

A PATH BACK TO LAWFUL ABORTION: TRANSGENDER MEN AND THE IMMUTABLE CHARACTERISTIC OF A SUSPECT CLASS.

Jenna Karvunidis*

I. INTRODUCTION

Cazembe Murphy Jackson, a 44-year-old man, is still haunted by the rape he experienced more than 20 years ago.¹ Not only was his body violated in the attack, but he felt echoes of special psychological terror due to his abortion that the rape necessitated.² Yes, *his* abortion. Mr. Jackson is a transgender man.³ Many transgender men can get pregnant via nonconsensual means and need abortions.⁴ In fact, “being forced to carry a pregnancy to term [is] magnified for transgender men” and has a disproportionate effect on their mental health.⁵ Additionally, “changes to their body can increase stress over the mismatch with their gender identity”⁶ and even cause death or injury as transgender men may endanger themselves

* Although I do not personally encounter the world through the lens of a transgender person, it is with great respect for those lived experiences that this Note was written. Intersectional advocacy is the key to chipping away at anti-choice legislation, and building a system of laws that protect bodily autonomy for everyone.

1. Cazembe Murphy Jackson, *Abortion is Essential: Stories of Liberation*, AM. C.L. UNION [ACLU], <https://www.aclu.org/abortion-stories/cazembe-murphy-jackson> (last visited Jan. 4, 2024); Jacquelyne Germain, ‘*We’re a Part of This Movement, Too.*’ *Transgender and Nonbinary People Say They Feel Excluded From the Abortion Fight*, CABLE NEWS NETWORK (Aug. 27, 2022, 3:01 AM EDT), <https://www.cnn.com/2022/08/27/us/transgender-nonbinary-abortion-reproductive-care-reaj/index.html#>.

2. See Jackson, *supra* note 1.

3. *Id.*

4. *Media Guide: Abortion as an LGBTQ Issue*, GAY & LESBIAN ALL. AGAINST DEFAMATION [GLAAD] (July 6, 2022), <https://www.glaad.org/blog/LGBTQabortionfacts>.

5. Lucy Middleton, *Facing Abortion Barriers, Trans Men Warn of the Risks*, REUTERS (July 19, 2022, 8:23 AM PDT), <https://www.reuters.com/article/lgbt-health-abortion/feature-facing-abortion-barriers-trans-men-warn-of-the-risks-idUSL8N2YU1QV>.

6. *Id.*

is distress experienced in people whose gender identity is not congruent with their sex assigned at birth and is

Deadly Violence Against Transgender People Is on the Rise. The Government Isn't Helping.,

stare decisis in place declaring that abortion is not a “fundamental right,”¹⁴ a Court of the future could overcome this precedent by viewing state anti-abortion laws through the lens of targeting a suspect class entitled to strict scrutiny.

This Note explores the suspect-class path to judicial strict scrutiny, focusing on the “immutable characteristic” prong of the analysis and its application to transgender men. Part II maps standards of review in the Supreme Court and examines the reasoning behind recent case law that treats transgender men as a suspect class. Part III strengthens that reasoning and applies it to anti-choice state laws that affect transgender men, offering the suspect class as a path back to lawful abortion. Part IV addresses criticisms and limitations of applying the suspect class to transgender people. Part V concludes by responding to those criticisms and offering solutions.

II. BACKGROUND

A. *Transgender people in the United States*

Transgender people experience an incongruence between their gender identity and their sex assigned at birth.¹⁵ Their heteronormative counterparts are referred to as “cis-gender.”¹⁶ There are about 480,000 transgender men living in the United States as of June 2022.¹⁷ Half of transgender men who do not use hormonal medication have unplanned pregnancies, whether the result of sexual assault or other contact, which is comparable to their cis-gendered counterparts.¹⁸ Transgender people are targeted by laws on their face, and insidiously through the impact of facially neutral laws such as anti-choice legislation.

14. *Id.*

15. *Frequently Asked Questions about Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

16. *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Jan. 4, 2024).

