

BITING BACK AGAINST ANIMUS: GENDER-AFFIRMING CARE BANS ENACTED WITH ANIMUS ARE UNCONSTITUTIONAL UNDER THE RATIONAL BASIS WITH BITE STANDARD

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I. INTRODUCTION

Meet Claire Jones, a 15-year-old who enjoys playing piano and kicking around a soccer ball, and her 14-year-old brother Dan, who loves hanging out with friends and expressing himself through art. The siblings live in Alabama with their parents and two cats. While their interests may seem typical of two children, their lives take an unexpected turn. Claire, amidst her love of music and sports, struggles with gender dysphoria. She hopes to begin embracing life as a male. With the support of her understanding parents and well-informed medical professionals, Claire’s family opts to start treating her gender dysphoria with puberty blockers and later hormone therapy. Simultaneously, her brother, Dan, is diagnosed with a medically verifiable disorder of sex development—he has an extra X chromosome and suffers from Klinefelter syndrome.¹ He also contemplates his treatment options, such as hormone therapy, under the watchful eyes of his family and doctor.

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1. “Klinefelter syndrome is a common genetic condition in which people assigned male at birth (AMAB) have an additional X chromosome. Symptoms may include breast growth, infertility, osteoporosis and learning difficulties. Treatments usually involve physical and emotional therapy, as well as hormone replacement.” *Klinefelter Syndrome*, CLEVELAND CLINIC (2023), <https://my.clevelandclinic.org/health/diseases/21116-klinefelter-syndrome>.

Yet, because of where they live, one child has more choices than the other. Under Alabama's stringent gender-affirming care ban, only one child will receive the care they need. Even though this was a decision each sibling came to with their family and in consultation with their doctors, the state legislature has banned any gender-affirming care for minors like Claire while making an exception for minors like Dan.

This hypothetical depicts a sampling of the illogicalness and animus involved when states enact gender-affirming care bans. As of 2024, twenty-six states, including Alabama, have enacted some form of gender-affirming care bans for minors.² States claim their purpose in enacting these bans is to protect children from untested experimental treatments³—a seemingly noble cause. However, this stated purpose is nothing more than a pretext for a more sinister purpose. While in one breath, these legislators claim to care about protecting children from experimental treatments,⁴ in their next pen stroke, they write in exceptions for certain children to receive those same “experimental,” “unproven” treatments.⁵ Such statutes allow *cisgender*⁶ minors, but not *transgender*⁷ minors, to receive identical medically

2. See Annette Choi, *26 states have passed laws restricting gender-affirming care for trans youth*, CNN, (Dec. 3, 2024, 4:00 AM EST), <https://www.cnn.com/politics/state-ban-gender-affirming-care-transgender-dg/> (Including Alabama in a diagram of states which have passed bans on medical care for trans youth); see also Elliott Davis Jr., *States That Have Restricted Gender-Affirming Care for Trans Youth in 2023*, US NEWS, (Dec. 17, 2024), <https://www.usnews.com/news/best-states/articles/2023-03-30/what-is-gender-affirming-care-and-which-states-have-restricted-it-in-2023>.

3. Samantha Rosenthal, *Gender-affirming care has a long history, though anti-trans laws pretend it's 'untested.'* L.A. TIMES, (Mar. 28, 2023, 6:00 AM), <https://www.latimes.com/opinion/story/2023-03-28/opinion-gender-affirming-care-is-not-new-or-experimental>.

4. Republican State Sen. Shay Shelnett, sponsor of the Alabama bill, said about gender-affirming health care, “We don’t want parents to be abusing their children. We don’t want to make that an option because that’s what it is, it’s child abuse. This is just to protect children.” Kiara Alfonseca, *As Alabama’s trans youth care ban goes into effect, providers scramble for answers: A federal judge is considering whether to block the ban*, ABC NEWS, (May 10, 2022, 11:15 AM), <https://abcnews.go.com/US/alabamas-trans-youth-care-ban-effect-providers-scramble/story>; Missouri Attorney General Andrew Bailey issued new regulations severely limiting gender-affirming care for both adults and youth stating, “gender transition interventions are experimental.” Sareen Habeshian, *Missouri AG issues order limiting gender-affirming care*, AXIOS – POLS. & POL’Y, (Apr 13, 2023) <https://www.axios.com/2023/04/13/missouri-ag-gender-affirming-care>.

5. Compare Ala. Code § 26-26-2 (describing the use of puberty blockers for “gender nonconforming children [as] experimental and not FDA approved”), with Ala. Code § 26-26-4 (listing exceptions, permitting use of puberty blockers for minors in particular situations).

6. *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Jan. 1, 2024) (defining cisgender as, “of, relating to, or being a person whose gender identity corresponds with the sex the person was identified as having at birth”).

7. “*Transgender* is an umbrella term for persons whose gender identity or expression (masculine, feminine, other) is different from their sex (male, female) at birth.” GLAAD Media Reference Guide: *Glossary of Terms*, GLAAD, <https://glaad.org/reference/trans-terms/> (last visited Nov. 19, 2023).

recommended treatments. Additionally, often, the same legislators who sponsor the gender-affirming care bans also sponsor other transphobic legislation.⁸ It is clear these laws are motivated by animus and disapproval towards transgender people and not to protect children from supposed unproven treatments.⁹

These bans specifically harm transgender minors as gender-affirming care is a recognized lifesaving treatment¹⁰ for people diagnosed with gender dysphoria.¹¹ The UCLA Williams Institute estimates that in the United States, 300,000 youth identify as transgender, or about 1.4% of youth ages 13-17 years old.¹² Transgender youths have particularly high rates of poor mental health outcomes compared with their cisgender counterparts.¹³ Before the flurry of bans on access to gender-affirming care in 2020, “more than a third (34.6%) of transgender high school students who completed a 2017 survey conducted by the Centers for Disease Control and Prevention reported attempting suicide in the prior twelve months—at four to six times the rate reported by their cisgender peers.”¹⁴ These higher rates are “likely a consequence of social rejection, lack of support from parents, bullying and discrimination.”¹⁵

8. State Sen. Gary Stubblefield of Arkansas sponsored two anti-trans bills—an anti-drag performance bill (Ark. Leg., 2023 Ark. Laws Act 131 (S.B. 43), 94th Gen. Assemb. Reg. Sess. (Ark. 2023)); and an anti-gender-affirming care bill (ARK. CODE ANN. § 20-9-1504 (West 2023)).

