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Ignored, Harassed, and Endangered: States Must Provide Gender-Affirming Healthcare to Transgender Youth in Juvenile Detention

Jake Gnolfo[*]

In 2019, the U.S. Court of Appeals for the Ninth Circuit in Edmo v. Corizon, Inc. *held a prison's denial of gender-affirming care to a transgender adult prisoner constituted cruel and unusual punishment under the Eighth Amendment. However, the reality for incarcerated transgender juveniles is much different. It is incredibly hard, if not impossible, for transgender juveniles to obtain access to gender-affirming care while detained. Furthermore, states have begun banning gender-affirming healthcare for all transgender youth. Preliminary injunctions of these laws have been swift and successful; however, transgender juveniles remain left out of the conversation. While being restrained of their liberty, transgender youth held in juvenile facilities are prohibited from accessing life-saving gender-affirming healthcare, and they are suffering as a result.*

This Comment argues state legislatures should require that juvenile facilities provide gender-affirming healthcare to transgender juveniles and write guidelines for how to provide such care. It will provide up-to-date research on the best practices for treating gender dysphoria. It will analyze Edmo v. Corizon, Inc.*, and other recent caselaw regarding the constitutionality of denying gender-affirming care to adult transgender prisoners. It will analyze* Brandt v. Rutledge *and the state bans that prohibit transgender youth gender-affirming care. Using these cases, it will apply constitutional and public policy arguments that illustrate why incarcerated transgender juveniles should have access to gender-affirming care. Ultimately, this Comment will synthesize these arguments and provide a legislative proposal to best ensure incarcerated transgender juveniles have access to gender-affirming care.*

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* J.D. Candidate, Loyola University Chicago School of Law, 2024. Many thanks to the staff members of *Loyola University Chicago Law Journal*—especially Madison Causey and Madeleine Springer—for their edits and support. I also want to recognize the many LGBTQ+ activists fighting for transgender rights nationwide. You motivate me every day and inspired me to write this Comment.

INTRODUCTION 3
A. Gender Nonconformity, Gender Dysphoria, and Gender-Affirming Care 7
B. Transgender Youth Are Overrepresented in the Juvenile Legal System 11
II. DISCUSSION: THE CURRENT LEGAL LANDSCAPE REGARDING GENDER-AFFIRMING CARE FOR THE TRANSGENDER COMMUNITY 13
A. Prisons Deny Care to Transgender Adults 13
1. The Eighth Amendment Medical Standard 13
2. *Kosilek*: The First Major Case in the First Circuit 15
3. *Gibson*: The Fifth Circuit's Different Approach But Similar Outcome 18
4. *Edmo*: The Ninth Circuit Creates a Circuit Split 21
B. States Deny Care to Transgender Youth 23
1. Pre-2021 Transgender Healthcare History 24
2. 2021-Present: Six States Prohibit Healthcare for Transgender Youth.. 27
3. *Brandt*: The Litigation Strategy to Overturn These Transgender Youth Healthcare Bans 30
a. Equal Protection 31
b. Due Process 32
c. Freedom of Speech 33
4. Further State Policies That Will Impact the Availability of Transgender Juveniles' Access to Gender-Affirming Care 33
III. ANALYSIS: TRANSGENDER JUVENILES DEMAND THE ABILITY TO RECEIVE GENDER-AFFIRMING CARE 36
A. Edmo and Brandt Are Correct and Should Be Applied in the Juvenile Context... 36
B. Policy Arguments.. 43
1. Mental Health 43
2. Negative Juvenile Detention Experiences 47
3. Stopping Treatment: Withdrawal................................ 50
4. Poor Future Outcomes.. 51
IV. MOVING FORWARD: A LEGISLATIVE PROPOSAL TO GUARANTEE THE RIGHT TO GENDER-AFFIRMING CARE FOR TRANSGENDER JUVENILES 53
CONCLUSION 55
APPENDIX 57

INTRODUCTION

In 2002, Alyssa Rodriquez lived as a transgender[1] teenager.[2] She had been taking hormone treatment to ease her gender dysphoria which enabled her to live comfortably as the girl she identified as.[3] However, after an encounter with the police, the state sent Alyssa to the Red Hook Residential Center in New York City.[4] As an incarcerated transgender juvenile, the state housed her incorrectly in the male wing of the detention center even though she publicly identified as female.[5] The state abruptly stopped her prescribed hormone treatment.[6] Inmates and guards punished and harassed her for her feminine hairstyle and other certain features of her personality and gender expression.[7]

Due to the harassment and hormone withdrawal, Alyssa suffered from nausea, headaches, increased facial hair, and severe mental distress.[8] Her attorney sought a court order to force Red Hook to provide her gender-affirming care and change her placement, but the court and facility refused.[9] For the two years she spent in juvenile detention, Alyssa never had access to gender-affirming care, and she suffered as a result.[10]

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1. For purposes of this Comment, transgender and trans may be used interchangeably and includes all transgender, gender nonconforming, genderqueer, non-binary, and intersex people. Transgender is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. *Understanding Transgender People, Gender Identity and Gender Expression*, AM. PSYCH. ASS'N (Mar. 9, 2023), https://www.apa.org/topics/lgbtq/transgender#:~:text=Transgender%20is%20an%20umbrella%2term,they%20were%20assigned%20at%20birth [https://perma.cc/K4AK-HQF3].
2. *See* KATAYOON MAJD ET AL., *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS* 112 (2009) (discussing widespread discrimination that transgender juveniles experience in juvenile detention). This report was the foundation for this Comment and showed this issue needed to be addressed. *See also Lambda Legal and Sylvia Rivera Law Project Settle Lawsuit on Behalf of Transgender Youth Denied Appropriate Care in State Custody*, LAMBDA LEGAL (Dec. 20, 2006), lambdalegal.org/news/ny_20061220_lambda-and-sylvia-rivera-settle-on-behalf-transgender-youth [https://perma.cc/W646-GB6T] [hereinafter *Lambda Legal and Sylvia Rivera Law Project*] (discussing Alyssa's case history). Reading this case shows the general population does not understand the importance that gender-affirming care has with transgender youth and why this issue must be written about.
3. MAJD ET AL., *supra* note 2, at 112; *Lambda Legal and Sylvia Rivera Law Project*, *supra* note 2 (experiencing severe withdrawal symptoms after periods without hormones).
4. MAJD ET AL., *supra* note 2, at 112; *Lambda Legal and Sylvia Rivera Law Project*, *supra* note 2.
5. *Lambda Legal and Sylvia Rivera Law Project*, *supra* note 2.
6. *Id.*; MAJD ET AL., *supra* note 2, at 112.
7. *Lambda Legal and Sylvia Rivera Law Project*, *supra* note 2.
8. *Id.*; MAJD ET AL., *supra* note 2, at 112.
9. MAJD ET AL., *supra* note 2, at 112.
10. After her release, Alyssa sued the New York State Office of Children and Family Services for failing to provide her with adequate healthcare while incarcerated in Rodriquez v. Johnson. *Lambda Legal and Sylvia Rivera Law Project, supra* note 2. The case later settled out of court with

Kyle, a transgender male, also requested gender-affirming care while in the custody of the state.[11] Unlike Alyssa, Kyle had never been prescribed hormone treatment before the court sent him to a juvenile detention facility.[12] After undergoing counseling and therapy, he felt he needed access to gender-affirming care while being detained.[13] He asked his attorney to request a court order regarding potential gender-affirming care, however, his attorney dismissed the request.[14] Kyle stated his attorney saw him simply as a lesbian and was ignorant of his correct gender identity.[15] The juvenile court judge also dismissed Kyle's concerns by referring to prescription hormones as drugs and equating them with illegal narcotics.[16] Due to these ignorant and discriminatory practices, Kyle continued to suffer from gender dysphoria and did not receive the healthcare he needed until he was released from custody at eighteen.[17]

Alyssa and Kyle's experiences are typical across the United States.[18] Juvenile detention facilities do not consider transgender healthcare a priority for detained juveniles.[19] The purposed mission of juvenile court is to rehabilitate juveniles through counseling, education,

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the help of the Sylvia Rivera Law Project and Lambda Legal. *Id.* Alyssa received monetary damages for her harmful treatment while in custody, and OCFS also pledged to implement new guidelines regarding transgender incarcerated juveniles, including where to place them, how to treat them, and mandated all staff transgender training. *Id.*; *see* MAJD ET AL., *supra* note 2, at 112 (describing how since the 2006 lawsuit, the Office and Children and Family Services (OCFS) adopted a policy that helps LGBT youth get their needs met). In this Comment, I hope to replicate Alyssa's post-release experience and persuade all states to adopt similar practices as OCFS.

11. MAJD ET AL., *supra* note 2, at 51. Along with the present consequences of denying medical care, there are also future consequences that put transgender child in more danger through exposure to HIV and engaging in prostitution post-release to secure hormone treatment. *Id.*

12. *Id.* at 51. Entering a juvenile detention facility without a gender-affirming care plan is common since juveniles may be entering the system without strong family ties and medical support. *See* discussion *infra* Part III.B.4.

13. MAJD ET AL., *supra* note 2, at 51.

14. *Id.*

15. *Id.* This assumes the attorney referred to Kyle as a cisgendered woman. Misgendering is detrimental to trans teens' mental health. *See infra* Part IV.B.1; *see also* Tanya Albert Henry, *For Transgender Kids, Gender-Affirming Names Can Be Lifesaving*, AM. MED. ASS'N (June 4, 2021), https://www.ama-assn.org/delivering-care/population-care/transgender-kids-gender-affirming-names-can-be-lifesaving [https://perma.cc/T2S7-AAVG] (discussing the importance of proper pronouns).

16. MAJD ET AL., *supra* note 2, at 51.

17. *Id.*

18. *Id.; see* CTR. FOR AM. PROGRESS ET AL., UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 6 (2017) [hereinafter UNJUST] (discussing the issues that LGBTQ+ juveniles face while incarcerated). Transgender healthcare varies greatly among juvenile correction facilities, and a court order may be required for any sort of action for transgender juvenile offenders. *Id.*

19. UNJUST, *supra* note 18, at 5 ("Now when a youthful offender who is LGBTQ comes in, they are processed much differently, providing the best possible outcome for the general population and the staff.").

and proper food and shelter.[20] However, transgender juveniles often face harassment, stigmatization, and continual mental and physical distress by being denied access to life-saving healthcare.[21]

In this Comment, I emphasize that trans juveniles need to be heard, and states should take legislative and regulatory action to protect the health and safety of transgender juveniles. Traditionally, LGBTQ+ and prisoners' rights activists have used a litigation-focused strategy where they allege current government action, or lack thereof, violates an individual's constitutional rights.[22] However, the Supreme Court has recently taken an extremely hostile view of fundamental rights.[23] In June 2022, the Supreme Court overturned the fundamental right to an abortion for individuals[24] capable of becoming pregnant.[25] *Dobbs v. Jackson Women's Health Organization* overturned decades of precedent and has had wide-ranging ramifications for other fundamental rights rooted in the right to privacy.[26] In *Dobbs*, Justice Thomas concurred and stated other "erroneous" fundamental rights may be reconsidered.[27] Due to this dangerous rhetoric and potential trickle-down effect to the lower federal circuits, litigation may not be a promising course of action. Additionally, an unfavorable decision may set the LGBTQ+ movement

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20. *Id.* at 1.