17. JODY L. HERMAN ET AL., UCLA SCH. OF L.: WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 1 (2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

18. See Kimberley G.S. Thornton & Fiona Mattatall, *Pregnancy in Transgender Men*, 193 CANADA MED. ASS’N J. 1303, 1303 (2021); see generally Alexis Light et al., *Family Planning and Contraception Use in Transgender Men*, 98 CONTRACEPTION 266 (2018).

strict scrutiny). 426 U.S. 229, 241-42 (1976) (The landmark case that established

If the state law appears motivated by animus against a specific group, a law will fail even rational basis review. In the case of race,

“Suspect classes” have been found by the Supreme Court to include race, ethnicity, religion, and alienage, due to the “immutable characteristics” these classes possess.³⁴ However, threshold qualifications for which new groups of people are suspect classes are a bit less ascertainable. Generally, a class may gain entry to the strictly-protected suspect classes whether the class has historically been discriminated against,³⁵ whether the class has a defining characteristic that “frequently bears no relation to ability to perform or contribute to society,”³⁶ whether the class is politically powerless minority,³⁷ or whether the class exhibits “obvious, immutable or distinguishing characteristics that define [it] as a discrete group.”³⁸ Immutability is not well-defined, but the Court has shed some illumination that it is “determined solely by the accident of birth” and is not capable of or susceptible to change.³⁹

When a class is found to be suspect under these rules, strict scrutiny is applied to laws that affect the class, and the law is usually struck down as unconstitutional.⁴⁰ Thus, if a new group can gain suspect class definition by the Court, they are more fiercely protected from discrimination.

1. What is an Immutable Characteristic?

Parts of our identity we cannot change and should not have to change, even if we are physically able, is the unarticulated essence of the Court’s immutable characteristic.⁴¹ “[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”⁴² Of some debate is whether sex qualifies as such an accident. For example, the *Frontiero* Court applied strict scrutiny to the sex class, reasoning that “statutory distinctions between the sexes often have the effect of invidiously

34. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); see also *Bostock v. Clayton County*, 140 S. Ct. 1731, 1833 (2020).

35. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

36. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

37. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985), *superseded by statute*, Fair Housing Act, Pub. L. No. 118-21, 82 Stat. 81 (1968) (codified as 42 U.S.C.S. § 3604), *as recognized in Hum. Res. Rsch. & Mgmt. Grp. v. County of Suffolk*, 687 F. Supp. 2d 237, 255-56 (E.D.N.Y. 2010); see also *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir.) (quoting *Bowen*, 483 U.S. at 602), *cert. granted*, 568 U.S. 1066 (2012), *and aff’d*, 570 U.S. 744 (2013).

38. *Bowen*, 483 U.S. at 602.

39. *Frontiero*, 411 U.S. at 686.

40. See generally *Korematsu v. United States*, 323 U.S. 214 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

41. Anthony R. Enriquez, *Assuming Responsibility for Who You Are: The Right to Choose “Immutable” Identity Characteristics*, 88 N.Y.U. L. REV. 373, 377 (2013).

42. *Frontiero*, 411 U.S. at 686.

relegating the entire class of females to inferior legal status.”⁴³ Although sex as a characteristic is sometimes weighed on a rational basis, such as issues involving the draft.⁴⁴

Race is an obvious example of an immutable characteristic, presumably because people are born with the physical features of their race.⁴⁵ Less obvious is why the Court is willing to include religion as a suspect class. A belief can be changed. One can abandon a religion. One can convert. Regardless, religion is included in the recognition as a “discrete and insular” minority worthy of suspect class status.⁴⁶ Perhaps this is because religion, like one’s gender, is a matter strictly up to the individual. The Court in *Carolene Products* likely included religion in footnote four because of the Establishment Clause,⁴⁷ but nevertheless, although it is possible to change one’s religion, it is recognized as a suspect class.⁴⁸ Notably, there is no mention that race, ethnicity, religion, and alienage is an exhaustive list of suspect classes. Thus, the door to including new “discrete” groups in the suspect class category appears open.