9. “Gender-affirming care is considered safe, effective, and medically necessary by major professional health associations, including the American Medical Association, the American Academy of Pediatrics, and the Endocrine Society.” ELANA REDFIELD ET AL., THE WILLIAMS INSTITUTE, PROHIBITING GENDER AFFIRMING MEDICAL CARE FOR YOUTH 2 (2023), <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>

10. See generally Kristina R. Olson, et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137(3) PEDIATRICS 1 (2016), https://pmc.ncbi.nlm.nih.gov/articles/PMC4771131/pdf/PEDS_20153223.pdf (finding socially transitioned transgender children have notably lower rates of internalizing psychopathology than previously reported among children with GID living as their natal sex.)

11. “[T]he Fifth Edition of the Diagnostic and Statistics Manual of Mental Disorders (DSM-5) defines *gender dysphoria* as a condition where patients experience ‘[a] marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics’ that ‘is associated with clinically significant distress or impairment in social, occupation, or other important areas of functioning.’” *Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023).

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

13. REDFIELD ET AL., *supra* note 9 at 15.

14. REDFIELD ET AL., *supra* note 9 at 15.

15. Giuliana Grossi, *Suicide Risk Reduces 73% in Transgender, Nonbinary Youths with Gender-Affirming Care*, HCP LIVE NETWORK (Mar. 8, 2022), <https://www.hcplive.com/view/suicide-risk-reduces-73-transgender-nonbinary-youths-gender-affirming-care>.

When given access to gender-affirming care treatments, trans youth have much better mental health outcomes. In a prospective observational cohort study comprised of 104 transgender and nonbinary youth patients aged 13-20 at Seattle Children's Gender Clinic, transgender youth receiving gender-affirming care treatment were "60% less likely to experience depression [] and 73% less likely to experience suicidality [] when compared to youths who did not receive gender-affirming interventions."¹⁶ Moreover, a 2020 study published in *Pediatrics* found that access to pubertal suppression treatment for transgender adolescents was associated with lower odds of lifetime suicidal ideation among transgender adults.¹⁷ The positive effects of early access to gender-affirming care treatment for trans youth extend beyond their time as youths and can significantly contribute to improved long-term health and well-being.

Because these treatments can dramatically improve lives, citizens are not standing idly by while these damaging bans go into effect. Transgender minors and their parents are bringing forth court challenges in the form of preliminary injunctions, claiming the laws violate the Equal Protection clause.¹⁸ Preliminary injunctions require four elements to be satisfied for a successful claim. One element of a successful preliminary injunction claim is that it is "likely to succeed on the merits."¹⁹ The outcome of these cases is unpredictable because courts struggle to consistently apply the same standard of review for an Equal Protection challenge. District courts consistently apply intermediate scrutiny²⁰ after determining there is a sex-based classification, while federal courts of appeal generally apply rational basis review,²¹ finding no such suspect classification. A divergence of which standard of review to apply has, accordingly, emerged.

16. *Id.*

17. Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145(2) *PEDIATRICS* 1, 4, 7 (2020), <https://doi.org/10.1542/peds.2019-1725>.

18. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1143-44 (M.D. Ala. 2022), vacated sub nom. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205 (11th Cir. 2023); *K. C. v. Individual Members of Med. Licensing Bd. of Ind.*, F. Supp. 3d 802, 809 (S.D. Ind. 2023); *L.W. by & through Williams v. Skrmetti*, 679 F. Supp. 3d 668, 680 (M.D. Tenn. 2023).

19. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

20. A majority of district courts apply intermediate scrutiny to the claims by plaintiffs against state bans on gender affirming care and find there is a likelihood of success on the merits. *L.W. by & through Williams*, 679 F. Supp. 3d at 686-91; *K. C.*, 677 F. Supp. 3d at 686; *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 917 (E.D. Ark. 2023); *Eknes-Tucker*, 603 F. Supp.3d at 1144, 1147; *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1344, 1348 (N.D. Ga. 2023); *Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1217-19 (N.D. Fla. 2023).

21. Most circuit courts apply rational basis review and find the plaintiffs are not likely to succeed on the merits of their equal protection claims. *See L. W. by & through Williams v. Skrmetti*, 73 F.4th 408, 413 (6th Cir. 2023); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1227-30 (11th Cir. 2023); *but see Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022)

This note argues that the correct standard of review for these gender-affirming care bans is *at least* rational basis with bite. Even without resolving the dispute over whether transgender status is a suspect classification,²² these gender-affirming care bans should be invalidated because they are unconstitutional under the rational basis with bite analysis. This is the correct standard of review for these challenges because the statutes are enacted with animus.²³ Applying this standard of review will make a positive difference in these cases by correctly focusing the courts on whether there is a nondiscriminatory rationale that withstands logical examination.

Part II explains general terminology, what these bans prohibit, and how states enacting gender-affirming care bans create problems and harm for trans people. Part III highlights the divergence of how each level of the court applies a different standard of review to challenges presented by transgender minors. Part IV argues that courts should apply rational basis with bite to preliminary injunction challenges under the Equal Protection clause because the law's passage is motivated by animus towards transgender people. Part V briefly concludes.

II. WHAT ARE GENDER-AFFIRMING CARE BANS, AND HOW DO THEY HARM TRANS YOUTH?

A. *Transgender People and the Diagnosis of Gender Dysphoria*

It is essential to understand some terminology used within gender-affirming care bans. “*Gender identity* refers to a person’s internal understanding of their own gender, or gender with which a person identifies.”²⁴ The assignment of a person’s “sex” commonly occurs at birth and is determined by the external genitalia of an infant.²⁵ However, these

(affirming the decision by the district court where it found intermediate scrutiny was the appropriate level of scrutiny).

22. The Supreme Court granted certiorari for *United States v. Skrametti*, 144 S. Ct. 2679 (2024), in the 2024 Term; In their reply brief, the government argues that transgender status is a sex-based classification and thus warrants heightened scrutiny. Reply Brief for Petitioner at *4, *United States v. Skrametti*, 2024 WL 4766977, at *4 (Nov. 7, 2024) (No. 23-477).

23. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985); *see also* *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring). (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

24. *See* Terminology, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 29, 2024), <https://www.cdc.gov/healthy-youth/lgbtq-youth/terminology.html#:~:text=Gender>; Glossary of Terms, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 21, 2024), <https://gis.cdc.gov/grasp/nchhst atlas/Content/docs/AtlasPlusGlossary.pdf>.