21. UNJUST, *supra* note 18, at 1; *see infra* Part III.B (discussing the policy reasons for why gender-affirming care must be provided in juvenile detention facilities).

22. *See infra* Part II (discussing three cases across three federal circuits alleging prisons failed to provide medically necessary care to LGBTQ+ juveniles).

23. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (undoing decades of precedent by holding there is no fundamental right to abortion).

24. Public commentary on abortion typically designates the right to an abortion as a woman's rights issue. Although this is largely correct, transgender men and non-binary individuals may still become pregnant and seek abortions. To continue use of gender-inclusive language, I use "individuals capable of becoming pregnant." For more information on this correct usage, see generally Lauren Paulk, *Abortion Access Is an LGBTQ Issue*, NAT'L CTR. FOR LESBIAN RTS (Oct. 1, 2013), https://www.nclrights.org/abortion-access-is-an-lgbt-issue/ [https://perma.cc/BC96-2L3P].

25. *Dobbs*, 142 S. Ct. at 2284.

26. *See* Amanda Hainsworth, Dobbs *and the Post-*Roe *Landscape*, 66 BOSTON BAR J. 9, 11 (2022) ("There is good reason to fear for the future of constitutional privacy rights given this Supreme Court's willingness to contort stare decisis principles to reach a desired outcome."); Yvonne Lindgren, Dobbs v. Jackson Women's *Health and the Post-*Roe *Landscape*, 35 J. AM. ACAD. MATRIMONIAL L. 235, 244 (2022) ("Just as the majority wrote about how abortion is not deeply rooted in the nation's history or tradition, the same could be said of each of the other rights . . . .").

27. *See Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring). Justice Thomas stated,

> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.

Id. (citations omitted).

decades back until the current bench is replaced.[28]

As such, this Comment recommends a different approach. Using recent Eighth Amendment, Equal Protection and Due Process Clause caselaw and transgender public policy research, I provide a legislative proposal for states that affirms the right to gender-affirming care in juvenile facilities and provides guidelines for juvenile facilities on how best to ensure every trans juvenile receives the care they deserve. I call on advocacy organizations, medical associations, LGBTQ+ activists, and legislators to take this proposal and implement it in their state to finally recognize the existence of transgender juveniles and their custodial discrimination.

To support this thesis, in Part I, I provide critical background regarding transgender gender-affirming care, including a description of gender dysphoria, what gender-affirming care is, and how to receive it. Additionally, I briefly detail how juvenile offenders are increasingly identifying as LGBTQ+ and transgender.

In Part II, I discuss the current legal landscape of gender-affirming care in the transgender community. In Part II.A, I focus on the circuit split regarding gender-affirming care for adult transgender prisoners. First, I provide background information on what the standard for denial of a prisoner's medical care claims are under the Eighth Amendment. I break down three cases across three circuits that disagree on whether the state must provide incarcerated transgender adult prisoners with gender confirmation surgery. I discuss these cases to illustrate how courts have determined gender-affirming care is medically necessary for transgender incarcerated individuals.

In Part II.B, I discuss the emerging movement to criminalize gender-affirming care for transgender youth in Republican-led states. I break down why these laws are being introduced and passed, along with the current litigation strategy to overturn these laws. Finally, I provide an update on the insurance and Medicaid restrictions of gender-affirming care for all transgender individuals. I discuss state legislation and litigation to illustrate how states control the availability of gender-affirming care for transgender youth. As such, advocacy for state-level legislative change should be pursued to protect the health of trans juveniles.

In Part III, I synthesize the constitutional arguments that illustrate why states should provide transgender juveniles with access to gender-affirming care. I detail how *Edmo v. Corizon* and *Brandt v. Rutledge* can

28. Silvia Foster-Frau, *LGBTQ Community Braces for Rollback of Rights after Abortion Ruling*, WASH. POST (June 24, 2022, 4:50 PM), https://www.washingtonpost.com/nation/2022/06/24/abortion-fears-lgbtq-gay-rights/ [https://perma.cc/3MDR-XE6K].

be applied to the juvenile context. I supplement the cases with public policy research behind gender-affirming care. The public policy arguments are included to show the real life implications of denying gender-affirming care to trans juveniles. Detailing this analysis will build support for why states should take the lead on providing the right to gender-affirming care in their juvenile facilities. Failing to do so is not only unconstitutional according to these cases but is also detrimental to the lives of trans individuals and to society as a whole.

In Part IV and the Appendix, I provide a proposal that states should enact to ensure proper treatment of transgender juveniles. This proposal affirms the right to gender-affirming care for trans youth in juvenile detention. I provide specific guidelines that detail exactly how such care should be provided for trans juveniles.

I. Background

Transgender issues, especially those dealing with transgender offenders, do not receive the media attention they deserve, therefore, a thorough discussion of treatments, the standards of care, and the process of obtaining gender-affirming care is needed. Because this Comment focuses on transgender juveniles, information on the overrepresentation of LGBTQ+ juveniles in juvenile detention centers is provided.

A. Gender Nonconformity, Gender Dysphoria, and Gender-Affirming Care

Federal courts have mandated prisons and jails follow established modern medical science when making decisions regarding prisoners' medical care.[29] With the transgender community, the source for proper medical standards of care is the World Professional Association for Transgender Health Standards of Care (WPATH-SOC).[30] The WPATH-SOC combines research and medical expertise to assist families, doctors, courts, insurance companies, and many other parties regarding how to provide transgender people with appropriate medical care.[31]

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29. Mike Greene, *Adree Edmo, the Eighth Amendment, and Abolition: Evaluating the Fight for Gender-Affirming Care in Prisons*, 28 WM. & MARY J. RACE GENDER & SOC. JUST. 445, 452 (2022) (citing United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987)).

30. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE 1 (7th ed. 2012) [hereinafter WPATH-SOC] https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [https://perma.cc/WHZ6-GKZ5]. WPATH is a world-renowned organization that brought together diverse professionals to develop the best practices that "promote health, research, education, respect, dignity, and equality for transexual transgender and gender nonconforming people in all cultural settings." *Id.*

31. *Id.*

The WPATH-SOC begins by distinguishing two inter-related concepts: gender nonconformity and gender dysphoria.[32] Gender nonconformity "refers to the extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex."[33] Gender dysphoria "refers to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)."[34] These two concepts are commonly interchanged by the general population, however, in the medical community, keeping them separate is crucial.[35] Whereas both deal with transgender individuals changing their appearance to match their identity, only gender dysphoria is a medical term that is recognized as a mental disorder.[36] The WPATH-SOC emphasizes that only some trans individuals develop gender dysphoria at some point in their life.[37]

Because gender dysphoria is a diagnosable medical condition, it is included in the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V).[38] The American Psychiatric Association (APA) defines gender dysphoria as a "marked incongruence between one's experienced/expressed gender" which manifests as two of the following criteria for six months:

> 1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics . . . .
> 2. A strong desire to be rid of one's . . . sex characteristics because of a marked incongruence with one's experienced/expressed gender . . . .
> 3. A strong desire for the . . . sex characteristics of the other gender.
> 4. A strong desire to be of the other gender . . . .

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32. *Id.* at 5.

33. *Id.* (citing INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING (National Academic Press 2011)).

34. *Id.* (citing N. M. Fisk, *Gender Dysphoria Syndrome—The Conceptualization That Liberalizes Indications for Total Gender Reorientation and Implies a Broadly Based Multi-Dimensional Rehabilitative Regimen*, 120 WEST J. MED. 386, 386–91 (1974); *see also* Gail Knudson et al., *Recommendations for Revision of the DSM Diagnoses of Gender Identity Disorders: Consensus Statement of the World Professional Association for Transgender Health*, 12 INT'L J. TRANSGENDERISM 115, 115–18 (2010) (describing gender dysphoria).

35. WPATH-SOC, *supra* note 30, at 5.

36. *Id.*

37. *Id*. Gender nonconforming juveniles are not the focus of this paper as the juveniles who demand gender-affirming care have been diagnosed with gender dysphoria. However, they are still relevant here because even if a trans juvenile does not have gender dysphoria, they are still bullied, harassed, and victimized in juvenile facilities and demand equal treatment. The legislative proposal in the Appendix of this Comment not only ensures gender-affirming care for juveniles with gender dysphoria; it also protects all LGBTQ+ juveniles from the discrimination they face in juvenile facilities.

38. *See generally* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AM. PSYCHIATRIC ASS'N (5th ed. 2013) [hereinafter DSM-V].

> 5. A strong desire to be treated as the other gender . . . .
> 6. A strong conviction that one has the typical reactions and feelings of the other gender . . . .[39]

Those diagnosed with gender dysphoria may receive various forms of treatment through gender-affirming care.[40] Gender-affirming care is an umbrella term to describe several different interventions to alleviate gender dysphoria and allow an individual to match their internal gender identity with their external appearance.[41] To facilitate uniform application of these interventions, WPATH created the Standards of Care, so medical professionals have recommendations to guide their decisions regarding which treatment options are available and recommended for their patients.[42]

First, when a trans patient experiences the symptoms of gender dysphoria, the medical professional should diagnose the individual accordingly.[43] As previously stated, with a diagnosis, the medical professional can officially place the individual on a variety of treatment plans.[44] For the WPATH-SOC, time is crucial.[45] To be eligible for certain treatments like hormones or surgery, the individual must have had gender dysphoria or previous treatment for a specified amount of time, therefore, the relevant timing may determine potential care.[46]

Second, the medical professional will prioritize non-medical courses of action.[47] These include sending the patient to peer support groups, referring them to a counselor or therapist specialized in gender dysphoria, providing resources for friends and family, changing the patient's name and pronouns, altering how they dress, do their hair, and express their gender, and changing their physical appearance including breast binding,

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39. *Id.* at 452; *see What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/9P6Y-R2T4] (last visited Aug. 20, 2022) (describing Gender Dysphoria in layperson's terms).

40. WPATH-SOC, *supra* note 30, at 5.

41. *Id.* (citing W.O. Bockting & J.M. Goldberg, *Guidelines for Transgender Care (Special Issue)*, 9 INT'L J. TRANSGENDERISM (2006)).

42. *Id.* at 9–21.

43. *Id.* at 5–6.

44. *Id.*

45. *Id.* at 9–21.

