation.

The *Kincaid* court agreed and cited to the DSM-5 which “explains that the discomfort or distress caused by gender dysphoria may result in intense anxiety, depression, suicidal ideation, and even suicide.”<sup>116</sup> These conditions also “substantially limit major life activities” for purposes of ADA coverage.<sup>117</sup> Essentially, even if gender dysphoria is not considered connected to a body’s internal processes, it is still an invisible disability covered by the ADA. Gender-affirming care is, therefore, a meaningful accommodation because it addresses both the primary cause and secondary effects of gender dysphoria. Accordingly, states should have no ability to limit access to gender-affirming care under Title II of the ADA.

Advocates should take several lessons from *Kincaid* when fighting for youths’ access to gender-affirming care. First, the Fourth Circuit provided powerful textualist arguments that litigants can use to show that the ADA covers gender dysphoria. Second, the medical knowledge we had when the ADA passed no longer aligns with our current understanding of gender. Therefore, advocates can argue that gender dysphoria deserves ADA protection because medicine has finally caught up with what we have always known: being who you are is not the problem, preventing people from being who they are is the problem. Advocates can use these arguments to ensure that transgender and gender fluid folks of all ages have access to gender-affirming care across the United States under the ADA.

However, we should acknowledge that *Kincaid* is not perfect. The case expressly links the double-edged medical diagnosis requirement to ADA protection, for better or worse. Without Ms. William’s medical history as proof that she suffers from “*clinically significant distress*,” then the court may not have found a “clinical problem” that the ADA would cover.

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113. ADA, ST. & LOC. GOV’T, *supra* note 65.

114. ADA, PERSONS WITH HIV/AIDS, *supra* note 74.

115. *Id.*

116. *Kincaid*, 45 F.4th at 768.

117. 42 U.S.C § 12101.

#### IV. THE EQUAL PROTECTION CLAUSE (EPC) CAN ALSO ENSURE ACCESS TO GENDER-AFFIRMING CARE

Although the ADA provides a myriad of litigation strategies, as seen in *Kincaid*, we should also consider arguments to protect and expand youths' access to gender-affirming care according to the Equal Protection Clause (EPC) of the Fourteenth Amendment. This strategy presents some difficulties, such as convincing the court to use intermediate scrutiny over rational basis review, but case law firmly supports exploring these challenges.

##### A. Overcoming Rational Basis Review

Since only the Fourth Circuit recognizes that the ADA should cover gender dysphoria, advocates should consider EPC challenges as a viable alternative because gender-affirming care restrictions in most states explicitly target those under the age of majority. There is an opportunity here because there is no established standard of review for EPC challenges to gender-affirming care restrictions for youth.

*City of Cleburne v. Cleburne Living Center* established rational basis review as the appropriate standard of review for EPC challenges when those with disabilities argue that they allegedly experienced discrimination.<sup>118</sup> The burden lies with the plaintiff alleging that the government violated their constitutional rights. Litigants can only overcome rational basis review if they can show that the legislation in dispute is (1) not rationally related to a (2) legitimate governmental purpose.<sup>119</sup> The *Cleburne* Court wrote that this standard “affords government the latitude necessary both to pursue policies designed to assist the [disabled] in realizing their full potential, and to freely and efficiently engage in activities that burden the [disabled] in what is essentially an incidental manner.”<sup>120</sup> As a result, courts are deferential toward government purposes when they apply rational basis review.<sup>121</sup> This standard presents an obvious uphill battle, but it is not insurmountable.

Many state actions seeking to limit youths' access to gender-affirming care are potentially vulnerable to EPC challenges. States like Texas, with executive orders limiting youths' access to gender-affirming care, may claim that prohibiting youth from pursuing gender-affirming care is a legitimate government interest because these states believe that youth should not make potentially life-altering medical decisions prior to reaching the age of majority.<sup>122</sup> Yet, these orders fail to consider the process that youth undergo in

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118. 473 U.S. 432, 466 (1985).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Abbott*, 2022 WL 837956 at \* 1–2.

their pursuit of gender-affirming care, which undermines this claim. Before a youth can pursue gender-affirming care they must: (1) meet with a health care professional, (2) receive the diagnosis of “gender dysphoria” according to the DSM-5, (3) decide that they would like to pursue gender-affirming care, (4) develop a treatment plan with their physician, and (5) secure the consent of a parent or guardian.<sup>123</sup> Thus, according to *Meyer v. Nebraska*, state actions preventing or restricting gender-affirming care for youth are an unlawful overreach by the state.<sup>124</sup>

LGBTQ+ advocates should highlight the fact that courts view parents as decision-makers for those under the age of majority when it comes to childrearing decisions, not states.<sup>125</sup> Two cases illustrate this point. The court in *Meyer v. Nebraska* held that parents are at liberty to make decisions to “bring up children” as they see fit.<sup>126</sup> Following World War I, the State of Nebraska sought to limit access to the German language by making it unlawful for young students to learn German in school.<sup>127</sup> The court found that the law was an excessive overreach of state power and deferred to parent’s decision-making in childrearing.<sup>128</sup> Here, parents of transgender and gender fluid children may argue that the decision to allow their children to pursue gender-affirming care is theirs alone and does not belong to the state.