25. *Sex and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity#> (last visited Jan. 26, 2025).

external genitalia may not always align with other factors related to sex, such as “internal reproductive organs, gender identity, chromosomes, and secondary sex characteristics.”²⁶ A transgender person’s gender identity differs from the sex assigned at birth, whereas a cisgender person’s gender identity aligns with the sex assigned to them at birth.²⁷

Some transgender minors experience *gender dysphoria*.²⁸ Gender dysphoria is a serious but treatable medical condition. If “[I]eft untreated, however, it can lead to debilitating distress, depression, impairment of function . . . self-injurious behaviors, and even suicide.”²⁹ Medical professionals have established treatment for gender dysphoria over years of assessment. “Professionals have treated individuals experiencing gender dysphoria following the protocols laid out in the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (Version 7)*, developed by the World Professional Association for Transgender Health (“WPATH”).”³⁰ WPATH has stringent recommendations for gender-affirming care for youth.³¹ For example, WPATH Standards of Care recommends that “cross-sex hormones be considered *only* where the adolescent is experiencing persistent gender dysphoria, other mental health conditions are well-managed, and the minor is able to meet the standards³² to consent to the treatment.”³³ (emphasis added). Interventions to treat gender dysphoria are based on decades of

26. *Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023).

27. *Id.*

28. “Gender dysphoria is the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics.” *Gender Dysphoria*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> (last visited Jan. 26, 2025).

29. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019).

30. *Hecox*, 79 F.4th at 1017.

31. *USPATH and WPATH Confirm Gender-Affirming Healthcare is Not Experimental: Condemns Legislation Asserting Otherwise*, WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, (Mar. 22, 2023), https://wpath.org/wp-content/uploads/2024/11/USPATH_WPATH-Response-to-AG-Bailey-Emergency-Regulation-03.22.2023.pdf; E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT’L J. OF TRANSGENDER HEALTH S1, S5-S8 (Sept.15, 2022), <https://doi.org/10.1080/26895269.2022.2100644>.

32. Summary of Criteria for Hormonal treatments: a.) Gender diversity/incongruence is marked and sustained over time; b.) Meets the diagnostic criteria of gender incongruence in situations where a diagnosis is necessary to access health care; c.) Demonstrates the emotional and cognitive maturity required to provide informed consent/assent for the treatment; d.) Mental health concerns (if any) that may interfere with diagnostic clarity, capacity to consent, and gender-affirming medical treatments have been addressed; sufficiently so that gender-affirming medical treatment can be provided optimally; e.) Informed of the reproductive effects, including the potential loss of fertility and the available options to preserve fertility; f.) Reached Tanner stage 2. See Coleman et al., *supra* note 31.

33. *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022).

clinical experience and research and are not considered experimental.³⁴ Gender-affirming care is one type of treatment for gender dysphoria.

B. What Exactly is Gender Affirming Care?

Gender-affirming care for transgender minors “covers a spectrum of interventions,” ranging from socially affirming changes like changing names, clothing, and pronouns to align with their gender identity to more comprehensive measures, including puberty blockers, hormone treatments, and, sometimes, surgical procedures.³⁵ “Puberty blockers can delay the changes of puberty in transgender and gender-diverse youth who have started puberty.”³⁶ “These drugs, known as GnRH agonists, suppress the body from release of the sex hormones testosterone and estrogen.”³⁷ Puberty blockers can slow the growth of facial hair and growth of the penis in people assigned male at birth and prevent or limit breast development and menstruation in people assigned female at birth.³⁸ From 2017 to 2022, at least 4,780 minors with a prior gender dysphoria diagnosis started puberty-blocking medications.³⁹

Another gender-affirming care treatment option is hormone replacement therapy. As transgender teens get older, some may request sex hormone treatment—estrogen for transgender girls and testosterone for transgender boys. These medications play a crucial role in aligning a transgender individual’s body with their gender identity. Testosterone therapy is used to suppress female secondary sex characteristics and masculinize transgender men (leading to facial hair growth and a deeper voice), while estrogen therapy is used to suppress male secondary sex characteristics and feminize transgender women (such as breast growth).⁴⁰

34. *USPATH and WPATH Confirm Gender-Affirming Health Care is Not Experimental; Condemns Legislation Asserting Otherwise*, *supra* note 31.

35. Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS INVESTIGATES, YOUTH IN TRANSITION, (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-data/>.

36. Mayo Clinic Staff, *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075> (last visited Jan. 26, 2025).

37. Respaut & Terhune, *supra* note 35.

38. Mayo Clinic Staff, *supra* note 36.

39. Respaut & Terhune, *supra* note 35.

40. Samantha Schmidt, *FAQ: What you need to know about Transgender Children*, WASH. POST, (Feb. 25, 2022) <https://www.washingtonpost.com/dc-md-va/2021/04/22/transgender-child-sports-treatments/>.

Markedly, the changes from most gender-affirming care treatments are reversible.⁴¹ For example, once a person stops taking feminizing hormone therapy, effects such as a decrease in muscle mass and strength, a decrease in sex drive, and male sexual dysfunction are reversible.⁴² Nonetheless, the medical field has taken precautions for administering hormone therapy since other effects (such as breast growth) are irreversible.⁴³ Of note, “[t]he Endocrine Society recommends waiting to begin treatment until after a person has ‘sufficient mental capacity to give informed consent,’ which the society said most adolescents have by age 16.”⁴⁴ Further, as a precaution, it “recommend[s] initiating treatment using a gradually increasing dose schedule.”⁴⁵ Other treatments that are not reversible, such as genital reassignment surgery, are advised only after physician approval and completion of at least one year of consistent and compliant hormone treatment. Further, non-reversible treatments are not recommended for those under the age of 18, according to guidelines for the medical care of transgender patients developed by the Endocrine Society and WPATH.⁴⁶

The FDA approves puberty blockers to treat some disorders and diseases, though it has not approved puberty blockers for patients with gender dysphoria.⁴⁷ “Their off-label use in gender-affirming care, while legal, lacks the support of clinical trials to establish their safety for such treatment.”⁴⁸ This does not imply that they lack widespread usage and endorsement in the medical field. In fact, in a statement by USPATH and WPATH, there are no

41. *See id.* (noting that at any point during the course of the use of puberty blockers, a transgender teenager could continue to “go through the puberty of their sex assigned at birth” if they stop taking puberty blockers); *see also* Dr. Joel Lebed, *Effects of Feminizing Hormone Therapy*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/uploads/filer_public/db/88/db881467-f6e5-47a3-a6a3-2c7d3ea545e0/gac2.pdf (last visited Jan. 26, 2025) (listing eight changes resulting from gender-affirming care as being “reversible”).

42. Lebed, *supra* note 41.

43. “Some of the physical changes caused by feminizing hormone therapy can be reversed if you stop taking it. Others, such as breast development, cannot be reversed.” Additionally, “feminizing hormone therapy might limit your fertility.” *Feminizing Hormone Therapy*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/> (last visited Jan. 26, 2025).