2. Transgender Men as a Suspect Class

There is a potential circuit split on whether transgender and non-binary individuals qualify as quasi-suspect or the more tightly protected suspect class.⁴⁹ The court in *Williams v. Kincaid* reasoned that intermediate scrutiny applies to laws that discriminate against transgender people because of the long history of discrimination against them declaring, “transgender people constitute, at minimum, a quasi-suspect class.”⁵⁰ The key phrase here is “at minimum,” implying the requirement of an “exceedingly persuasive justification” for a law targeting transgender people is a bare minimum, opening the door to the possibility of transgender people as a suspect class.⁵¹

43. *Id.* at 686-87.

44. *See* *United States v. Fallon*, 407 F.2d 621, 623 (7th Cir. 1969).

45. Maya Sen & Omar Wasow, *Race as a Bundle of Sticks: Designs that Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499, 504 (2016).

46. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

47. *Id.*; U.S. CONST. amend. I.

48. *Suspect Classification*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/suspect_classification (last visited Jan. 4, 2024).

49. CHRISTINE J. BLACK ET AL., CONG. RSCH. SERV.: LEGAL SIDEBAR, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: EQUAL PROTECTION CHALLENGES DIVIDE APPELLATE COURTS 2 (2023) <https://crsreports.congress.gov/product/pdf/LSB/LSB10902>.

50. 45 F.4th 759, 772 (4th Cir. 2022); *Karnoski v. Trump*, 926 F.3d 1180, 1192 (9th Cir. 2019).

51. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

While this was seen as a victory by many LGBTQA+ people at the time, the 1964 Act, nor the Court in *Bostock* went far enough to protect transgender people. Title VII is limited to employment situations and does not carry into the private lives anti-choice laws reach. *Bostock* simply prevents employers from firing a person based on their transgender status, but it does not address the violations of forced birth on transgender men.

[B]ecause transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care, and will be subject to the Court's 'strict scrutiny.'" Although the appellate court in *Karnoski* disagreed and went back to the quasi-suspect class for transgender people, the district court's opinion shows a judicial willingness to protect transgender people with the utmost scrutiny.

3.

Under strict scrutiny, the state's interest must be "compelling." Courts have found the following interests "compelling" enough to overcome litigation: national defense, stopping terrorism, and preserving the integrity of judicial elections. Interestingly, the *Dobbs* decision adopts the standard of rational basis review in overturning *Roe*'s assertion that the state's interest in the fetus is "compelling" after viability. Thus, as of December 2022, no one has a fundamental right to an abortion, but the state only has to have a "legitimate" (not "compelling") interest in the fetus. A mere important state interest is not sufficient to overcome a law subject to strict scrutiny. It is this snag in the *Dobbs* decision that opens the toolbelt for activists and lawyers to protect bodily autonomy by urging the court to accept vulnerable populations particularly impacted by anti-choice laws, particularly transgender men, as a protected class.

The Equal Protection and Due Process clauses of the Constitution prevent states from discriminating with their laws. If a law has a discriminatory impact on a discrete class based on race, but is not expressly targeting that group in the text of the statute (i.e., the law does not discriminate "on its face"), a petitioner must show that the state had discriminatory intent. That a law merely affects a race, is not unconstitutional per se – there must be a demonstration of discriminatory intent by lawmakers. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts," such as showing a history of

discriminatory application (such as when a neutral law is applied discriminately to a certain group), or by extrinsic evidence, wherein statements made by the parties who wrote the bill may show their true intentions. It is unclear whether transgender people, if treated as a suspect class, would be subject to the discriminatory intent burden that plaintiffs who bring race-related equal protection claims have.

plaintiff can prove discriminatory intent. State anti-choice laws may be stricken as unconstitutional due to the mere “legitimate interest” the state has in the fetus. Thus, whether anti-choice statutes affecting transgender men are unconstitutional may turn on whether the Plaintiffs can show a discriminatory purpose.