46. WPATH-SOC, *supra* note 30, at 9–21. To be diagnosed with gender dysphoria, one must have symptoms for six months. *Id.* at 71. To be eligible for puberty blockers, these symptoms must be long-lasting. *Id.* at 19. To be eligible for hormone replacement therapy, one must have the consent of their parent or, in most countries, be sixteen. *Id.* at 20. To be eligible for gender confirmation surgery, one must have reached the age of majority (typically eighteen and continuously lived "for at least 12 months in the gender role that is congruent with their gender identity." *Id.*

47. *Id.* at 9–10 (outlining options for social support and changes in gender expression as alternatives to options for psychological and medical treatment).

genital tucking, and padding of hips.[48]

Third, if these recommendations prove unsuccessful in alleviating gender dysphoria, physical interventions may be recommended.[49] The WPATH-SOC divides physical interventions into three categories by reversibility: full reversibility, partial reversibility, and irreversibility.[50]

Fully reversible interventions are only for adolescents going through puberty.[51] They include medication known as puberty blockers which stop the progression of puberty in adolescents.[52] The WPATH-SOC recommends puberty blockers because it allows adolescents time to explore their identity through the non-medical treatments previously discussed.[53] Additionally, if unsuccessful, the next stage of gender-affirming care will be much easier as secondary sex characteristics have not yet developed.[54]

Partially reversible interventions, usually beginning at age sixteen, allow trans patients to be prescribed hormone replacement therapy (HRT).[55] HRT is an injection that provides the hormone that matches the patient's gender identity as opposed to their sex assigned at birth.[56] For trans girls, HRT involves injecting estrogen,[57] which causes breast growth, softer skin, and a reduction in body hair.[58] For trans boys, HRT involves taking testosterone,[59] which causes hair growth, a deeper voice, and muscle growth.[60] The decision to take HRT usually requires parental consent for youth and is a decision reached by the entire medical team, including the adolescent's doctor and therapist.[61]

Finally, irreversible intervention includes gender confirmation surgery (GCS).[62] These surgeries include breast and reproductive organ removal

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48. *Id.*
49. *Id.* at 18–21.
50. *Id.* at 18–21.
51. *Id.* 18.
52. *Id.*
53. *Id.* at 19. For more information on the effects and importance of puberty blockers, see Lena Wilson, *What Are Puberty Blockers?*, N.Y. TIMES (May 11, 2021), nytimes.com/2021/05/11/well/family/what-are-puberty-blockers.html [https://perma.cc/6K3P-9288].
54. WPATH-SOC, *supra* note 30, at 19.
55. *Id.* at 20.
56. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2166–67 (2021) [hereinafter *Outlawing*]. This Comment focuses on the ramifications of transgender youth healthcare bans and provides a litigation template to overturn these laws.
57. *Id.* at 2167; WPATH-SOC, *supra* note 30, at 48.
58. *Outlawing*, *supra* note 56, at 2167; WPATH-SOC, *supra* note 30, at 38.
59. *Outlawing*, *supra* note 56, at 2167; WPATH-SOC, *supra* note 30, at 49.
60. *Outlawing*, *supra* note 56, at 2167; WPATH-SOC, *supra* note 30, at 37.
61. WPATH-SOC, *supra* note 30, at 20.
62. *Id.* at 21.

and alteration.[63] However, the WPATH-SOC require the patient to have reached the age of majority to be eligible.[64] In the U.S., the age of majority is eighteen, causing GCS to rarely be performed on trans youth.[65] For the purposes of this Comment, gender-affirming care for juveniles will only pertain to therapeutic intervention, puberty blockers, and HRT. This Comment in no way recommends or requests states to allow GCS for transgender individuals as WPATH and other medical professionals do not recommend surgery for trans adolescents.[66]

B. Transgender Youth Are Overrepresented in the Juvenile Legal System

Nationwide, 1.6 million people thirteen or older identify as transgender (roughly 0.6 percent of the total U.S. population)[67] and approximately 300,000 of those are youth, aged thirteen to seventeen, which constitutes roughly 1.4 percent of the total U.S. youth population.[68] Recent research on the juvenile legal system shows an increased overrepresentation of LGBTQ+ adolescents in juvenile detention facilities.[69] Within the juvenile legal system, the number of transgender juveniles is grossly disproportionate.[70] There are few studies breaking down juveniles by their gender identity and sexual orientation, but the few that have been conducted show transgender individuals are overrepresented in juvenile facilities.[71]

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63. WPATH-SOC, *supra* note 30, at 21; *Outlawing*, *supra* note 56, at 2167.
64. WPATH-SOC, *supra* note 30, at 21; *Outlawing*, *supra* note 56, at 2167.
65. WPATH-SOC, *supra* note 30, at 21; *Outlawing*, *supra* note 56, at 2167.
66. WPATH-SOC, *supra* note 30, at 21; *Outlawing*, *supra* note 56, at 2167.
67. 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) (in this data set, the Williams Institute included gender-nonconforming, gender queer, and non-binary people as transgender).
68. *Id.*
69. Angela Irvine & Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 J. GENDER, SOC. POL'Y & L. 243, 248–49 (2016). This monumental study has shown the need for increased attention to juvenile facilities and whether LGBTQ+ juveniles are being treated fairly while in custody.
70. *Id.*
71. Even with the very few studies showing overrepresentation, LGBTQ+ juveniles are likely even more overrepresented than these studies report for multiple reasons. *See* Angela Irvine, "*We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Nonconforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 678–81 (2010) (discussing important limitations of LGBTQ+ juvenile overrepresentation research).
First, most research has been privately conducted.one study found that no government jurisdiction formally collected data on youths' sexual orientation and gender identity. *Id.* at 678. Because the data comes from predominantly private sources, it may not be as extensive and accurate as government research. Second, all data collected relies on the juvenile reporting their sexual

The first study controlling for LGBTQ+ populations found that 15 percent of juveniles in detention facilities identified as LGBT.[72] However, this data set excluded nonbinary adolescents and those questioning their identity or sexuality.[73] Regardless, LGBTQ+ adolescents account for 6–8 percent of all youth in the U.S., so this initial study shows LGBT juveniles are 2.5 times more likely to be in a juvenile detention facility than cisgendered heterosexual adolescents.[74]

Taking this critique into account, the authors revised the study and included all gender minority children in their analysis where they found 20 percent of juveniles in detention facilities identified as LGBTQ+.[75] Contrasted with 6–8 percent of the general population, the inclusion of more LGBTQ+ adolescents made them 3.5 times more likely to be in a juvenile detention facility.

Furthermore, these percentages were broken down by gender identity of juveniles in state custody. For males assigned at birth, roughly 10.1 percent of juveniles did not identify as male, thus identifying as gender nonconforming, non-binary, or as a transgender woman.[76] For females assigned at birth, roughly 17 percent of them did not identify as female, thus identifying as gender nonconforming, non-binary, or as a transgender man.[77]

This study did not re-aggregate all juveniles who are gender non-confirming, therefore, to estimate their combination, 12–15 percent of all juveniles in state custody identified as a gender that did not correspond to their sex assigned at birth.[78] Overall, 1.4 percent of the general youth U.S. population identify as transgender[79] and 12–15 percent of all incarcerated juveniles identify as transgender.[80] These alarming statistics illustrate how the denial of gender-affirming care in juvenile facilities

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orientation and gender identity. *Id.* at 680. With the widespread prevalence of discrimination, mistreatment, and alienation in the juvenile legal system, juveniles may not feel comfortable disclosing their sexual orientation or gender identity, therefore, any voluntary disclosure is likely underreported. *Id.* Finally, studies vary in their definition of LGBTQ+ when surveying juveniles. Some limit the definition to lesbian, gay, and bisexual (LGB) juveniles, while others include transgender juveniles (LGBT), thus ignoring non-binary or questioning juveniles. *Compare* Irvine, *supra* 71, at 678 (collecting data on LGB juveniles) *and* Irvine and Canfield, *supra* 69, at 248–49 (collecting data on LGBT juveniles).

72. Irvine, *supra* note 71, at 686.

73. *Id.*

74. *Id.*; Bianca D.M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. YOUTH ADOLESCENCE 1547, 1548 (2017) [hereinafter *Disproportionality and Disparities*].

75. Irvine & Canfield, *supra* note 69, at 248–49.

76. *Id.*

77. *Id.* at 249.

78. *Id.* at 248–49.

79. HERMAN, *supra* note 67, at 1.

80. *Id.*

may be prevalent and must be addressed.

II. Discussion: The Current Legal Landscape Regarding Gender-Affirming Care for the Transgender Community

A. Prisons Deny Care to Transgender Adults

In the past decade, three federal circuits have come to three different conclusions regarding the ability of transgender prisoners to receive gender confirmation surgery (GCS).[81] An important caveat to these cases is their relation to trans youth. Whereas these cases determine the constitutionality of denying GCS to adult trans offenders, this Comment does not advance providing GCS for trans youth as it is not recommended for trans youth.[82] Rather, these cases are included to discuss the medical necessity of gender-affirming care and the legitimacy of the WPATH-SOC. This section will first discuss the Eighth Amendment medical standard as each case relies on it for its decisions. This section will then analyze these decisions in chronological order: *Kosilek v. Spencer* from the First Circuit, *Gibson v. Collier* from the Fifth Circuit, and *Edmo v. Corizon* from the Ninth Circuit.

1. The Eighth Amendment Medical Standard

This Comment focuses on the right of transgender juveniles to receive gender-affirming care while in a juvenile detention facility. To date, there have been no court decisions handed down regarding transgender juvenile healthcare; however, three transgender adult prisoners have brought claims that reached the federal courts of appeals.[83] These cases will be discussed in the next three sections, however, their litigation strategy has been the same: the denial of GCS while incarcerated is a violation of the Eighth Amendment right against cruel and unusual punishment.[84]

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81. *Compare* Kosilek v. Spencer, 774 F.3d 63, 89 (1st Cir. 2014), *and* Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) (ruling prisons do not have to provide transgender adult prisoners with gender confirmation surgery), *with* Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019) (ruling the denial of gender confirmation surgery for transgender inmates is cruel and unusual punishment).

82. WPATH-SOC, *supra* note 30, at 46 (noting the lifelong implications of medical treatment).

83. *See Kosilek*, 774 F.3d at 96 (rejecting a trans prisoner's claim that sex reassignment surgery was a medical necessity and, therefore, the prison could constitutionally refuse to provide her access to the surgery); *Gibson*, 920 F.3d at 227–28 (expanding the *Kosilek* decision to create a blanket ban on sex reassignment surgery claims under the Eighth Amendment); *Edmo*, 935 F.3d at 767 (disagreeing with *Kosilek* and *Gibson* by ruling that denying gender confirmation surgery in medically necessary cases was cruel and unusual punishment, making this the first Federal case to allow gender confirmation surgery in prisons). Although this Comment focuses on these three cases, other trans prisoners have likely filed lawsuits but were dismissed, dropped, or unsuccessful.

84. *See Kosilek*, 774 F.3d at 68 (raising the issue whether the Department of Corrections has

In *Estelle v. Gamble,* the Supreme Court held the government has an "obligation to provide medical care" to incarcerated individuals, and a prison's "deliberate indifference to serious medical needs of prisoners constitute[d] the 'unnecessary and wanton infliction of pain,'" in violation of the Eighth Amendment.[85] Courts utilize a two-prong test—with an objective and subjective component—to evaluate Eighth Amendment claims.

First, the prisoner must prove they have a serious medical need.[86] To prove this prong, a prisoner must objectively "show a 'serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'"[87] Additionally, "[s]erious medical needs can relate to 'physical, dental and mental health.'"[88] In the case of gender-affirming care for transgender prisoners, the patient must show their course of treatment was recommended by a licensed medical professional who used recognizable standards of care such as the WPATH-SOC and DSM-V.[89] With transgender medical care, there tends to be political discourse on the legitimacy of transgender issues and healthcare, so the objective lens may still be skewed by the political leanings of the justices on the bench.[90]

Second, if the objective prong is met, the prisoner must show the prison was deliberately indifferent to their serious medical need.[91] Deliberate indifference does not mean "[a]n inadvertent or negligent failure to provide adequate medical care,"[92] but rather "that the course of treatment the [official] chose was medically unacceptable under the circumstances and that the [official] chose this course in conscious disregard of an

violated the Cruel and Unusual Punishment Clause of the Eighth Amendment by providing inadequate medical care); *Gibson*, 920 F.3d at 218, 227 (challenging policy as unconstitutional under the Eighth Amendment); *Edmo*, 935 F.3d at 775 (asserting Petitioner's Eighth Amendment rights had been violated).

85. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

86. *Id.*

87. *Edmo*, 935 F.3d at 785 (citing Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991))).

88. *Edmo*, 935 F.3d at 785 (citing Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982)).

89. Greene, *supra* note 29, at 455.

90. *Id.* In transgender cases, judge biases arise as transgender issues are typically ignored, so ignorance regarding proper pronouns, terminology, and the specific needs of trans individuals is typical. *See Kosilek*, 774 F.3d at 68 and *Gibson*, 920 F.3d at 215–16 (both ruling prisons do not have provide transgender adult prisoners with gender confirming surgery).

91. *Edmo*, 935 F.3d at 786 (noting that medical malpractice does not become a constitutional violation simply because the patient is a prisoner).

92. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 105–06 (1976) and Farmer v. Brennan, 511 U.S. 825, 835 (1994)).

excessive risk to the plaintiff's health."[93] As such, these decisions are always analyzed on a case-by-case basis.[94] To prove this prong, transgender prisoners often introduce lengthy accounts of their history of self-harm including suicide attempts and/or self-castration, mental health reports of their gender dysphoria, and expert opinions regarding which course of treatment the prison official should have taken.[95]

2. *Kosilek*: The First Major Case in the First Circuit

In 1994, Michelle Kosilek was sentenced to a term of life imprisonment without parole for the murder of her then-wife.[96] Kosilek was a transgender woman who suffered from gender dysphoria.[97] Over a twenty-year period, Kosilek battled the Massachusetts Department of Corrections (MDOC) over her gender-affirming care, amounting to a lengthy record to illustrate the case history.[98]

In 1992 while awaiting her criminal trial, she first sued the MDOC for failing to provide her with medical care for her gender dysphoria following her first attempted self-castration after being denied GCS.[99] At the time, the prison used a "freeze-frame" policy where a prisoner would only receive gender-affirming care that they were prescribed at the time of admittance.[100] As such, since Kosilek entered the prison without any plan or prescription for HRT or GCS, she was only eligible for "supportive therapy" to cope with her gender dysphoria.[101]

In 2002, the district court decided the first case, known as *Kosilek I,* in favor of the MDOC.[102] Although Kosilek did prove an objective serious medical need, the MDOC was unaware it needed to provide additional gender dysphoria treatment for Kosilek. Thus, Kosilek did not meet the

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93. *Id.* (alterations in original) (citing Hamby v. Hammond, 821 F.3d 1085, 1092 (9th Cir. 2016) (quoting Snow v. McDaniel, 681 F.3d 978, 988 (9th Cir. 2012))).

94. Greene, *supra* note 29, at 454. A rare exception to this rule is *Gibson*, 930 F.3d at 217. *See generally infra* Part III.A.3 (describing how prisons do not have to provide GCS to any prison inmate).

95. Greene, *supra* note 29, at 456.

96. *Kosilek*, 774 F.3d at 68–69.

97. *Id.* at 68. The case uses Gender Identity Disorder to describe Kosilek's condition. *Id.* It is an outdated term that is now known as gender dysphoria. *Compare* DSM-V, *supra* note 38, *with* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)). To best keep terminology consistent throughout this Comment, gender dysphoria will be used.

98. *Kosilek*, 774 F.3d at 68, 69.

99. *Id.* at 68–69. *Kosilek* uses the term "sex reassignment surgery," which is an outdated term that is now known as gender confirmation surgery. *See generally* Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014). To best keep the terminology consistent throughout the Comment, GCS will be used.

100. *Id.* at 69.

101. *Id.*

102. *Kosilek*, 774 F.3d at 69.

subjective deliberate indifference prong of the *Estelle* test.[103] Despite ruling for the MDOC, the court did warn that if the MDOC failed to provide Kosilek gender-affirming care in the future, it would be deliberately indifferent and an Eighth Amendment violation would result.[104] In response, the MDOC abandoned their "freeze-frame" policy and instituted a new policy that would provide gender-affirming care to prisoners according to medical recommendations made by the University of Massachusetts Correctional Health Program (UMass).[105]

In 2003, Dr. David Seil evaluated Kosilek and recommended "ameliorative treatment," including gender-appropriate clothing, hormonal treatments, and laser hair removal.[106] After one year of hormonal treatment, Dr. Seil recommended Kosilek be considered for GCS.[107] Kosilek was first evaluated by the Fenway Center who in its report, decided that although Kosilek benefited from the "ameliorative treatment," she would greatly benefit from GCS.[108] The MDOC contacted Dr. Cynthia Osborne from John Hopkins School of Medicine to review Fenway's report.[109] In her review, Dr. Osborne expressed doubt in the Fenway report as she believed it was not comprehensive and concluded there was not a national consensus regarding the medical necessity of GCS.[110] Additionally, the MDOC produced a report regarding security concerns that could result if Kosilek received GCS as she would be transferred to an all-female prison following her surgery.[111] Given Kosilek's history with killing her then-wife and the prevalence of female inmates who experienced abuse and trauma from male partners, the MDOC's report expressed concern that Kosilek would harm other females inmates if she was transferred to an all-female prison.[112] As a result, the MDOC declined to provide Kosilek with GCS.[113]

In 2006, Kosilek again filed suit, known as *Kosilek II*.[114] Kosilek brought a team of experts including her psychiatrist, her Fenway doctors, and other UMass doctors who reiterated GCS was needed to alleviate her continued symptoms of gender dysphoria and stop her suicidal

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103. *Id.* at 82, 91; *see generally* Estelle v. Gamble, 429 U.S. 97, 104 (1976).
104. *Kosilek*, 774 F.3d at 69.
105. *Id.*
106. *Id.* at 69–70.
107. *Id.* at 70.
108. *Id.* at 71.
109. *Id.*
110. *Id.* at 72.
111. *Id.* at 73–74.
112. *Id.*
113. *Id.* at 74.
114. *Id.*

thoughts.[115] The MDOC offered testimony from Dr. Chester Schmidt of the John Hopkins School of Medicine who defended its original conclusion that GCS was not medically necessary as GCS could increase her suicidal tendencies.[116]

Next, the court appointed a new doctor, Dr. Stephen Levine, to issue an independent report regarding Kosilek's case.[117] He emphasized that the WPATH-SOC did not represent the national consensus in the medical community regarding gender-affirming care.[118] He cautioned that it was influenced by political forces and that not all doctors followed the WPATH-SOC.[119] Additionally he expressed doubt that Kosilek even met the WPATH-SOC as she had not lived as a woman outside of prison which is "required" by the WPATH-SOC.[120]

Finally, MDOC Commissioner Harold Clarke summarized MDOC's earlier report, explaining that providing Kosilek with GCS and transferring her to a woman's prison would endanger other female inmates.[121] Additionally, the trial had received substantial media attention and Clarke testified that he received several letters from outraged state politicians regarding Kosilek's surgery, stressing that providing Kosilek with this surgery was a waste of taxpayer money.[122]

Six years after the trial began, the district court ruled in favor of Kosilek and held GCS was medically necessary, and MDOC was deliberately indifferent to her need for GCS.[123] The court stated the prison's concern over security was a pretext for denying GCS, and the prison may have based its initial decision to deny GCS on public and political pressure.[124] The MDOC appealed this decision to the First Circuit Court of Appeals.[125]

In 2014, the First Circuit reversed the district court's decision, holding that denying GCS in Kosilek's case was not a violation of the Eighth Amendment.[126] For the first prong of objective medical necessity, the court questioned the district court's overreliance on the Fenway doctors'

115. *Id.* at 74–76.
116. *Id.* at 76.
117. *Id.* at 77.
118. *Id.* at 78–79.
119. *Id.* at 78.
120. *Id.* I placed "required" in quotes because this made-up requirement of living outside of the prison in their gender identity is a reoccurring topic that is discussed in *Edmo* as well. *See generally infra* Part III.A.4.
121. *Kosilek*, 774 F.3d at 81.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 68.
126. *Id.*

GCS recommendation and believed Dr. Levine's testimony was sufficient to question the universality of the WPATH-SOC.[127] Given the disagreement in the medical field regarding the need for GCS and Dr. Levine's testimony that Kosilek had not lived as a woman outside of prison, the court concluded there was no medical necessity in Kosilek's case.[128] For the second prong regarding deliberate indifference, the court held MDOC's security concerns were reasonable and did not constitute a pretext for denying GCS.[129] As such, Kosilek's Eighth Amendment claim failed, and her case was dismissed.[130]

3. *Gibson*: The Fifth Circuit's Different Approach But Similar Outcome

Vanessa Lynn Gibson[131] was a transgender woman who was convicted of aggravated robbery and murder and was sentenced to prison from January 1995 through May 2031.[132] She suffered from gender dysphoria and had been living as a woman since she was fifteen years old.[133] Despite identifying as a woman, she was housed in an all-male prison under the Texas Department of Criminal Justice (TDCJ).[134] While incarcerated, Gibson attempted suicide three times and tried to castrate herself.[135] The policy regarding gender-affirming care for transgender prisoners was determined on a case-by-case basis, where each prisoner would be evaluated by medical and mental health professionals.[136] At the time of her lawsuit, there was a dispute regarding whether the policy actually forbid GCS or if it was purposefully silent on it, however, Gibson

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127. *Id.* at 85–91.
128. *Id.*
129. *Id.* at 93.
130. *Id.* at 96.
131. The Fifth Circuit uses "Scott Lynn Gibson" and masculine pronouns throughout its opinion which it states is required under Texas Department of Criminal Justice (TDCJ) policy. TEX. DEP'T. OF CRIM. JUST., *Offender Information Details: Scott Lynn Gibson*, https://ivss.tdcj.texas.gov/offender-search/offender-details/?id=3a99a23c-93a4-e811-8114-1458d04e2f10 [https://perma.cc/4C9V-UYMZ] (last visited Mar. 25, 2023). Referring to trans individuals using their names and pronouns assigned at birth is transphobic, hateful, and discriminatory. *See Why Deadnaming Is Harmful*, CLEVELAND CLINIC (Nov. 18. 2021), https://health.clevelandclinic.org/deadnaming/ [https://perma.cc/86VW-27WS]. For the respect of the plaintiff, the plaintiff will be known as Vanessa Lynn Gibson, and feminine pronouns will be used.
132. Gibson v. Collier, 920 F.3d 212, 216–17 (5th Cir. 2019); Tex. Dep't. of Crim. Just., *Inmate Information Details*, https://inmate.tdcj.texas.gov/InmateSearch/viewDetail.action?sid=05374437 [https://perma.cc/Y2EX-NSQC] (last visited Mar. 18, 2023) (providing Gibson's inmate details including her convictions, sentences, parole date, current housing, and projected release date).
133. *Gibson*, 920 F.3d at 217.
134. *Id.*
135. *Id.*
136. *Id.* at 217–18.

was repeatedly denied GCS while serving her sentence.[137] Gibson sued the TDCJ for an Eighth Amendment violation, yet the court granted TDCJ's motion for summary judgment on the merits of her Eighth Amendment claim.[138] Gibson then appealed to the Fifth Circuit.[139]

The Fifth Circuit affirmed the district court's ruling and held Gibson's Eighth Amendment rights were not violated when the TDCJ refused to allow her to undergo GCS.[140] The court based its decision on *Kosilek v. Spencer* and the inability of Gibson's counsel to distinguish Gibson's case from Kosilek's case.[141] In the "sparse record" before the court, the Fifth Circuit held Gibson could not prove there was a genuine dispute of facts regarding the medical necessity of GCS.[142] Relying on the testimony of Dr. Levine from *Kosilek*, the court saw no reason to depart from the First Circuit as Gibson could not prove the WPATH-SOC represented the medical consensus regarding transgender gender-affirming care.[143] Although no actual testimony was heard, and the evidentiary hearing from *Kosilek* was held thirteen years prior, the Fifth Circuit claimed no material facts were in dispute since there was an ongoing contentious debate regarding the WPATH-SOC.[144] Because Gibson could not prove a medical necessity, the district court held there was no need for a trial, and the Fifth Circuit agreed.[145]

Justice Barksdale strongly dissented from the majority, stating its decision essentially created a blanket -ban on GCS for transgender inmates, which was not the purpose of the *Kosilek* decision.[146] Although

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137. *Id.* at 218.