44. Schmidt, *supra* note 40.

45. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/ Gender-Incongruent Persons: An Endocrine Society* Clinical Practice Guideline*, J. OF CLINICAL ENDOCRINOLOGY & METABOLISM, 3869, 3871, 3883 (2017), <https://doi.org/10.1210/je.2017-01658>.

46. *Id.* at 3872.

47. Chad Terhune et al., *As more transgender children seek medical care, families confront many unknowns*, REUTERS INVESTIGATES, YOUTH IN TRANSITION (Oct. 6, 2022, 11:00 AM GMT), <https://www.reuters.com/investigates/special-report/usa-transyouth-care/> (“Puberty blockers and sex hormones do not have U.S. Food and Drug Administration (FDA) approval for children’s gender care.”).

48. Respaunt & Terhune, *supra* note 35.

formal FDA approvals “for *many* hormonal therapies across all of endocrinology, not limited to hormone replacement therapies for TGD [transgender and gender diverse] patients, despite the medications themselves having been approved by the FDA.”⁴⁹ (emphasis added).

The widespread use of effective off-label medications is a common practice across various fields of healthcare.⁵⁰ “Once a drug is FDA-approved for a specific indication, legally it can be used for any indication. Off-label prescribing is common; it accounts for 10 to 20 percent of all prescriptions written.”⁵¹ To illustrate, the drug Clonidine (Catapres) is FDA-approved and commonly used for the treatment of hypertension, but it also has a number of off-label non-FDA-approved uses, including to treat those with ADHD.⁵² Data from studies suggests that the harm from denying care is far worse than the potential side effects.⁵³ Similarly, while the FDA doesn’t officially approve hormone therapy for treating gender dysphoria, research has demonstrated that its use and benefits in managing the condition (improving mental well-being and reducing depression and suicidal attempts) outweigh potential side effect risks.⁵⁴ According to the American Medical Association (“AMA”), gender-affirming hormone therapy is a standard of care and an accepted medically necessary treatment for gender dysphoria.⁵⁵

The world has been slow to do extensive or randomized controlled studies on the medical and psychological effects of puberty blockers and

49. *USPATH and WPATH Confirm Gender-Affirming Health Care is Not Experimental: Condemns Legislation Asserting Otherwise*, *supra* note 31.

50. Katrina Furey, *Prescribing “Off-Label”: What Should a Physician Disclose*, *AMA J. ETHICS* (June 2016), <https://journalofethics.ama-assn.org/article/prescribing-label-what-should-physician-disclose/2016>.

51. *Id.*

52. *10 Surprising Off-Label Uses for Prescription Medications*, *PHARMACY TIMES* (Jan. 5, 2016), <https://www.pharmacytimes.com/view/10-surprising-off-label-uses-for-prescription-medications>.

53. Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, *SCI. AM.* (May 12, 2022), <https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows/>.

54. According to a peer reviewed study from 2021, among those aged 13-17, receipt of [gender affirming hormone therapy] GAHT was associated with nearly 40% lower odds of recent depression and attempting suicide in the past year. Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, *TREVOR PROJECT*, (Oct. 28, 2021), [https://www.jahonline.org/article/S1054-139X\(21\)00568-1/fulltext#secsectitle0090](https://www.jahonline.org/article/S1054-139X(21)00568-1/fulltext#secsectitle0090).

55. Letter from James L. Madara, MD, on behalf of the American Medical Association (AMA) and physician and medical student members, to Bill McBride, Executive Director National Governors Association (Apr. 26, 2021), <https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf>.

hormone replacement therapy for transgender minors.⁵⁶ In part, there are few transgender minors to include in any study. Only 1.6 million people identify as transgender in the U.S., while only 300,000 youth identify as transgender.⁵⁷ However, several small studies have been done in the U.S., Europe, and the U.K., consistently finding that transgender adolescents diagnosed with gender dysphoria, taking puberty suppression drugs, and gender-affirming hormones (estrogen or testosterone) had significant improvements in psychological functioning and adverse mental health outcomes.⁵⁸

Moreover, in addition to WPATH and the AMA, most of “the largest establishment medical associations (including the . . . American College of Physicians, the Endocrine Society, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Psychiatric Association, among others) have supported the provision of gender-affirming care for transgender people as medically necessary care.”⁵⁹ The American Academy of Pediatrics “recommends that youth who identify as transgender have access to comprehensive, gender-affirming, and developmentally appropriate health care that is provided in a safe and inclusive clinical space.”⁶⁰

The purpose of gender-affirming care treatments is to treat gender dysphoria—to improve the mental and physical well-being of those children who suffer from gender dysphoria. When transgender minors are not allowed to receive these treatments, the result can be detrimental, even resulting in attempted or completed suicide.⁶¹ According to a survey done by the Trevor Project, 14% of LGBTQ youth attempted suicide in the past year, including

56. Sarah C.J. Jorgensen et al., *Puberty Suppression for Pediatric Gender Dysphoria and the Right to an Open Future*, 53 ARCHIVES OF SEXUAL BEHAVIOR 1941, 1946 (2024) (“[Puberty Blocker] analogues have never been evaluated in a randomized controlled trial (RCT) for pediatric gender dysphoria.”).

57. HERMAN ET AL., *supra* note 12, at 4.

58. Jack Turban, *The Evidence for Trans Youth Gender-Affirming Medical Care: Research Suggests Gender-Affirming Medical Care Results in Better Mental Health*, PSYCHOLOGY TODAY (Jan. 24, 2022), <https://www.psychologytoday.com/us/blog/political-minds/202201/the-evidence-trans-youth-gender-affirming-medical-care>.

59. *USPATH and WPATH Confirm Gender-Affirming Health Care is Not Experimental; Condemns Legislation Asserting Otherwise*, *supra* note 31.

60. Lee Savio Beers, *American Academy of Pediatrics Speaks Out Against Bills Harming Transgender Youth*, AM. ACAD. OF PEDIATRICS, (Mar. 16, 2021), <https://www.aap.org/en/newsroom/news-releases/aap/2021/american-academy-of-pediatrics-speaks-out-against-bills-harming-transgender-youth/>.