Transgender men asserting a challenge to anti-choice laws due to their purported status as a suspect class would be in good company with other suspect class challenges, such as those based on religion. A case filed in federal court in Indiana on September 21, 2022, takes aim at Senate Enrolled Act 1, a near-total abortion ban.⁷⁹ The plaintiff, a female member of the Satanic Temple, claims Indiana’s ban infringes on her religious rights.⁸⁰ Similarly, Jewish women filed suit in Jefferson Circuit Court in Kentucky, claiming their state’s anti-choice laws infringe on their religious freedom.⁸¹

III. TRANSGENDER PEOPLE SHOULD BE A PROTECTED CLASS

A. *Being Transgender is an Immutable characteristic, qualifying transgender people a suspect class*

A cherub-cheeked little boy armed with a light saber battles his brothers on B-roll footage before the camera cuts to an interview where he explains to the PBS audience that he doesn’t like to be called “she.”⁸² Daniel transitioned at age seven, after explaining to his mother that he wanted a boy body and wished he had a penis.⁸³ His story is not unique. Forty-two thousand children and teens were diagnosed with gender dysphoria in 2021

79. Matt Christy & Nexstar Media Wire, *Satanic Temple Suing Indiana Over State’s Near-Total Abortion Ban*, THE HILL (Sept. 26, 2022, 7:32 PM ET), <https://thehill.com/homenews/3662156-satanic-temple-suing-indiana-over-states-near-total-abortion-ban/>; see also Complaint at 9-13, *Satanic Temple v. Holcomb*, No. 1:22-cv-1859 (S.D. Ind. Sept. 21, 2022), ECF No. 1.

80. Complaint, *supra* note 79.

81. Yonat Shimron, *Jewish Women Sue Over Kentucky Abortion Laws, Citing Religious Freedom*, THE WASH. POST, <https://www.washingtonpost.com/religion/2022/10/10/kentucky-abortion-law-2022-jewish-lawsuit/> (Oct. 14, 2022, 4:30 PM EDT); see also Complaint, *Sobel v. Cameron*, No. 22-CI-005189 (Ky. Jefferson Cir. Ct. Oct. 6, 2022).

82. Frontline, *Growing Up Trans*, PUB. BROAD. SERV. (Oct. 25, 2016), <https://www.pbs.org/wgbh/frontline/documentary/growing-up-trans/>.

83. *Id.*

treatment.”

“often subjected to differential



transgender people to an inferior class. While the Supreme Court has not yet ruled on whether Transgender people are a suspect class, it is time.⁹⁴

B. Lawmakers have discriminatory intentions against transgender people

Lawmakers demonstrate anti-trans bias while simultaneously writing anti-choice laws, which demonstrates their intent. For example, Senator Bryan Hughes, the Texas lawmaker who wrote the anti-choice “heartbeat bill” that was eventually signed into law, also supported Senate Bill 29 that would have barred transgender children from playing sports that match their gender identity.⁹⁵ Similarly, Governor Ron DeSantis signed anti-choice legislation, HB 5, which prohibits all abortions after 15 weeks of gestation, into law less than a year after he appointed Joseph Ladapo as Florida’s surgeon general, who said that “social gender transition should not be a treatment option for children or adolescents.”⁹⁶ Ladapo’s attacks on transgender minors was called “one of the most extreme in the country.”⁹⁷ Right-wing groups spent over \$24 million in advertising targeting transgender people in 2022, the same year *Dobbs* freed the states to enact anti-choice legislation.⁹⁸ Anti-trans rhetoric by the very lawmakers who push anti-choice legislation demonstrate the dovetail nature of the two issues.

“As men and women, we have exceptional . . . differences. They should be celebrated, but those differences are very real,” South Dakota Governor Noem said when announcing an executive order to treat transgender girls differently than other student athletes.⁹⁹ This embrace of the outdated gender binary and emphasis on the “real” physical differences demonstrates anti-transgender intent behind the order. This same intent and ideology are behind anti-choice legislation, even if the discrimination is not in the language of the law.

94. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020).