Further, in *Troxel v. Granville*, parents challenged a Washington statute permitting their children’s grandparents more visitation rights than the petitioning parents wanted to grant.<sup>129</sup> The Washington Supreme Court held the challenged statute “unconstitutionally interfere[d] with the fundamental right of parents to rear their children.”<sup>130</sup> Justice O’Connor, on behalf of the Court, stated that “the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”<sup>131</sup> The *Troxel* Court also noted that “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”<sup>132</sup> The Court affirmed the Washington Supreme Court’s finding that the legislation was

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123. Alfonseca, *supra* note 12; *see also* Boyle, *supra* note 45.

124. 262 U.S. 390, 401 (1923).

125. *Id.* at 401.

126. *Id.* at 399.

127. *Id.* at 396–97.

128. *Id.* at 403.

129. 530 U.S. 57, 60 (2000).

130. *Id.*

131. *Id.* at 65.

132. *Id.* at 68–69.

unconstitutional based on these parental control arguments.<sup>133</sup> LGBTQ+ advocates can use *Troxel* to argue that if health care professionals deem gender-affirming care for a young person as medically necessary, then a youth with parental consent to start said gender-affirming care treatment cannot be prevented access by the state. Thus, if state legislation interferes with a parent's decision to sign off on their child's gender-affirming care, then the legislation interferes with that parent's fundamentally protected constitutional right to rear their children and is, therefore, unlawful according to precedent.

B. It Is Unlikely That a Youth Can Access Gender-Affirming Care Without Parental Consent

There is no court precedent to guide the court's approach when parents do not consent to their child's request to pursue gender-affirming care. Advocates may analogize to other treatment contexts wherein youths have an independent say in their pursuit of health care, such as nonprescription contraception.<sup>134</sup> Of course, this analogy does not adequately account for the medical changes brought on by gender-affirming care because gender presents visibly, while contraceptives are invisible in many ways. It is also important to note that in homes where parents are not comfortable consenting to a minor's pursuit of gender-affirming care, a minor transitioning visibly may put their homelife and comfort in danger. This complication presents further reason for ADA coverage of gender-affirming care.

C. Arguing for Intermediate Review in the Alternative

In addition to arguments that will satisfy rational basis, advocates should challenge this level of review itself. Litigants should specifically request intermediate scrutiny, a higher level of scrutiny than rational basis review, because the pursuit of gender-affirming care exists at the nexus between disability law and gender. *Craig v. Boren* defined how courts analyze gender discrimination under intermediate scrutiny.<sup>135</sup> In *Craig*, a male plaintiff challenged an Oklahoma statutory law prohibiting the sale of 3.2% beers to males under the age of 21 and to females under the age of 18.<sup>136</sup> The plaintiff alleged the law discriminated against males on the basis of sex and, accordingly, violated the EPC.<sup>137</sup> The *Craig* Court held that to overcome intermediate scrutiny, "classifications by gender must [1] serve important governmental objectives and [2] must be substantially related to achievement

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133. *Id.* at 75.

134. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 679 (1997).

135. 429 U.S. 190, 218 (1976).

136. *Id.* at 191.

137. *Id.* at 192.

of those objectives.”<sup>138</sup> Intermediate scrutiny, therefore, shifts the burden from the plaintiff to the government to prove the challenged legislation and policies does not violate the EPC.<sup>139</sup>

The arguments and data cited in *Kincaid*, and throughout this note, indicate why state restrictions on gender-affirming care should not survive intermediate scrutiny. The health and safety of innocent youths should outweigh any state government’s alleged reasons for denying access to gender-affirming care. For example, without access to this care, transgender youths are vulnerable to secondary symptoms of gender dysphoria, including depression and anxiety, and may even attempt suicide if they cannot access treatment.<sup>140</sup> State governments cannot claim that these bans are substantially related to achievement of an important governmental objective if these restrictions are denying medically necessary, age-appropriate, best practices in gender-affirming care. Therefore, advocates should invalidate this “important governmental objective” element by making judges confront the real life-or-death consequences that these state bans impose on innocent youth.

It is also established that protecting gender-affirming care is necessary to protect transgender youth because numerous medical associations agree that gender-affirming care is the most effective treatment for gender dysphoria.<sup>141</sup> For example, “the American Medical Association supports insurance coverage for gender-affirming care for transgender people,” because data shows gender-affirming care is associated with better mental health and feelings of safety at school, while efforts to reject or change the gender identity of transgender people are associated with suicidality.<sup>142</sup> In fact, numerous anti-trans and anti-LGBTQ+ bills filed in state legislatures in 2022 and 2023 are partially responsible for recent increases in suicidality among transgender and gender fluid youth.<sup>143</sup> If states claim that they are trying to protect youth, then they are choosing a substantially *unrelated* means to do so, which invalidates the second element of intermediate review. Thus, courts should find that EPC challenges to legislation restricting youths’ access to gender-affirming care are unconstitutional.