61. Transgender youth “have high rates of depression, anxiety, and suicide: almost double the rates of suicide ideation of their cis peers.” *A Flawed Agenda for Trans Youth*, 5 LANCET CHILD & ADOLESCENT HEALTH, 385 (2021), [https://doi.org/10.1016/S2352-4642\(21\)00139-5](https://doi.org/10.1016/S2352-4642(21)00139-5).

nearly 1 in 5 transgender and nonbinary youth and 1 in 10 cisgender youth.⁶² By forbidding transgender minors from even considering these treatments, the legislatures create a situation in their states where children may unnecessarily suffer avoidable harm.⁶³ Puberty blockers or gender-affirming hormones can alleviate risks of depression and suicidality in transgender and nonbinary youths aged 13-20 years old, and they should have access to these treatments.⁶⁴

C. *Gender-Affirming Care Bans in the U.S. and Subsequent Preliminary Injunctions*

Despite the strong recommendations of medical experts and early data on efficacy, in 2021, Arkansas became the first U.S. state to ban gender-affirming medical care for transgender minors.⁶⁵ Since then, twenty-five states have followed suit and enacted laws restricting or prohibiting gender-affirming medical care for transgender minors.⁶⁶ These bans prevent *only* transgender youth from receiving any gender-affirming care while allowing exceptions for cisgender and intersex youth to receive the same care. For example, in Alabama's Gender Affirming Care ban (SB184), section 4 begins by saying,

[N]o person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or *affirm* the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's *sex*.⁶⁷ (emphasis added).

The statute prohibits treatments including "prescribing . . . puberty blocking medication," or "prescribing or administering suprphysiologic doses of testosterone or other androgens to females," and or "prescribing or administering suprphysiologic doses of estrogen to males."⁶⁸ Then, the bill follows with an exception stating "[s]ubsection (a) does not apply to a procedure undertaken to treat a minor born with a medically verifiable

62. 2022 *National Survey on LGBTQ Youth Mental Health*, TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2022/> (last visited Nov. 19, 2023).

63. Diana M. Tordoff, et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, JAMA NETWORK OPEN (Feb. 25, 2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=022522.

64. *Id.*

65. *Fighting for Gender-Affirming Care*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (June 28, 2023), <https://www.hsph.harvard.edu/news/features/fighting-for-gender-affirming-care/>.

66. Davis Jr., *supra* note 2.

67. ALA. CODE, *supra* note 5.

68. ALA. CODE, *supra* note 5.

disorder of sex development,” such as being intersex or another disorder of sexual development⁶⁹ determined by a physician.⁷⁰ The statutes list the prohibited gender-affirming care treatment for trans minors and then note that those same treatments are permitted if they are for non-transgender kids.

Transgender minors and their parents recognize this blatant discrimination; the law treats only trans kids differently, and therefore, they have filed Equal Protection court challenges in the form of preliminary injunctions against the enactment of these bans.⁷¹ This note will demonstrate that there is clearly discriminatory intent and treatment of transgender youth. Yet the question remains: what is the proper standard of review for these Equal Protection claims?

D. Equal Protection Claims and the Standards of Review

The standard of review for an Equal Protection claim depends on the nature of the claim itself. In determining what level of scrutiny to apply, the court first considers whether the affected group is a suspect class or whether the claimant is from a “discrete and insular minorit[y]” requiring a “more searching judicial inquiry.”⁷² The Supreme Court has evaluated “discrete and insular minorities” to be those who have been “subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁷³

There are three primary standards of review and three main classifications. Suspect classifications receive the highest scrutiny—strict scrutiny—where a law must be narrowly tailored to serve a compelling government interest.⁷⁴ The lowest and most lenient standard, rational basis review, merely requires that a law’s classification be rationally related to a

69. ALA. CODE, *supra* note 5.

70. ALA. CODE, *supra* note 5.

71. *E.g.*, *Eknes-Tucker v. Marshall*, 63 F. Supp. 3d 1131 (M.D. Ala. 2022); *K. C. v. Individual Members of Med. Licensing Bd. of Ind.*, F. Supp. 3d 802, 809 (S.D. Ind. 2023); *L.W. by & through Williams v. Skrmetti*, 679 F. Supp. 3d 668, 680 (M.D. Tenn. 2023).

72. Jayne Ponder, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 709, 712 (2018); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

73. Edward J. Erler, *Discrete and Insular Minorities*, ENCYCLOPEDIA.COM ENCYCLOPEDIA OF THE AM. CONST. (1986), <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/discrete-and-insular-minorities>.

74. *Equal Protection: Strict Scrutiny of Racial Classifications*, CONG. RSCH. SERV. (updated June 30, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12391#:~:text=To%20pass%20the%20strict%20scrutiny,only%20criteria%20used%20to%20classify>.

legitimate state interest.⁷⁵ A third standard was recognized in *Craig v. Boren*.⁷⁶ The Court established a middle sex-based classification, a quasi-suspect classification, to which it applied intermediate scrutiny.⁷⁷ Under the intermediate scrutiny standard, “the party seeking to uphold the policy carries the burden of ‘showing that the [sex-based] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”’”⁷⁸

The choice of which standard of review plays a central role in assessing the constitutionality of state laws or regulations under the Equal Protection clause and, consequently, in deciding whether a preliminary injunction should be granted based on a “likelihood of success on the merits.” As a result, it is vital to carefully consider the proper standard of review for equal protection challenges related to laws that restrict gender-affirming care for transgender minors.

III. COURT CHALLENGES TO GENDER-AFFIRMING CARE BANS AND THE DIVERGENCE IN HOW THE COURTS RULE

Transgender youth and their parents or representatives challenge these bans by filing motions for preliminary injunctions.⁷⁹ Courts review the issuance of a preliminary injunction by considering several factors; “the threat of irreparable harm to the movant, the likelihood that the movant will succeed on the merits, the balance between the harm to the movant and injury that an injunction would inflict on other parties, and the public interest.”⁸⁰ Central to this note is the second factor—the likelihood of success on the merits. A party challenging a gender-affirming care ban must show their claim will likely prevail on the merits.⁸¹

As these statutes are challenged, courts must decide which standard of review to apply for a preliminary injunction and an Equal Protection violation (to determine the likelihood of success on the merits). A divergence has emerged where district and circuit courts consistently apply two different standards of review for equal protection claims in preliminary injunctions of

75. Rational Basis Test, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test (Mar. 2024).

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

77. *Id.*

78. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1226 (11th Cir. 2023).

79. *See Salter et al.*, *infra* note 126 (“Most of the bans face legal challenges and enforcement on some of them has been put on hold by courts.”).

80. *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022) (quoting *Brakebill v. Jaeger*, 932 F.3d 671, 676 (8th Cir. 2019)).

81. *Id.*

state bans for gender-affirming care. District courts apply intermediate scrutiny⁸² after determining there is a sex-based classification, and federal courts of appeal generally apply rational basis review,⁸³ finding no such suspect classification.

For example, in *Eknes-Tucker v. Marshall*, the Alabama district court found the statute violated the Equal Protection clause because “the Act prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity . . . [t]he Act, therefore, constitutes a sex-based classification for purposes of the Fourteenth Amendment.”⁸⁴ On the other hand, when the case went up on appeal, the 11th Circuit held that transgender status is not a quasi-suspect class and does not trigger heightened scrutiny.⁸⁵ The 11th Circuit found that because the Alabama statute “classifies on the bases of age and procedure, not sex or gender nonconformity, [it] is therefore not subject to any heightened scrutiny above rational basis review.”⁸⁶ This disagreement about which standard of review to apply leads to a figurative whiplash effect in the judicial system.