138. *Id.*

139. *Id.* Technically, the TDCJ never moved for summary judgment based on the merits of the Eighth Amendment claim, but rather the District Court granted summary judgment based on the merits sua sponte. Gibson v. Livingston, No. W-15-CA-190 at 22 (W.D.Tex. Aug. 21, 2016). Gibson's appeal asks the court to hear arguments regarding the merits of the claim only and "to remand for future proceedings accordingly." *Id.* at 218. The appeal did not request the court hear arguments based on whether the grant of summary judgment was correct; therefore, even if it were, the court would not decide this issue. *Id.*

140. *Id.* at 220.

141. *Id.* at 221.

142. *Id.* at 221–23.

143. *Id.* at 223.

144. *Id.* I want to emphasize that Dr. Levine's testimony was from thirteen years prior to the oral arguments in this case. In this period, public acceptance of the transgender community increased as the transgender population became more prevalent in society and shown in a more positive light. *See, e.g.*, Daniel Greenberg et al., *America's Growing Support for Transgender Rights*, PUB. RELIGION RSCH. INST., https://www.prri.org/wp-content/uploads/2019/06/PRRI_Jun_2019_LGBT-Survey-1.pdf [https://perma.cc/25KX-CCZM] (last visited Aug. 21, 2022) (detailing the progress that American society has made toward supporting transgender rights).

145. *Gibson*, 920 F.3d at 223.

146. *Id.* at 228, 236 (Barksdale, J., dissenting). Justice Barksdale dissented regarding the

Justice Barksdale agreed with the First Circuit's ruling in Kosilek's individual case, she stated the decision was reached using an exhaustive review of medical evaluations, hearing testimony from various experts, and reading reports regarding the universality of the WPATH-SOC.[147] At the time, the holding was based on *Kosilek*'s specific circumstances and whether the court believed it was medically necessary for her to undergo GCS.[148]

Here, no such consideration was given, thus, the ruling created a blanket -ban on GCS for transgender inmates, which was dangerous for future litigants.[149] This rule was contrary to TDCJ's policy which required an individualized, case-by-case consideration of gender-affirming care for transgender prisoners.[150] Additionally, according to *Estelle*, any claim regarding the denial of medical care for prisoners must be analyzed on a case-by-case basis by looking at the prisoner's medical needs and the prison's deliberate indifference.[151] A blanket-ban on GCS is a violation of the Eighth Amendment because it automatically prohibits prisoners from certain medical procedures, regardless of their medical necessity.[152] The lack of consideration was deliberate indifference; thus, Justice Barksdale warned that by granting summary judgment and instituting a blanket-ban, the majority decision created an unconstitutional prohibition on GCS for transgender prisoners.[153]

The majority addressed the dissent by asserting there was no precedent stating the Eighth Amendment requires an individualized assessment of every prisoner's medical care claim.[154] The majority supported this assertion by detailing how the Food and Drug Administration categorically approves certain treatments, therefore, with Eighth Amendment litigation, courts may do the same.[155] Because the Constitution does not mandate individualized assessments of Eighth

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procedural posture of the case and stated the court should not hear this appeal based on the merits of the claim. *Id.* The lower court improperly granted summary judgment, as the TDCJ did not move for summary judgment based upon the merits of the Eighth Amendment claim. *Id.* Justice Barksdale would have remanded for future proceedings to correct the error. *Id.*

147. *Id.* at 236.

148. *Id.*

149. *Id*. at 236–38.

150. *Id.* at 238–39.

151. *Id.* at 239*; see generally* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (concluding that "deliberate indifference to serious medical needs of prisoners" qualifies as "unnecessary and wanton infliction of pain" as prohibited by the Eighth Amendment).

152. *Gibson*, 920 F.3d at 239.

153. *Id.* ("More importantly, our precedent suggests a refusal to evaluate Gibson for SRS or the decision to deny SRS not based on medical judgment could constitute delibertate indifference.").

154. *Id.* at 224–25.

155. *Id.* at 225.

Amendment lawsuits, the court dismissed Gibson's claim.[156] As such, in the Fifth Circuit, prisons do not have a duty to provide GCS for *any* transgender inmate.

4. *Edmo*: The Ninth Circuit Creates a Circuit Split

Adree Edmo was serving time in the Idaho Department of Correction (IDOC) after pleading guilty in 2012 to sexual abuse of a minor.[157] She identified as a female since about six years old and presented as a woman since she was about twenty-one.[158] Although she commonly experienced symptoms of gender dysphoria, she was first diagnosed while incarcerated by prison psychiatrist, Dr. Scott Eliason.[159] Her dysphoria caused her to feel "depressed," "disgusting," "tormented," and "hopeless."[160] Since her diagnosis, Edmo was provided counseling, HRT, and was allowed to physically identify as a woman while in prison.[161] Nevertheless, the benefits of HRT had reached its ceiling.[162] In September 2015, Edmo tried to castrate herself, so Dr. Eliason promptly evaluated her for GCS.[163] He concluded she was not eligible for the surgery based on his own criteria where a patient must meet one of the following: "(1) 'congenital malformations or ambiguous genitalia,' (2) 'severe and devastating dysphoria that is primarily due to genitals,' or (3) 'some type of medical problem in which endogenous sexual hormones were causing severe physiological damage.'"[164] Following his conclusion, Dr. Eliason testified at an evidentiary hearing that he denied Edmo's GCS because her dysphoria may have been caused by other mental health issues, and she had not lived outside of the prison as a woman for twelve months which he believed was required under the WPATH-SOC.[165]

Following this initial denial, Edmo partially castrated herself using a razor blade.[166] Edmo reported self-castration helped partially alleviate some of her dysphoria caused by having male genitalia which she believed would be fully alleviated by undergoing GCS.[167] As such, she

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156. *Id.*
157. Edmo v. Corizon, Inc., 935 F.3d 757, 772 (9th Cir. 2019).
158. *Id.* at 771–72.
159. *Id.* at 772.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 773.
164. *Id.*
165. *Id.* at 774. Like the doctor in *Kosilek,* part of Dr. Eliason's conclusion relied on the belief that transgender inmates must live outside of the prison in their gender identity in order to receive GCS. *Kosilek*, 774 F.3d at 78.
166. Edmo v. Corizon, Inc., 935 F.3d 757, 774 (9th Cir. 2019).
167. *Id.*

sued IDOC, claiming its denial of GCS was a violation of her Eighth Amendment rights.[168]

The district court held an evidentiary hearing where it heard testimony from Dr. Eliason and four expert witnesses: two for Edmo and two for the State.[169] Edmo's two expert witnesses, Dr. Ettner and Dr. Gorton, had extensive experience working with transgender patients, particularly those with gender dysphoria seeking GCS.[170] They testified that Edmo met the WPATH-SOC requirements and it was medically necessary for Edmo to receive GCS.[171] Additionally, they rebuked Dr. Eliason's reasoning for denying Edmo's GCS as he had misinterpreted the WPATH-SOC by claiming prisoners had to live outside of the prison in their gender identity to be eligible for GCS.[172] In contrast, the State's two experts, Dr. Garvey and Dr. Andrade, both had minimal experience working with transgender patients.[173] Whereas both had extensive experience working with prisoners, neither had worked with patients with gender dysphoria.[174] Both defended Dr. Eliason stating Edmo did not meet the criteria for GCS under the WPATH-SOC since Edmo had never lived outside of the prison as a woman.[175]

The district court held that Edmo proved her Eighth Amendment claim.[176] In its opinion, the district court found Dr. Ettner and Dr. Gorton more credible than the State's experts as both had more extensive experience working with transgender patients and interpreted the WPATH-SOC correctly.[177] Edmo had a medical necessity for GCS and the prison was deliberately indifferent to Edmo's gender dysphoria when it denied her request for GCS despite extensive evidence of self-harm, including self-castration, cutting, and suicidal ideation.[178] The State appealed this ruling to the Ninth Circuit, arguing the district court abused its discretion by siding with Edmo's witnesses when it was merely a difference in medical opinion which cannot amount to a successful Eighth Amendment claim.[179]

The Ninth Circuit affirmed the district court's ruling and ordered the

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168. *Id.* at 774–75.
169. *Id.*
170. *Id.* at 775–77.
171. *Id.* at 776–78.
172. *Id.*
173. *Id.* at 778–79.
174. *Id.*
175. *Id.* at 779–80.
176. *Id.* at 780–81.
177. *Id.*
178. *Id.*
179. *Id.* at 781.

prison to allow Edmo to undergo GCS.[180] The court rejected the State's argument that the doctors' disagreements were a matter of medical difference of opinion.[181] Instead, the court stated the vast differences in the doctors' experience with transgender patients gave Edmo's experts more credibility.[182] Additionally, the court emphasized that the State's witnesses, including Dr. Eliason, repeatedly misinterpreted the WPATH-SOC, and stated there was no such requirement that prisoners live outside of prison in their preferred gender identity for twelve months.[183] Finally, the court disregarded the State's argument that because the State did not intend to inflict pain upon Edmo, it was not deliberately indifferent to her medical needs.[184] The court explained no such standard was required, but rather that Edmo must show the State knew of the risks of not providing GCS and disregarded these risks.[185] Here, Dr. Eliason knew of Edmo's self-castration history and still did not recommend GCS.[186] As such, the Ninth Circuit forced the prison to provide GCS to Adree Edmo.[187] Following a motion to reconsider by the prison, the Ninth Circuit declined to rehear the case en banc, thus in the Ninth Circuit, prohibiting GCS in medically necessary cases may amount to an Eighth Amendment violation on a case-by-case basis.[188]

As a result of the *Edmo* ruling, there is a circuit split regarding whether it is unconstitutional under the Eighth Amendment to deny GCS to transgender inmates. In the next section, I pivot and consider state initiatives that criminalize gender-affirming care for trans youth. Whereas the previous prison litigation uses the Eighth Amendment as a source for litigation, the upcoming section focuses primarily on the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Analyzing these initiatives and cases provides trans juveniles with more constitutional arguments to advocate for state-level legislation that would provide them with much-needed medical care.