95. Sanford Nowlin, *Assclown Alert: These Texas Lawmakers Voted to Inflict Harm on Transgender Kids for Political Points*, SAN ANTONIO CURRENT (June 4, 2021, 10:39 AM), <https://www.sacurrent.com/news/assclown-alert-these-gop-lawmakers-voted-to-inflict-harm-on-transgender-kids-for-political-points-26378688>; *see also* S. 29, 88th Leg., Reg. Sess. (Tex. 2023).

96. Chrissy Stroop, *Florida’s Republican Governor is Attacking Trans Rights to Gain Power*, OPEN DEMOCRACY (Aug. 4, 2022, 9:39 AM), <https://www.opendemocracy.net/en/5050/florida-republican-governor-desantis-attack-trans-rights/>; *see also* H.B. 5, Leg., Reg. Sess. (Fla. 2023).

97. Stroop, *supra* note 96.

98. *See* Ashley Ahn, *Right-Wing Groups Spend Millions of Dollars on Ads Targeting Transgender Kids*, NAT’L PUB. RADIO (Nov. 3, 2022, 5:39 AM ET), <https://www.npr.org/2022/11/03/1133741967/right-wing-groups-spend-millions-dollars-ads-anti-transgender-kids>; *see also* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022).

99. James Factora, *South Dakota Governor Announces Transphobic Coalition to “Save Women’s Sports”*, THEM (Mar. 22, 2021), <https://www.them.us/story/south-dakota-governor-kristi-noem-transphobic-coalition-sports-discrimination>.

Equal protection is an area of the law that can be elucidated by asking essential questions such as identifying a class harmed by legislation and identifying how that class been historically disfavored by our laws. “What

is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class

Regulation targeting disadvantaged minorities must be viewed with more scrutiny and tested under stricter review.



either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures” and someone misinformed may conflate gender with biology.



characteristic frequently bears no relation to the ability to perform or contribute to society.”¹²¹ By excluding classes based on disability, the legislature is able to pass bills that affect that class in a positive way. For example, the Americans with Disabilities Act (ADA), though not without criticism,¹²² has made strides in requiring employers to provide reasonable accommodations for those with disabilities. If those laws would have to pass strict scrutiny, they would not pass and people with disabilities would remain unprotected. The ADA is constitutional because although the laws affect a certain classification of people (those with disabilities), that class remains a non-suspect class in terms of constitutional review.

D. The burden is on the plaintiff to prove discriminatory intent on facially neutral laws

Even if strict scrutiny would be applied to state anti-abortion laws because they target transgender people based on their immutable body parts and gender identity, plaintiffs may not succeed. When a facially neutral law has a discriminatory impact against the suspect class of race, for example, the burden is on the plaintiff to prove discriminatory impact. In the case of transgender people, the court may require similar proof of discriminatory intent on the part of lawmakers, which could be difficult to overcome.

V. SOLUTIONS AND REBUTTALS

A. Quasi-suspect standard for transgender class is inadequate

Classifying the state of being transgender as merely a sex characteristic illuminates the misunderstanding that the identity is limited to anatomy. LGBTQA+ is a social group,¹²³ and transgender men in particular are a discrete subset of that group whose primary identifying characteristic comes from within. Describing transgender maleness as a mere sex characteristic does not fit in the binary sex classifications of our current legal structure. That is to say, quasi-suspect classifications based on sex have historically been rooted in the outdated gender binary. Modernly, the quasi-suspect classification has been made obsolete by laws that now address crime in a non-gendered manner, such as statutory rape.

121. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (emphasis added).

122. Jayne Ponder, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L.L. REV. 709, 717-18 (2018).

123. *Identity*, LGBTQA+ INTERSECT, <http://www.lgbtiqintersect.org.au/learning-modules/identity/> (last visited Jan. 5, 2024).

1. Though not targeted on the face of anti-choice statutes, transgender men are especially harmed by anti-choice legislation.