The Supreme Court has not yet determined the classification of transgender people for an Equal Protection claim.⁸⁷ However, the Court has

82. A majority of district courts apply intermediate scrutiny to the claims by plaintiffs against state bans on gender affirming care and find there is a likelihood of success on the merits. *L.W. by & through Williams v. Skremetti*, 679 F. Supp. 3d 668, 677 (M.D. Tenn. 2023); *K. C. v. Individual Members of Med. Licensing Bd. of Ind.*, F. Supp. 3d 802, 813 (S.D. Ind. 2023); *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 917 (E.D. Ark. 2023); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1143-44 (M.D. Ala. 2022), vacated sub nom. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 12005 (11th Cir. 2023); *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1328 (N.D. Ga. 2023); *Doe v. Ladapo*, 676 F. Supp. 3d 1205, 1216 (N.D. Fla. 2023).

83. Most circuit courts apply rational basis review and find the plaintiffs are not likely to succeed on the merits of their equal protection claims. See *L. W. by & through Williams*, 73 F.4th at 412-13; *Eknes-Tucker*, 80 F.4th 1205; but see *Brandt by & through Brandt*, 47 F.4th 661 (affirming the decision by the district court where it found intermediate scrutiny was the appropriate level of scrutiny).

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

85. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1226 (11th Cir. 2023).

86. *Id.*

87. In *Bostock v. Clayton County*, the Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of sexuality or gender identity. The Court clarified that the holding was limited to “whether an employer who fires someone for being homosexual, or transgender has . . . discriminated against that individual ‘because of such individual’s sex.’” The Court’s holding does not “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination” and does not create a blanket suspect classification for transgender and homosexual status. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 680-81 (2020) (quoting 42 U.S.C. § 2000e-2(a)(1)); see also *United States v. Skremetti*, 144 S. Ct. 2679 (2024) (The Supreme Court granted cert on the issue of whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow “a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or to treat “purported discomfort or distress from a discordance

used a fourth standard of review—rational basis *with bite*—without requiring a suspect classification analysis. Using this standard—first applied in *City of Cleburne, Texas v. Cleburne Living Center*—would authorize scrutiny where statutes are enacted with an animus against transgender people.⁸⁸ This fourth standard of review, often described as rational basis with bite⁸⁹ or rational basis plus,⁹⁰ is the solution to the Court’s struggle.

IV. STANDARD OF REVIEW FOR ANTI-TRANS EQUAL PROTECTION CLAIMS SHOULD BE RATIONAL BASIS WITH BITE

A. *City of Cleburne and the Fourth Standard of Review: Rational Basis with Bite*

Occasionally, courts have found a need to apply a heightened standard of review even when the group being discriminated against does not rise to the level of a suspect class. Rational basis with bite is a heightened standard of review, applicable where a statute is enacted with “animus.”⁹¹ In *City of Cleburne, Texas v. Cleburne Living Center*,⁹² the Supreme Court, applying rational basis review, deemed unconstitutional a town ordinance mandating a special housing permit for a group home catering to mentally disabled individuals, a requirement not imposed on other similar facilities.⁹³ The Court did not apply heightened scrutiny, such as intermediate scrutiny or strict scrutiny, and “specifically refus[ed] to recognize the [disabled] as a

between the minor’s sex and asserted identity,” violates the equal protection clause of the 14th Amendment. Oral arguments were held on Wednesday, December 4, 2024, and parties argued whether transgender status is a sex-based classification.)

88. *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 435, 440 (1985).

89. “Sometimes the animus cases are said to apply ‘heightened rational-basis review,’ *see, e.g.*, *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009), or—more colorfully—‘rational basis with bite,’ *see, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011).” *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014); *see United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014) (noting there are two versions of the rational basis review test with a more rigorous rational basis standard “sometimes referred to as ‘rational basis with a bite’”); *Am. Express. Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 692 (6th Cir. 2011) (“[C]ommentators have correctly discerned a new rational basis with bite standard.”).

90. Thomas B. Nachbar, *Rational Basis “Plus”*, 32 CONST. COMMENT. 449, 449 n.8 (2017) (“Among scholars, the preferred term appears to be ‘rational basis with bite,’ garnering 501 hits in the Westlaw JLR database, well ahead of either ‘rational basis with teeth’ with 98 hits and ‘rational basis plus’ with only 76 (with some overlap among them).”).

91. “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

92. *City of Cleburne*, 473 U.S. at 432.

93. Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process*, 73 VAND. L. REV. 425 (2020).

quasi-suspect class.”⁹⁴ It did, however, spontaneously create and apply a new standard, holding that even though the mentally disabled people were not a suspect class, the city’s statute did not satisfy rational basis review.

The City of Cleburne’s insistence on a special permit was based on concerns about the “negative attitude[s]” of nearby residents and “the fears” of others living close by.⁹⁵ However, merely holding negative attitudes or harboring fear is not an acceptable justification for treating a home for mentally disabled people differently from apartment houses, multiple dwellings, and similar establishments.⁹⁶

Another claimed basis for the special permit requirement—“the city [claimed] that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals, and the like may freely locate in the area without a permit.”⁹⁷ The city allowed all other similarly situated care and multiple-dwelling facilities to exist without a special permit. When the stated concern is avoiding congestion from high-density populations, then allowing *any* high population concentration would exacerbate this problem.

The city’s additional fear—that students at a nearby high school might harass mentally disabled residents living at the home—was undermined by a critical counterexample: “[T]he school itself is attended by about 30 mentally [disabled] students.”⁹⁸ The Court acknowledged that making policy decisions based solely on “vague, undifferentiated fear[.]” violates constitutional equal protection principles.⁹⁹ The Court concluded that “requiring [a] permit in this case appears to us to rest on an irrational prejudice against the mentally [disabled].”¹⁰⁰

The Court did not find the state’s arguments persuasive because they were based on double standards and irrational prejudice.¹⁰¹ *Cleburne Living Center* set forth a different application of the traditional rational basis review “because it forced the government to justify its discrimination.”¹⁰² The Court did not “simply defer to the government,” it examined the reasonings offered

94. Sean Pevsner, *Reasonable Accommodations as Constitutional Obligations*, TEX. F. ON CIV. LIBERTIES AND CIV. RTS. 322 (2002).

95. *City of Cleburne*, 473 U.S. at 448.