One court has taken up this EPC argument and ruled in favor of protecting gender-affirming care. In 2022, Alabama passed the Vulnerable

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138. *Id.* at 197.

139. *Id.*

140. See generally THE TREVOR PROJECT, 2022 NATIONAL SURVEY, *supra* note 104, at 4–10; *id.* at 5 (finding that 45% of LGBTQ youth seriously considered suicide and 14% attempted suicide in 2021-2022); *id.* at 8 (finding that 73% of LGBTQ youth reported experiencing symptoms of anxiety and 58% reported experiencing symptoms of depression in 2021-2022); Green, *supra* note 31, at 643.

141. Alfonseca, *supra* note 12.

142. Conron, *supra* note 9, at 3–4.

143. Branigin & Kirkpatrick, *supra* note 11.

Child Compassion and Protection Act,<sup>144</sup> which made it a felony for anyone to prescribe or administer gender-affirming medication to transgender youth under the age of nineteen.<sup>145</sup> U.S. District Court judge Liles C. Burke in *Eknes-Tucker v. Marshall* found that the Act was unconstitutional because it could not survive intermediate review.<sup>146</sup> The court held Alabama's claimed objective—preventing doctors from forcing experimental treatments on minors—was insufficient because the state “had produced no credible evidence to show that transitioning medications are ‘experimental.’”<sup>147</sup> Judge Burke cited to “the uncontradicted record” presented by more than twenty-two American major medical associations showing that transitioning medications are “well-established, evidence-based treatments for gender dysphoria in minors.”<sup>148</sup> Further, Alabama and the states that joined the suit failed to show that doctors were *pushing* anyone to undergo gender-affirming care.<sup>149</sup> “Accordingly, the States’ proffered justifications are hypothesized, not exceedingly persuasive,” and the court held in favor of the injunction, thus preventing the Act from going into effect.<sup>150</sup> The Eleventh Circuit would later reverse this ruling, but these arguments remain powerful considering ever-growing research on the secondary effects of gender dysphoria.<sup>151</sup>

## CONCLUSION

Nationwide access to gender-affirming care is essential to reducing the distress faced by youth diagnosed with gender dysphoria. Current tensions between conflicting state policies and interpretation of the ADA and EPC means that Congress or the Court will eventually need to address this issue at the federal level. Even as state officials continue to propose statutes and issue directives to target and restrict transgender and gender fluid youths’ access to gender-affirming care, several lawsuits have successfully challenged those restrictions—resulting in temporary and permanent injunctions,

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144. S.B. 184, ALA. 2022 REG. SESS. §§ 4–5 (Ala. 2022); ALA. CODE § 43-8-1(18) (1975).

145. *Eknes-Tucker v. Marshall*, 603 F.Supp.3d 1131, 1139–40 (M.D. Ala. 2022) *vacated sub nom.* *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023); THE ASSOC. PRESS, *A judge blocks part of an Alabama law that criminalizes gender-affirming medication*, NPR (May 14, 2022, 9:46 AM), <https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medication#:~:text=rights%20under%20attack-,A%20judge%20blocks%20part%20of%20an,that%20criminalizes%20gender%20affirming%20medication&text=MONTGOMERY%2C%20Ala.,and%20hormones%20to%20transgender%20minors>.

146. *Eknes-Tucker*, 603 F.Supp.3d at 1147.

147. *Id.* at 1147–48.

148. *Id.* at 1146.

149. *Id.* at 1148.

150. *Id.*

151. *Id.*



as well as remedies under the ADA and EPC. Kincaid shows that the ADA may offer youths protection as they pursue gender-affirming care as a meaningful accommodation for their gender dysphoria in states that seek to restrict access to such care. Even if it is unclear whether courts would apply rational basis review or intermediate scrutiny, advocates should also pursue parental control arguments for EPC-based challenges to state restrictions on gender-affirming care for youths, like in *Eknes-Tucker*.

These two strategies are of course not our only options. For example, we need more research on whether advocates can successfully bring challenges under the Age Discrimination Act of 1975 and the Civil Rights Act.

Notably, we can definitively prove a fact that underpins, and will support, any strategy mentioned above: ensuring that youths can access gender-affirming care when they are diagnosed with gender dysphoria can save lives. We cannot allow some states to selectively separate themselves from other states through their attempts to restrict youths' access to gender affirming care within their borders. Although some states may assume fewer transgender and gender fluid individuals reside there, anti-trans policies affect youth with gender dysphoria and can cause or increase anxiety, depression, and suicidal ideation. Every transgender child's life matters and should be protected by the law. Hopefully, legal advocates for the LGBTQ+ community will apply and experiment with these strategies so that all youth in this country can lead full, free, and authentic lives regardless of their gender identity.