B. States Deny Care to Transgender Youth

In reaction to recent pro-LGBTQ+ court rulings from the Supreme

180. *Id.* at 767.
181. *Id.* at 786.
182. *Id.* at 787–88.
183. *Id.* at 789.
184. *Id.* at 793.
185. *Id.*
186. *Id.*
187. *Id.* at 800, 803.
188. *Id.* at 803.

Court,[189] the pendulum has swung back as state legislatures make it their mission to curtail LGBTQ+ rights in new overreaching ways. In this section, I focus on how states are restricting the healthcare rights of transgender youth as well as the litigation challenging these harmful laws. Although recent state action has been directed toward transgender youth, states have also allowed Medicaid and insurance companies the right to refuse to provide coverage for gender-affirming care for all trans individuals. Discussing the current landscape of state-level laws for LGBTQ+ healthcare is useful to know what work needs to be done to erase the discrimination of LGBTQ+ juveniles.

1. Pre-2021 Transgender Healthcare History

Prior to 2019, transgender youth healthcare was not a hot-button issue to which state legislatures paid much attention.[190] As discussed in the introduction, discrimination may have occurred at the local level or in doctors' offices. However, there has never been a law that explicitly stated transgender youth could not be prescribed gender-affirming care for their gender dysphoria. This changed in October 2019 after a typical parental rights dispute garnered national attention.[191]

Jeffrey Younger and Dr. Anne Georgulas were a married couple with a pair of seven-year-old twins.[192] When their daughter, Luna, who at the time identified as a boy and had a birth name of James, started asking to put on dresses and to paint their nails, their marriage began to fall apart.[193] After a bitter fight over their child's gender identity, the couple got their marriage annulled and went to family court.[194] Jeffrey Younger alleged Dr. Anne Georgulas committed child abuse when she allowed their child to change their name, wear female clothes, and put on makeup.[195] Dr. Georgulas took Luna to a therapist who diagnosed her with gender dysphoria and started her on psychotherapy to ensure she was coping with

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189. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (legalizing gay marriage nationwide); United States v. Windsor, 570 U.S. 744, 770 (2013) (holding the Defense of Marriage Act's definition of marriage violated the Fifth Amendment); Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020) (ruling employment discrimination based on sexual orientation and gender identity violated Title VII of the Civil Rights Act of 1964).

190. *See Outlawing*, *supra* note 56, at 2172 ("A custody battle in a Dallas suburb is an unlikely spark for a political brushfire.").

191. *See generally* Teo Armus, *A Texas Man Says His 7-Year-Old Son Isn't Transgender. Now His Custody Fight Has Reached the Governor's Office*, WASH. POST (Oct. 24, 2019; 7:13 AM) https://www.washingtonpost.com/nation/2019/10/24/james-younger-luna-transgender-greg-abbott/ [https://perma.cc/8BVE-HKVM].

192. *Id.* I refer to the mother in this situation as Dr. Anne Georgulas, just as the article does. Even though her ex-husband repeatedly calls her a child abuser, she is a pediatrician who specializes in children's health.

193. *Id.*

194. *Id.*

195. *Id.*

her condition.[196] Eventually, the Texas Republican establishment caught wind and the national conservative press flocked to Texas to support Jeffrey Younger.[197] In October 2019, a jury of twelve awarded Dr. Anne Georgulas full custody of Luna, thus proving the jury did not think providing gender-affirming care to children was child abuse.[198]

However, the damage had already been done. Due to far-right outrage, immediately after the initial trial decision, Texas Representative Steve Toth stated he would propose a bill to add "Transitioning of a Minor" to the definition of child abuse.[199] The Heritage Foundation[200] hosted numerous panels and discussions detailing the Younger-Georgulas case and what could be done about it.[201] It detailed the factually incorrect risks of gender-affirming care and discussed why legislation regarding trans youth health care and other anti-trans issues needed to be introduced

196. *Id.*

197. *Id.* Texas Senator Ted Cruz tweeted, "This is horrifying & tragic. F or a parent to subject such a young child to life-altering hormone blockers to medically transition their sex is nothing less than child abuse." Senator Ted Cruz (@SenTedCruz), TWITTER (Oct. 23, 2019, 7:01 PM) https://twitter.com/sentedcruz/status/1187157024888496128 [https://perma.cc/6M8K-8V9N]; Texas Governor Greg Abbott also tweeted, "FYI the matter of 7 year old James Younger is being looked into by the Texas Attorney General's Office and the Texas Department of Family and Protective Services." Greg Abbott (@GregAbbbott_TX), TWITTER (Oct. 23, 2019, 6:58 PM) https://twitter.com/gregabbott_tx/status/1187156266449330176?lang=en [https://perma.cc/WF9L-PBXS].

198. Armus, *supra* note 191. This initial jury decision was vacated two days later by Judge Kim Cooks, who gave the parents the Texas equivalent of "joint custody." *See generally* Katelyn Burns, *What The Battle over A 7-Year-Old Trans Girl Could Mean for Families Nationwide*, VOX (Nov. 11, 2019, 9:00 AM) https://www.vox.com/identities/2019/11/11/20955059/luna-younger-transgender-child-custody [https://perma.cc/WU75-DVX6]. Although she denies any political pressure by Texas government officials, she was criticized for bowing to political pressure, yet she was celebrated by conservatives for upholding family values. *Id.*

199. Emma Plattoff & Stacey Fernández, *Top Texas Republicans Order Investigation Into Mother Who Supports Child's Gender Transition*, TEX. TRIB. (Oct. 24, 2019, 7:00 PM) https://www.texastribune.org/2019/10/24/top-texas-republicans-order-investigation-mother-who-supports-childs-g/ [https://perma.cc/ZY6Z-ZAHZ].

200. The Heritage Foundation is a far-right conservative think-tank that has its members testify at congressional hearings and meet with staff and legislators, in order to spread their conservative values in legislatures nationwide. For more information, see generally *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited Apr. 8, 2023) [https://perma.cc/88RL-ZKFH].

201. *Outlawing*, *supra* note 56, at 2172; Briana January, *Anti-LGBTQ Group Heritage Foundation Has Hosted Four Anti-Trans Panels So Far in 2019*, MEDIA MATTERS FOR AM. (Apr. 18, 2019, 9:18 AM), https://www.mediamatters.org/heritage-foundation/anti-lgbtq-group-heritage-foundation-has-hosted-four-anti-trans-panels-so-far [https://perma.cc/4LRC-UKBE].

and passed in states.[202] The Family Policy Alliance[203] was one of many groups that created model legislation for states and spread it to Republican legislators nationwide.[204] Although many of these bills differed since legislators picked and chose which restrictions they included in their final bill, the main provisions would:

> criminalize or impose/permit professional disciplinary action (e.g. revoking or suspending licensure) on health professionals providing gender-affirming care to minors, in some cases labeling such services as child abuse[;] penalize parents aiding in youth accessing gender-affirming care[;] permit individuals to file for damages against providers who violate such laws[; and] limit insurance coverage or payment for gender affirming services or prohibit the use of state funds for such services.[205]

With the contributions of the Heritage Foundation, the Family Policy Alliance, and other anti-trans organizations, including the American College of Pediatricians,[206] in the 2020 spring legislative session, fifteen states introduced nineteen bills that would regulate transgender youth

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202. In the panels hosted by the Heritage Foundation, panelists stated that gender-affirming care may have negative impacts on youths' future fertility, sexual function, and development. *See The Medical Harms of Hormonal and Surgical Interventions for Gender Dysphoric Children*, HERITAGE FOUND. (Mar. 28, 2019), heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children [https://perma.cc/B3EQ-3HT9]. However, these claims are baseless and medical associations disagree with these risks and recommend such care for transgender youth in accordance with the WPATH Standards of Care. *See e.g.*, Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869 (2017); Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS 1 (2018). The Heritage Foundation also opposes the federal Equality Act, trans inclusion in international policy, and trans participation in athletics. *See* January, *supra* note 201.

203. The Family Policy Alliance is a far-right hate-group that, like the Heritage Foundation, spreads conservative values to legislatures nationwide. Its mission connects the Evangelical Christian worldview with state legislatures. *See generally About,* FAM. POL'Y ALL., https://familypolicyalliance.com/about/about-us/ [https://perma.cc/CZ5S-L98K].

204. *Outlawing*, *supra* note 56, at 2172–73.

205. Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (Jun. 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/ [https://perma.cc/X5GP-KN88]. This tracker was instrumental in guiding my legislative research regarding the bills introduced and passed as well as the suits challenging the implementation of these laws.

206. The American College of Pediatricians is a socially conservative advocacy group of healthcare professionals that commonly supports discriminatory anti-LGBTQ+ legislation, including denying adoption access to LGBTQ+ couples. *See generally About Us*, AM. COLL. PEDIATRICIANS, https://acpeds.org/about [https://perma.cc/F38X-Y5AH] (last visited Mar. 26, 2023); The Southern Poverty Law Center officially named it an anti-LGBTQ+ hate group for its legislative initiatives and amicus briefs. *American College of Pediatricians*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians [https://perma.cc/G4GY-AZAS] (last visited Mar. 26, 2023).

healthcare availability.[207] Most of these bills died in committee or on the floor in mid-March 2020 because of the start of the COVID-19 pandemic.[208] Although the 2020 legislative session ended in failure for the anti-trans hate groups, 2021 would be the year they would finally break through and sign detrimental anti-trans bills into law.

2. 2021-Present: Six States Prohibit Healthcare for Transgender Youth

As of the end of 2022,[209] six states have taken some sort of legislative or executive action, curtailing the medical rights of transgender youth.[210] In 2021, twenty-one states introduced thirty-four bills.[211] Of these bills, two were implemented in their respective states.[212] First, Tennessee signed S.B. 126 into law which bans physicians from prescribing HRT to "prepubertal minors".[213] A common layperson would interpret this as banning the usage of HRT for trans youth; however, if one recalls the WPATH-SOC as discussed in Part I.A, one will see the bill is largely ineffective. The WPATH-SOC do not recommend prescribing HRT to any trans youth until after puberty begins.[214] Prepubertal minors should only be prescribed puberty blockers, which S.B. 126 does not include.[215] Therefore, this bill illustrates how these legislative efforts reflect a fundamental misunderstanding regarding medical care for transgender

207. These states included: Alabama, Colorado, Florida, Georgia, Iowa, Idaho, Kentucky, Missouri, Mississippi, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah. *Past Legislation Affecting LGBT Rights Across the Country 2020*, ACLU (Mar. 3, 2020) https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020 [https://perma.cc/4ZUE-E5QM] [hereinafter ACLU Tracker] (discussing the bills introduced in 2020 regarding trans healthcare).

208. *Id.*

209. It is possible more states acted against trans youth during the publication process for this Comment; however, for consistency purposes, this Comment cuts off any legislation at the end of 2022.

210. *See generally* ACLU Tracker, *supra* note 207.

211. *See id.* (including Alabama, Arkansas, Arizona, Florida, Georgia, Iowa, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia).

212. *See infra* notes 213–222 and accompanying text (describing the first two laws that prohibited gender-affirming care for transgender youth in varying capacities).