96. *Id.*

97. *Id.* at 450.

98. *Id.* at 449.

99. Landau, *supra* note 92, at 457.

100. *City of Cleburne*, 473 U.S. at 450.

101. *Id.*

102. *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998).

by the government to determine whether they were, in fact, rational.¹⁰³ This subtly heightened standard of review is appropriate where a group is being discriminated against, even if that group does not rise to a constitutionally protected suspect classification. *Cleburne* held that a statute can be invalidated under rational basis review if it does not satisfy a state's legitimate state interest. The Court held that "irrational prejudice" is never a legitimate state interest.¹⁰⁴

The term "animus" has not been clearly defined by the courts, but one way it can be found is when "lawmaking authority" treats one group as "other[s]."¹⁰⁵ Or, to put it another way, "[t]he government acts on animus when, to a material degree, it aims 'to disparage and to injure' a person or group of people."¹⁰⁶ Scholar Dale Carpenter has suggested that establishing whether animus significantly influenced the government's action involves examining various objective factors that do not rely on uncovering subjective legislative intent.¹⁰⁷ These factors encompass considerations such as statutory text, context, process, impact, and the persuasiveness of any justifications not rooted in animus, if applicable.¹⁰⁸ Animus goes beyond being merely an illegitimate purpose; it pollutes the government's action. The speculative and sometimes far-fetched justifications that might be adequate to support a law in typical rational-basis cases lose their effectiveness once animus is identified.

We can detect animus with the recent gender-affirming care bans; the purported reason for enacting the statute is not the actual reason. The courts must further scrutinize the statutory text, context, process, impact, and the government's claimed purpose to determine whether it is rational. Upon scrutinizing the statutory text and the exceptions outlined in the bill, along with considering the broader context of other anti-trans bills proposed by the lead sponsor in each state, it becomes evident that there is a clear animus against transgender minors.

103. *Id.*

104. *City of Cleburne*, 473 U.S. at 450.

105. *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014) (Holmes, Cir. J., concurring) ("[A]nimus may be present where the lawmaking authority is motivated solely by the urge to call one group 'other,' to separate those persons from the rest of the community.").

106. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 186 (2013).

107. *Id.* at 189-90.

108. *Id.* at 243.

B. Animus—Multiple Anti-Trans Bills Authored by the Same State Sponsors

These gender-affirming care bans are not enacted in a vacuum. Often, the same state senator or state house representative sponsors multiple anti-trans bills—further weakening the state’s arguments that they are not based on animus. The context and pattern of anti-trans bills show that the state legislators are not motivated by risks to minors but rather by anti-trans bias.

One example of this is in Arkansas’ 94th General Assembly (2023), State Senator Gary Stubberfield was the lead sponsor for two transphobic laws within the same session. First, in January of 2023, Mr. Stubberfield proposed an act to add restrictions to an adult-oriented performance, known as regulations to drag performance.¹⁰⁹ Next, in early February 2023, Mr. Stubberfield proposed a second transphobic bill, “Concerning Medical Malpractice And Gender Transition In Minors; And To Create The Protecting Minors From Medical Malpractice Act Of 2023,”—a ban on gender-affirming care for trans minors.¹¹⁰

The original text in the proposed bill to restrict adult-oriented performances included language such as where a performance “[e]xhibits a gender identity that is different from the performer’s gender assigned at birth.”¹¹¹ This language about being different from one’s “gender assigned at birth” is echoed in the gender-affirming care ban legislation also proposed by Sen. Stubberfield. That bill states, “[g]ender transition’ means the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex.”¹¹² The use of indistinguishable language in two seemingly unrelated bills exposes a lack of genuine concern for the protection of minors. Instead, it reveals an underlying motive driven by personal dislikes and prejudice, or animus, against transgender people.

Additionally, North Carolina provides another example of how context can show animus in legislation. Members of the North Carolina General Assembly have sponsored multiple anti-trans bills over the course of years. Back in 2016, Representative Dean Arp sponsored an anti-trans bathroom

109. S.B. 43, 94th Assemb., Reg. Sess. (Ark. 2023).

110. S.B. 199, 94th Assemb., Reg. Sess. (Ark. 2023).

111. Tess Vrbin, “Gutted” Arkansas bill no longer targets drag performers or LGBTQ community, activists say, ARK. ADVO. (Feb. 3, 2023, 7:30 PM), <https://arkansasadvocate.com/2023/02/03/gutted-arkansas-bill-no-longer-targets-drag-performers-or-lgbtq-community-activists-say/>.

112. Ark. Code § 20-9-1501(5).

bill,¹¹³ alleging that the bill was for “citizens . . . bodily privacy”¹¹⁴ and stating that “[i]t’s common sense, biological men should not be in women’s showers, locker rooms and bathrooms.”¹¹⁵ This legislation’s rationale rested almost entirely on the fear of transgender people and was motivated to “separate those persons from the rest of the community.”¹¹⁶ The law prohibited transgender people (those whose gender presentation does not match the sex listed on their birth certificate) and cisgender people of the opposite sex from using the bathroom.¹¹⁷ But, it listed many exceptions when cisgender people were permitted to enter a bathroom. For instance, the law allowed exceptions such as “[f]or custodial purposes.”¹¹⁸ The law allowed for a cisgender “biological” male janitor to enter a girls’ bathroom but not a transgender girl—a result that undermined the stated intent to protect bodily privacy. Though that law was later repealed,¹¹⁹ it started a pattern of anti-trans legislation by the same state representatives. In 2023, Representative Arp continued this trend and sponsored more anti-trans bills—North Carolina’s gender-affirming care ban, NC H808, and an anti-trans in sports bill, NC H574.¹²⁰ There is one consistent thread through each of these bills: animus toward transgender people.

Transgender identity is a key aspect of personhood and not merely a personal decision that the state should be able to regulate freely. Being transgender is not a switch that can be flipped on and off. It is at the core of someone’s person. Preventing the expression of transgender identity through a performance bill, a bathroom bill, an anti-trans in sports bill, or a gender-

113. H.B. 2, Gen. Assemb., Second Extra Assemb. (N.C. 2016).

114. Zach Stafford, *North Carolina’s anti-trans law is downright dangerous*, GUARDIAN, (Mar. 24, 2016, 11:24 AM), <https://www.theguardian.com/commentisfree/2016/mar/24/north-carolina-anti-transgender-bathroom-law-dangerous-discrimination>; Fred Barbash, *North Carolina’s ‘bathroom law’ and the GOP drive to disempower upstart local governments*, WASH. POST (Apr. 15, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/15/behind-north-carolinas-bathroom-law-and-a-host-of-others-democrats-see-republican-big-government-at-work/> (Representative Dean Arp claiming the anti-trans bathroom bill is about protecting “bodily privacy in showers, locker rooms and bathrooms.”).