For transgender men who become pregnant, the stigma affects their safety, financial stability, mental well-being, and physical health.¹²⁴ Deadly violence is a risk that increases when a transgender man is “outed,” and a forced pregnancy exacerbates that risk.¹²⁵ While anti-choice statutes burden cis-gendered women with unwanted pregnancies, they are spared the additional layer of such complications. Further, while some transgender men want to and do give birth,¹²⁶ it is a fraught area for many transgender men because of the forced incongruence with their identity.

2. Impact

Trans men as a suspect class are not specifically targeted by anti-abortion laws on their face, but they are widely, and perhaps most harshly affected by them. In the U.S., it is estimated that “500 transgender and nonbinary people got abortions in a clinical setting” in 2017.¹²⁷ Transgender and nonbinary people attempt abortion on their own at more than twice the rate of women who identify as their gender assigned at birth.¹²⁸ Transgender people are the most disadvantaged by anti-choice laws, specifically because they face the greatest barriers to accessing care in the first place, compounded by financial hardships, lower rates of medical insurance, and anti-trans discrimination by healthcare providers.¹²⁹ Additionally, transgender people might be disproportionately targeted for arrest now that abortion is criminalized in some states. The impact of anti-choice laws that restrict lawful access to abortion care impact transgender people in significant ways, despite being nearly invisible in public discussion of the topic. Due to the

124. Neelam Bohra, “Left Out of the Conversation”: *Transgender Texans Feel the Impact of State’s Restrictive Abortion Law*, THE TEX. TRIB. (Dec. 21, 2021, 5 AM CT), <https://www.texastribune.org/2021/12/21/texas-abortion-law-transgender-pregnancy/>.

125. Strangio, *supra* note 8.

126. See generally Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?*, 34 INT’L J. L. POL’Y & FAM. 225 (2020).

127. Hallie Lieberman, *Trans Men Talk About Why They Got Abortions*, BUZZFEED NEWS (Aug. 15, 2022, 9:47 AM), <https://www.buzzfeednews.com/article/hallielieberman/trans-men-abortion-rights-roe>; see generally Rachel K. Jones et al., *Transgender Abortion Patients and the Provision of Transgender-Specific Care at Non-Hospital Facilities That Provide Abortions*, 2 CONCEPTION X 100019 (2020), <https://www.guttmacher.org/article/2020/01/transgender-abortion-patients-and-provision-transgender-specific-care-non-hospital>.

128. Lieberman, *supra* note 127; see generally Moseson et al., *supra* note 7.

129. See Lieberman, *supra* note 127; see also MEDINA ET AL., CTR. FOR AM. PROGRESS, PROTECTING AND ADVANCING HEALTH CARE

particularly harsh impact of anti-choice laws on transgender men, they are not similarly situated with their cis-gendered female counterparts.

Further, the suspect classification for transgender people would reach beyond anti-choice laws to all laws that affect them, both on their face and otherwise. For example, “bathroom bills”¹³⁰ that deny access to public restrooms to transgender people based on their incongruous sex assigned at birth would come under strict scrutiny. Transgender athlete bans, like Indiana’s HEA 1041,¹³¹ would be struck down on constitutional grounds should transgender people, as a class, be recognized by the Court as suspect.

3. Intent

The states have generally claimed that the legislative intent behind their anti-choice laws is to protect the sanctity of life.¹³² However, under this guise, states have put pregnant individuals of all genders in positions of economic disadvantage¹³³ and considerable medical danger.¹³⁴ For example, the risk of dying from giving birth is 50 times higher than having an abortion.¹³⁵ This falls so far short of protecting life that an inference may be made about ulterior intentions. The true legislative intent of anti-abortion laws is control over a vulnerable population and has nothing to do with sanctity of life, as demonstrated by the numerous cases of dying or dead fetal tissue taking precedence over the pregnant person they are located within.¹³⁶ For example, a woman carrying a headless fetus – one with zero chance of ever taking a breath – was failed by her state’s anti-choice laws when her

130. Albert E. Smith, Jr., *On North Carolina’s House Bill 2 (HB2): The Public Facilities Privacy and Security Act*, NAT’L INSTS. OF HEALTH (Apr. 18, 2016), <https://www.edi.nih.gov/blog/news/north-carolinas-house-bill-2-hb2-public-facilities-privacy-and-security-act>.