213. *See* S.B. 126, 2021 Leg., Reg. Sess. § 1 (Tenn. 2021) [hereinafter Tennessee]; Wyatt Ronan, *Governor Lee Signs Anti-Trans Healthcare Bill into Law*, HUMAN RTS. CAMPAIGN (May 19, 2021), https://www.hrc.org/press-releases/governor-lee-signs-anti-trans-healthcare-bill-into-law [https://perma.cc/3V6G-VJEZ] ("Yesterday evening, Republican Governor Bill Lee signed SB 126 (HB 1027)—a bill that unnecessarily regulates life-saving, best practice medical care to transgender youth.").

214. *See* WPATH-SOC, *supra* note 30, at 112 ("We recommend health care professionals begin pubertal hormone suppression in eligible* transgender and gender diverse adolescents only after they first exhibit physical changes of puberty").

215. *See generally* Tennessee, *supra* note 213.

youth.[216]

Second, Arkansas overrode the veto of Governor Asa Hutchinson[217] and signed into law H.B. 1570 which prohibits puberty blockers, HRT, and GCS for transgender youth under eighteen.[218] It also prohibits medical providers from referring minors to other providers for these procedures.[219] Its enforcement mechanism is against doctors who refer or provide this treatment where the state may subject them to discipline via licensing entities.[220] Finally, the law prohibits insurance companies and Medicaid from covering these services.[221]

In 2022, twenty-one states introduced thirty-five bills, of which three were passed.[222] The third bill, Arizona S.B. 1138, bans physicians from providing GCS to minors without addressing HRT or puberty blockers.[223] However, as previously stated, GCS is typically never conducted with minors as the WPATH-SOC require the patient reach the age of eighteen.[224] Like the Tennessee bill, Arizona's bill reflects legislators' lack of understanding of transgender healthcare.

Fourth, Alabama passed S.B. 184 which similarly bans minors from receiving gender-affirming care, including puberty blockers, HRT, and GCS.[225] Any person that "engage[s] in or cause[s]" a transgender minor to receive any of these treatments has committed a felony and may be

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216. *See Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies [https://perma.cc/TZC2-AC3L] (last visited Sept. 5, 2022) (discussing updates on anti-LGBTQ+ laws passed in states nationwide, including updates on anti-trans bills, Medicaid exceptions, insurance prohibitions of care, and anti-trans sports bills).

217. *See* Asa Hutchinson, *Why I Vetoed My Party's Bill Restricting Health Care for Transgender Youth*, WASH. POST (Apr. 8, 2021, 4:10 PM) https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78c1d8228819_story.html [https://perma.cc/Y48K-RETA] (discussing his reluctance to sign the anti-trans healthcare bill). Gov. Hutchinson wrote this opinion piece to explain his reasoning. *Id.* Although he is pro-life and conservative, he thought the bill interfered with the rights of physicians and parents. *Id.* He believes by allowing the state to interfere in this decision, the government is overreaching and curtailing the right to choose the best medical care. *Id.* He references many organizations and experts such as the American Academy of Pediatrics that oppose the law since it will impart great harm on trans children if passed. *Id.* He asked whether this state action helps or interferes unjustifiably in their lives. *Id.*

218. The Arkansas Save Adolescents from Experimentation (SAFE) Act, H.B. 1570, 2022 Leg., Reg. Sess. § 1 (Ark. 2021) [hereinafter Arkansas].

219. *Id.*

220. *Id.*

221. *Id.*

222. The states include Alabama, Arizona, Florida, Georgia, Iowa, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Wisconsin, and West Virginia. ACLU Tracker, *supra* note 207.

223. *See generally* S.B. 1138, 2022 Leg., Reg. Sess. § 2 (Ariz. 2022).

224. WPATH-SOC, *supra* note 30, at 112.

225. *See generally* Alabama Vulnerable Child Compassion and Protection Act (V-CAP), S.B. 184, 2022 Leg., Reg. Sess. § 1 (Ala. 2022).

sentenced to ten years in prison or fined up to $15,000.[226]

Fifth, in February 2022, Governor Greg Abbott issued a directive calling on the Texas Department of Family and Protective Services (DFPS) to investigate any claims of families allowing gender-affirming care for minors.[227] Any parent that allows these procedures could be charged with child abuse and may have their children removed from their custody.[228] It also mandates school officials, doctors, nurses, and other personnel who work with children to report to DFPS any accounts of gender-affirming care.[229]

On October 4, 2022, Oklahoma became the sixth state to restrict gender-affirming care for transgender youth.[230] Governor Kevin Stitt signed into law a bill that does not ban gender-affirming care for trans youth, but rather prohibits hospitals in the University of Oklahoma medical system from providing said care if they receive public funding.[231] In his signing statement, he called for Oklahoma legislators to pass an outright ban in 2023, in the likes of Arkansas and Alabama.[232]

In 2023, as this Comment is being published, states continue proposing and passing legislation to restrict the healthcare rights of transgender youth.[233] Although these six states have restricted the rights of

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226. *Id.*
227. Letter from Greg Abbott, Tex. Governor, to Hon. Jaime Masters, Comm'r of Tex. Dept. of Fam. and Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/HN4Z-FEBQ].
228. *Id.*
229. *Id.*
230. Brooke Migdon, *Oklahoma Governor Signs Bill Barring OU Health from Providing Gender-Affirming Care to Trans Youth, Calls for Statewide Ban*, HILL (Oct. 5, 2022), https://thehill.com/changing-america/respect/equality/3674966-oklahoma-governor-signs-bill-barring-ou-health-from-providing-gender-affirming-care-to-trans-youth-calls-for-statewide-ban/ [https://perma.cc/HF8D-SRN7].
231. S.B. 3, 2022 Leg. Spec. Session § 2 (Ok. 2022).
232. *See generally* Migdon, *supra* note 230; *Governor Stitt Signs Bill to Prevent Gender Transition Services at OU Children's Hospital, Calls for Statewide Ban on Irreversible Transition Surgeries, Hormone Therapies on Minors*, Okla. Governor J. Kevin Stitt (Oct. 04, 2022), https://oklahoma.gov/governor/newsroom/newsroom/2022/october2022/governor-stitt-signs-bill-to-prevent-gender-transition-services-.html [https://perma.cc/BH5B-U8YM] ("I am calling for the Legislature to ban all irreversible gender transition surgeries and hormone therapies on minors when they convene next session in February 2023. We cannot turn a blind eye to what's happening all across our nation, and as governor I will not allow life-altering transition surgeries on minor children in the state of Oklahoma.").
233. *See* Grace Eliza Godwin, *Utah Just Banned Gender-Affirming Healthcare for Transgender Kids. These 21 Other States Are Considering Similar Bills in 2023*, INSIDER (Feb. 1, 2023, 9:19 AM), https://www.insider.com/states-considering-bills-ban-gender-affirming-healthcare-transgender-youth-2023-1 [https://perma.cc/56WU-9P39] ("So far this year, 21 states are considering a total of 72 bills, according to data provided by the ACLU, that seek to restrict gender-affirming care for trans youth . . . ."); Rick Bowmer, *Utah's Governor Has Signed a Bill Banning*

transgender youth and many more are likely to do so as well, LGBTQ+ advocacy groups like the ACLU and Lambda Legal have challenged these actions and laws in court, and have been successful in at least one case, *Brandt v. Rutledge*. Stopping the implementation of these laws is crucial to slowing the momentum that the far-right has gained in passing this harmful legislation.

3. *Brandt*: The Litigation Strategy to Overturn Transgender Youth Healthcare Bans

In response to these discriminatory laws, federal and state courts have universally blocked their implementation through preliminary injunctions.[234] In this section, I focus on *Brandt v. Rutledge*, a federal case out of the Eighth Circuit.[235] As of August 25, 2022, the Eighth Circuit affirmed the Eastern District Court of Arkansas's preliminary injunction of the Arkansas Save Adolescents from Experimentation (SAFE) Act, thus stopping the implementation of the SAFE Act until a full trial regarding the constitutionality of the statute is conducted.[236]

In *Brandt,* the plaintiffs[237] filed a complaint alleging that Arkansas's SAFE Act violated the Fourteenth Amendment's Equal Protection Clause, Due Process Clause, and the First Amendment's Freedom of Speech Clause.[238] Upon filing their complaint, the plaintiffs moved for a preliminary injunction, as the statute was set to take effect on July 28, 2021.[239] For a court to grant a preliminary injunction, plaintiffs must show (1) the likelihood of success on the merits, and (2) the likelihood of

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Gender-Affirming Care for Transgender Youth, NPR (Jan. 29, 2023, 8:49 AM), https://www.npr.org/2023/01/29/1152388859/utah-ban-gender-affirming-care-transgender-youth [https://perma.cc/K2AU-MGZ8] (explaining that as Utah's ban was passed, eighteen other states were considering bills banning gender-affirming care).

234. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 893 (E.D. Ark. 2021) [hereinafter *Brandt I*) (preliminarily enjoining the implementation of Arkansas's SAFE Act on Fourteenth and First Amendment grounds), *aff'd* Brandt v. Rutledge, No. 21-2876, slip op. at 11 (8th Cir. 2022) [hereinafter *Brandt II*]; Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1151 (M.D. Ala. 2022) (preliminarily enjoining the implementation of Alabama's anti-trans bill on Fourteenth Amendment grounds); Doe v. Abbott, No. D-1-GN-22-000977, at 7 (D. Travis Cnty. 2022) (declaring Gov. Abbott's advisory order as an unconstitutional use of executive power), *modified In re* Abbott, 645 S.W. 3d 276, 283 (Tex. 2022) (declaring the Circuit Court's ruling as an unconstitutional use of judicial power but stating Gov. Abbott's letter could be implemented, yet enjoining any punishments until after a full trial).

235. *See generally Brandt II*.

236. *Brandt I*, 551 F. Supp. 3d at 894; *Brandt II*, slip op. at 4.

237. *See Brandt I*, 551 F. Supp. 3d at 888 (There are three sets of Plaintiffs. First, there are the Patient Plaintiffs: Dylan Brandt, Sabrina Jennen, Brooke Dennis, and Park Saxton who are all transgender youth. Second, there are the Parent Plaintiffs: Joanna Brandt, Lacey and Aaron Jennen, Amanda and Shayna Dennis, and Donnie Saxton. Third, there are the Physician Plaintiffs: Dr. Michele Hutchison and Dr. Kathryn Stambough).

238. *Id.* at 888.

239. *Id.*; *Brandt II,* slip op. at 4.

irreparable harm.[240] In its August 2, 2021 ruling, the Eastern District Court of Arkansas granted the motion for preliminary injunction for the reasons discussed below.[241]

a. Equal Protection

The Equal Protection Clause guarantees all citizens the "equal protection of the laws."[242] To determine whether the SAFE Act denies equal protection to the plaintiffs, the court first determined what level of scrutiny applies. The district court determined heightened scrutiny should be used since the SAFE Act rests on a sex-based classification.[243] Although Arkansas argued the statute in no way referenced transgender people, the court noted the statute did reference "transition[ing]" which is a process only transgender individuals use.[244] As a result, under heightened scrutiny, the SAFE Act must be substantially related to an important government purpose which is supported by an "exceedingly persuasive justification."[245]

First, Arkansas argued the purposes of the statute were (1) to protect vulnerable children from experimental treatment, and (2) to regulate the ethics of the medical profession.[246] To support the first purpose, the State presented evidence from a United Kingdom High Court ruling which held transgender youth did not have the ability to consent to these procedures.[247] For the second purpose, the State argued there was a lack of credible evidence that supported gender-affirming care for youth, therefore the state needed to restrict physicians' discretion in allowing said care.[248] In contrast, plaintiffs argued the SAFE Act did not protect transgender children as it banned life-saving treatment that is widely accepted in the medical field.[249] The court stated that the gender-affirming care the SAFE Act banned was supported by numerous

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240. *See Brandt I*, 551 F. Supp. 3d at 889 (citing Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 485–86 (8th Cir. 1983)) ("The Court considers four factors in evaluating Plaintiffs' request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) the public interest.").