115. *North Carolina revokes transgender and gay protections*, BBC NEWS, (Mar. 24, 2016), <https://www.bbc.com/news/world-us-canada-35893281>.

116. *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014).

117. H.B. 2, Gen. Assemb., Second Extra Assemb. (N.C. 2016).

118. *Id.*

119. Jason Hanna et.al., *North Carolina repeals ‘bathroom bill’*, CNN, (Mar. 30, 2017) <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>.

120. NC H808, a gender-affirming care ban and NC H574 an anti-trans athletes in sports bill shared many of the same House Representative sponsors. Hugh Blackwell, Mark Pless, Ken Fontenot, Dean Arp, Celeste Cairns, Neal Jackson, Jake Johnson, Donnie Loftis, Jeffrey McNeely, Bill Ward, and David Willis all supported both bills. See H.B. 808, Gen. Assemb. (N.C. 2023); H.B. 57, Gen. Assemb. (N.C. 2023).

affirming care ban is based on animus and fear of trans people rather than merely disapproval of behavior. When considering the context of the same representatives proposing multiple anti-trans bills (sometimes using the exact same language), it becomes abundantly clear that the aim is “to disparage and to injure” transgender people. To shrink their personhood through the law. When state legislatures write laws out of fear of transgender people, they are writing laws with animus.

C. Animus: Exceptions in Legislation for Select Minors—Just Not Transgender Minors

The state’s alleged rationale for these bans is a farce. Most states proposing gender-affirming care bans assert that the purpose of enacting these bans is to protect children from “untested” and “experimental” treatments.¹²¹ State sponsors claim gender-affirming care treatment is unproven and harmful.¹²² However, this alleged rationale is undercut because the statutes list multiple exceptions that allow other minors to receive the same “experimental treatments” that the legislators claim to be concerned about. Some minors are still able to seek these so-called “untested and harmful treatments.” The bans do nothing to justify why some minors can receive treatment while transgender minors cannot.

First, by including exceptions for intersex minors and those with a verifiable disorder of sex development, the state is going against its own interest by allowing some minors to be “harmed” by the treatments. If the true intent was to safeguard minors from risky and “experimental treatments,” then it seems illogical to authorize *any* minors to undergo such procedures. For example, the Arkansas gender-affirming care ban, “Save Adolescents from Experimentation (Safe) Act,” does not save all adolescents from these treatments. In fact, it opens the door for some minors to get the treatments. The statute only prevents physicians and healthcare professionals from “provid[ing] gender transition procedures to any individual under eighteen (18) years of age.”¹²³ It then lists an exception stating that

121. Trudy Ring, *Mississippi Gov. Promises to Sign Ban on Gender-Affirming Care for Youth*, ADVOCATE (Feb. 22, 2023, 3:15 PM), <https://www.advocate.com/health-care/mississippi-governor-ban-transgender-care>; “Sen. Jeff Edler, R-State Center, repeatedly called the treatments ‘experimental.’”; see also Katie Akin, *Iowa ban on gender-affirming care for trans kids awaits Kim Reynolds’ signature. The impact.*, DES MOINES REGISTER (Mar. 7, 2023, 9:37 PM), <https://www.desmoinesregister.com/story/news/politics/2023/03/07/iowa-lawmakers-approve-gender-affirming-care-ban-for-transgender-youth/69980950007/>; Natasha Lennard, *Judges Keep Ruling That Anti-Trans Health Care Bans Make Shitty Law. The GOP Isn’t Giving Up*, INTERCEPT (July 6, 2023, 8:19AM), <https://theintercept.com/2023/07/06/trans-health-care-bans-courts/>.

122. *Id.*

123. Ark. Code Ann. § 20-9-1502 (West).

physicians and healthcare professionals are “not prohibited from providing any of the following procedures to an individual under eighteen (18) years of age” who is “born with a medically verifiable disorder of sex development, including a person with external biological sex characteristics that are irresolvably ambiguous, such as those born with 46 XX chromosomes with virilization, 46 XY chromosomes with undervirilization, or having both ovarian and testicular tissue;” or to those minors who “a physician has otherwise diagnosed a disorder of sexual development that the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action.”¹²⁴ The statute prohibits specific procedures for transgender children while permitting them for intersex or cisgender children. The Act explicitly forbids the use of puberty-blocking drugs only when employed “for the purpose of assisting an individual with a gender transition,” unmistakably targeting transgender minors. The statute’s intent is unquestionably not focused on preventing harm to minors. If that were the case, a ban would be applied universally. However, state legislatures recognize and accept the use of safe and medically necessary gender-affirming care treatments—yet selectively, in accordance with their personal preferences.

Second, gender-affirming care treatments are not experimental.¹²⁵ As articulated previously, these treatments are widely accepted in the medical community as “[effective and safe]”¹²⁶ and as evidence-based care that transgender people should be able to access.¹²⁷ “Medical intervention for transgender youth and adults (including puberty suppression, hormone therapy, and medically indicated surgery) is effective, relatively safe (when appropriately monitored), and has been established as the standard of care.”¹²⁸

124. *Id.* § 20-9-1502(c)(1).

125. See *WPATH/USPATH Public Statements*, *supra* note 31 (stating “[g]ender-affirming interventions are based on decades of clinical experience and research and are not considered experimental.”).

126. REDFIELD ET AL., *supra* note 9.

127. Jim Salter et al., *Some providers are Halting Gender-Affirming Care for Minors, Even Where it Remains Legal*, PBS NEWS HOUR, (Sept. 22, 2023, 12:34 PM), <https://www.pbs.org/newshour/nation/some-providers-are-halting-gender-affirming-care-for-minors-even-where-it-remains-legal>.

128. Position Statement by Pediatric Endocrine Society, ENDOCRINE SOC’Y, (Dec. 2020), <https://transhealthproject.org/resources/medical-organization-statements/pediatric-endocrine-society-special-interest-group-transgender-health-statements/>.

V. CONCLUSION

State laws prohibiting gender-affirming care are rooted in animus and disapproval towards transgender minors undergoing gender transition. The courts must recognize that when a state legislature enacts multiple bills that harm one group, there is probable animus directed at that group. Furthermore, a cursory examination reveals that state legislatures strategically carve out exceptions in the bills to allow cisgender minors—those deemed acceptable—to receive any of the treatments. While animus may not always be easily defined, in this instance, it is unmistakably apparent that states are enacting gender-affirming care bans out of animus against transgender people. Thus, the courts should apply rational basis with bite to any Equal Protection claim and find these gender-affirming care bans unconstitutional.