131. H.E.A. 1041, 122nd Gen. Assemb., 2nd Reg. Sess. (Ind. 2022).

132. See, e.g., H.B. 5401, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); see also S. Con. Res. 16, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); see also S.B. 1335, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

133. Mansureh Yazdkhasti et. al., *Unintended Pregnancy and Its Adverse Social and Economic Consequences on Health System: A Narrative Review*, 44 IRAN J. PUB. HEALTH 12, 18 (2015).

134. Emma Camp, *A Texas Woman Claims That She Nearly Died of Sepsis After Being Denied an Abortion*, REASON (Oct. 20, 2022, 5:13 PM), <https://reason.com/2022/10/20/a-texas-woman-claims-that-she-nearly-died-of-sepsis-after-being-denied-an-abortion/>.

135. Carol Hogue, *Can Dobbs Save Women from Dying of Forced Birth? Combining Epidemiologic Evidence with Constitutional Rational-Basis Review*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Nov. 30, 2022), <https://www.hsph.harvard.edu/event/can-dobbs-save-women-from-dying-of-forced-birth-combining-epidemiologic-evidence-with-constitutional-rational-basis-review/>.

136. See Eleanor Klibanoff, *How Texas’ Abortion Laws Turned a Heartbreaking Fetal Diagnosis Into a Cross-Country Journey*, THE TEX. TRIB., <https://www.texastribune.org/2022/09/20/texas-abortion-ban-complicated-pregnancy/> (Oct. 24, 2022).

particular. In order for a law to be discriminatory, transgender men would have to show that the lawmakers intended to discriminate against them. However, the population the legislature intends to control with anti-choice laws is precisely transgender men. When you remove the veneer of protecting women's health from anti-choice laws, it becomes clear that anti-choice laws are rooted in gaining control of those whose identities are outside the mainstream. Forcing a transgender man to give birth is forcing a gender role upon him that would bring him back in line with the status quo of a society those laws are so vehement to protect.

B. Being transgender is not a disability.

While it is true that suspect class distinction cannot be based on a disability (laws governing disabilities are treated with rational basis review),¹⁴⁵ there is a distinction between transgender people and the gender dysphoria they are susceptible to. Not all transgender people have gender dysphoria because being transgender is an identity that need not be cured, while gender dysphoria is a condition marked by feelings of distress that require alleviation.

Treating transgender people as merely a quasi-suspect class undermines the intention of ensuring special protections of the quasi-class. Laws that target quasi-classes generally aim to protect that class. For example, statutory rape laws were written specifically for female victims because they are the ones who are at risk of pregnancy, and whose "chastity" prevented such occurrences.¹⁴⁶ Notably, most modern statutory rape laws are written without regard to gender.¹⁴⁷ There are few other areas of the law where women receive any protection from their quasi-suspect class distinction. In theory, the quasi-class distinction protected women from the draft, however, even that theory may be crumbling. In 2019, a Texas judge ruled a male-

145. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 442 (1985), *superseded by statute*, Fair Housing Act, Pub. L. No. 118-21, 82 Stat. 81 (1968) (codified as 42 U.S.C.S. § 3604), *as recognized in* *Hum. Res. Rsch. & Mgmt. Grp. v. County of Suffolk*, 687 F. Supp. 2d 237, 255-56 (E.D.N.Y. 2010); *but cf.* *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) (finding that disability advocates have urged for heightened constitutional protection, and some lower federal courts have agreed);

see also *Hum. Res. Rsch. & Mgmt. Grp. v. County of Suffolk*, 687 F. Supp. 2d 237, 255-56 (E.D.N.Y. 2010).

146. Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSPS. 30, 32 (1997).

147. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 2024); *see also* N.Y. PENAL LAW § 130.96 (McKinney 2006); *see also* TEX. PENAL CODE ANN. § 22.011 (West 2021); *see also* FLA. STAT. ANN. § 794.05 (West 2022).

only draft is unconstitutional¹⁴⁸ (a decision which was later reversed on appeal and denied certiorari by the US Supreme Court, but which bears relevance because it reflects changing attitudes).¹⁴⁹ The quasi-class distinction is now used as a barrier (here, precluding transgender men from constitutional protection from laws that target them and cause harm), and is an unjust use of the law.

Even if one were to set aside the unjustness of a quasi-class being harmed by a law targeting them, the argument that gender dysphoria as a disability precludes the transgender class from being suspect is also false. While one may argue that transgender men with gender dysphoria have a “disability,” and classes based on disability preclude them from being included as a suspect class,¹⁵⁰ that is an incorrect analysis. Being transgender and having gender dysphoria are not one and the same. Gender dysphoria is a separate condition from being transgender. Gender dysphoria may be exacerbated by certain conditions in a transgender person’s life, such as a forced pregnancy incongruent with the identified gender, but it is not the defining characteristic of the class.¹⁵¹

In the context of applying strict scrutiny standards to laws that affect transgender men, the class is not based on the disability of gender dysphoria per se. That is, the class is transgender people and includes transgender men. Gender dysphoria is the harm caused by their need for support not being met.¹⁵² The added stress of a transgender man having gender dysphoria is a by-product of the very situation laws against them should ameliorate. That is, without the anti-choice laws that confine transgender sexual assault victims to pregnancies that exacerbate (or bring on) their gender dysphoria, the “disability” is more likely to remain at bay. It is the unwanted experience

148. *Nat’l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 576, 582 (S.D. Tex. 2019), *rev’d*, 969 F.3d 546 (5th Cir. 2020).

149. *Nat’l Coal. for Men*, 969 F.3d at 546-47, 550; *see also* Matthew S. Schwartz, *Judge Rules Male-Only Draft Violates Constitution*, NAT’L PUB. RADIO (Feb. 25, 2019, 7:50 AM ET), <https://www.npr.org/2019/02/25/697622930/judge-rules-male-only-draft-violates-constitution>; *but see Background: Women and the Draft*, SELECTIVE SERV. SYS., <https://www.sss.gov/register/women/background/#:~:text=LATEST> (last visited Jan. 5, 2024) (noting in 2015, the Department of Defense lifted all gender-based restrictions);

see also Emily Tillet, *Controversial Trump Administration Ban on Transgender Troops Goes Into Effect*, CBS NEWS, <https://www.cbsnews.com/news/transgender-military-ban-trump-administration-ban-on-transgender-troops-goes-into-effect/> (Apr. 12, 2019, 3:14 PM EDT) (noting in 2019, transgender people with gender dysphoria were banned from the military, but that ban was later lifted in 2021); *see also* Exec. Order No. 14004, 86 Fed. Reg. 7471 (Jan. 25, 2021).

150. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973).

151. *See* Margaret Besse et al., *Experiences with Achieving Pregnancy and Giving Birth Among Transgender Men: A Narrative Literature Review*, 93 *YALE J. BIOLOGY & MED.* 517, 522, 524 (2020).

152. *See* *Gender Dysphoria*, *supra* note 9.

of pregnancy forced by their states' anti-choice laws that create the very condition that would, in theory, keep them from the protections of a higher standard of review of laws that directly impact them. Qualification as a strict scrutiny class should not be fruit just out of reach of transgender men just because they are susceptible to a disability (gender dysphoria) that laws against them exacerbate or create.

VI. CONCLUSION

If there were to be a success in gaining suspect class status for transgender men, and thus a strict scrutiny standard applied to laws that target them, and the court took another further leap to recognize that transgender men are affected as a class by state anti-choice laws, then a hopeful future emerges: One in which people of every gender who have a uterus benefit from the striking of anti-choice laws. Bodily autonomy should not be the purview of cis-gendered men, but it may take civil rights activism for transgender men to ensure it for all.