241. *Id.* at 889–94.

242. U.S. CONST. amend. XIV, § 1.

243. *Brandt I*, F. Supp. 3d at 889; *accord* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020). The *Bostock* case is a monumental Supreme Court case that stated transgender individuals are a quasi-suspect class and thus deserve heightened scrutiny.

244. *Brandt I*, F. Supp. 3d at 889 (relying on Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

245. *Id.* (citing United States v. Virginia, 518 U.S. 515, 531 (1996)).

246. *Id.*

247. *Id.* at 889–90 (citing Bell v. Tavistock and Portman Nat'l Health Serv. Found. Trust, [2020] EWHC (Admin) 3274).

248. *Id.* at 889.

249. *Id.* at 891.

organizations who submitted amicus briefs to the court for its decision.[250] As for irreparable harm, the court concluded allowing this unconstitutional law to be implemented would cut off life-saving treatment for transgender youth.[251] By prohibiting access to puberty blockers, transgender youth would develop secondary sex characteristics that do not match their gender identity, immediately putting them at higher risk for lifelong gender dysphoria.[252] As such, plaintiffs would likely prove their equal protection claim.[253]

b. Due Process

The Due Process Clause forbids states from "depriv[ing] any person of life, liberty, or property, without due process of law."[254] To succeed on a due process challenge, the plaintiffs must show a liberty interest that is recognized under the U.S. Constitution was infringed by the SAFE Act without a compelling government purpose or narrowly tailored means.[255] In *Brandt I,* parent plaintiffs argued they had a fundamental right to seek medical care for their children based on the parent's interest in the care, custody, and control of their children.[256] In agreement, the court used the strict scrutiny standard of review.[257] Because the court already found Arkansas's government purposes as inadequate under intermediate scrutiny, the court's analysis was quite brief regarding strict scrutiny. The court simply stated that because their government purposes fail under the lower standard of review, they fail once again under the heightened standard of strict scrutiny review, thus this challenge would likely succeed on the merits.[258]

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250. *Id.* at 890. In this case, the American Medical Association, American Pediatric Society, American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychiatric Association, American Association of Physicians for Human Rights Inc, American College of Osteopathic Pediatricians, Arkansas Chapter of the American Academy of Pediatrics, Arkansas Council on Child and Adolescent Psychiatry, Arkansas Psychiatric Society, Association of Medical School Pediatric Department Chairs, Endocrine Society, National Association of Pediatric Nurse Practitioners, Pediatric Endocrine Society, Society for Adolescent Health and Medicine, Society for Pediatric Research, Society of Pediatric Nurses, and World Professional Association for Transgender Health signed on to the Plaintiff's case.

251. *Id.*

252. *Id.* at 892.

253. *Id.* ("Because Plaintiffs have demonstrated at least at this preliminary stage that they are likely to prevail on the issue of Act 626's unconstitutionality, an injunction preventing the State from enforcing the Act does not irreparably harm the State.").

254. U.S. CONST. amend. XIV, § 1.

255. *See Brandt I*, 551 F. Supp. 3d at 893 (citing Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997)).

256. *Id.* at 892 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)); *see also* Kanuszewski v. Mich. Dep't of Health and Human Serv's, 927 F.3d 396, 418–19 (6th Cir. 2019) (ruling the right to care, custody, and control of their children includes right to direct their children's medical care).

257. *Brandt I*, 551 F. Supp. 3d at 893 (citing *Glucksberg*, 521 U.S. at 719–20).

258. *Id.*

c. Freedom of Speech

The physician plaintiffs argued that the SAFE Act infringed on a physicians' right to freedom of speech by prohibiting them from telling patients about medically accepted treatments for gender dysphoria.[259] Although Arkansas argued this was a regulation of professional conduct rather than speech, the court disagreed.[260] The court, relying on Supreme Court precedent, stated the physician's right to give information is speech protected by the First Amendment.[261] Because the court interpreted the statute as regulating speech, strict scrutiny applied and the law failed for the same reasons discussed previously.[262]

Because *Brandt* was merely a preliminary injunction, it is not permanent nor persuasive to other circuits. However, given the justices' current viewpoints on the law's constitutionally, the Eighth Circuit may potentially strike down the SAFE Act after a later trial is held.[263] A full trial on the law's constitutionality was held at the end of 2022 and concluded right before the new year.[264] However, as shown in the next section, there are more obstacles that states have implemented that may make the process of obtaining gender-affirming care even harder.

4. Further State Policies That Will Impact the Availability of Transgender Juveniles' Access to Gender-Affirming Care

Apart from transgender youth gender-affirming care bans, states have continued to discriminate against the transgender youth population in two ways: (1) forcing trans youth to pay for gender-affirming care out-of-pocket, and (2) refusing to pass nondiscriminatory statutes that apply to detained juveniles based on gender identity and sexual orientation.

First, states differ regarding whether they allow insurance companies the right to exclude transgender healthcare from coverage. Arkansas is the only state that explicitly allows insurance companies the right to exclude transgender healthcare, however, twenty-seven states are silent regarding their policy.[265] As a result, in these states, there are no state

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259. *Id.* at 894.
260. *Id.* at 893.
261. *Id.* (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).
262. *Id.*
263. *See generally* Gillian Branstetter, Brandt v. Rutledge*: What to Know About the Arkansas Trial on Gender-Affirming Care*, ACLU (Oct. 21, 2022), https://www.aclu.org/news/lgbtq-rights/brandt-v-rutledge-what-to-know-about-the-arkansas-trial [https://perma.cc/49Q6-GPZ2].
264. *Id.* On June 20, 2023, the Eastern District of Arkansas permanently enjoined Arkansas from enforcing Act 626. Brandt v. Rutledge, No. 4:21-cv-00450-JM, 2023 WL 4073727, at *1 (E.D.Ark June 20, 2023). It held that the Act violated the Equal Protection Clause, Due Process Clause, and the First Amendment on the same bases in which the preliminary injunction was based upon. *Id.* at *74, 76, 79.
265. Arkansas, *supra* note 218 (allowing insurance companies the right to deny coverage of gender-affirming care); *Healthcare Laws and Policies*, *supra* note 216.

enforcement mechanisms to force an insurance company to pay or cover gender-affirming care. As such, trans individuals must pay for these treatments out of pocket even though they pay for health insurance.

Furthermore, since transgender people are likely to be unemployed, lower-economic status, or in the case of youth, estranged from their family and unable to be covered by parental health insurance, they must resort to Medicaid for health coverage.[266] Currently, nine states explicitly exclude transgender healthcare coverage from Medicaid, and fifteen states have no explicit policy.[267] Like insurance companies, the exclusion or lack of policy enables Medicaid to deny coverage and force the transgender patient to pay for such services out-of-pocket.

As applied to transgender juveniles seeking gender-affirming care while in the custody of the state, they may be forced to pay for such care out-of-pocket if the state they reside in does not allow Medicaid to cover such care or their parent's insurance does not allow coverage of gender-affirming care. For transgender youth, regardless of the availability of treatment, this is a brick wall that stops any gender-affirming care as costs reach the thousands for medication, including puberty blockers and HRT.[268]

Second, states differ in whether they explicitly protect juveniles from discrimination inside juvenile detention facilities based on their gender identity.[269] These nondiscriminatory polices are necessary, so if a transgender juvenile is denied healthcare or victimized while in custody of the state, they have an avenue to force proper treatment by citing a

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266. *See* Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, 73 ILR REV. 573, 588–89, https://journals.sagepub.com/doi/pdf/10.1177/0019793920902776 [https://perma.cc/8XNP-SXK4] (analyzing a data table outlining socioeconomic outcomes for cisgender persons and transgender persons); UNJUST, *supra* note 18, at 7 ("Some incarcerated LGBTQ youth have had negative experiences with their families or may be cut off from their families entirely and do not receive any visitors during their confinement—further disconnecting them from a support system.").

267. *See Healthcare Laws and Policies*, *supra* note 216 (detailing a map of which state Medicaid agencies refuse the right to cover coverage).

268. *Study: Paying for Transgender Healthcare Cost-Effective,* JOHN HOPKINS BLOOMBERG SCH OF PUB. HEALTH (Dec. 01, 2015), https://publichealth.jhu.edu/2015/study-paying-for-transgender-health-care-cost-effective [https://perma.cc/95GL-5TTZ].

269. *Compare* CAL. WELF. & INST. CODE 224.71 ("It is the policy of the state that all youth confined in a facility of the Division of Juvenile Facilities shall have the following rights: . . . (i) To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status."), *with* N.M. ADMIN. CODE 8.14.1.11 ("All services and licenses are provided in accordance with federal and state constitutional, statutory and regulatory requirements. Except as otherwise stated, the department and any contract provided service and license shall be without regard to age, gender, race, religion, disability, marital status, or tribal affiliation in accordance with the law.").

violation of the statute, policy, or regulation.

California and Washington, D.C. are the only entities that have statutes proclaiming the nondiscrimination of LGBTQ+ juveniles.[270] Statutes are the highest level of protection because they are less likely to be changed by new administrations as they require a legislative repeal.

Nineteen states have specific nondiscrimination policies for LGBTQ+ juveniles that include guidelines on how best to enforce the policy.[271] This is promising as it shows intent to protect LGBTQ+ offenders, however, policies are less permanent as new administrations can simply rescind the regulations.

More than half of the states have policies or regulations that assert LGBTQ+ juveniles cannot be discriminated against while in the care of the state.[272] However, because counties and municipalities typically have complete oversight of detention facilities,[273] the lack of specific state guidelines, oversight, and enforcement allows these centers to potentially continue discriminating.

Finally, numerous states, such as Oklahoma and Virginia, have no protections for LGBTQ+ juveniles.[274] Because states have failed to pass or implement these nondiscriminatory measures, transgender juveniles have a much harder task to force gender-affirming care accessibility. Without an explicit state policy, they must resort to federal law, argue an existing state statute should be applied to transgender juveniles, or use constitutional arguments.

Given these discriminatory state policies, or the lack of nondiscriminatory policies, transgender juveniles are disadvantaged in many ways when attempting to receive gender-affirming care in juvenile detention. Even if gender-affirming care is legal in their state, trans juveniles may have a difficult time finding money and support for said care. Furthermore, given the lack of anti-discrimination statutes, facilities do not have a duty to provide such care or treat trans juveniles the same as other incarcerated juveniles. These policies, or lack thereof, create a need for state-level reform to ensure trans juveniles are provided gender-affirming care and have an avenue to force care if facilities fail to provide it.

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270. *State-by-State Analysis of Juvenile Justice Systems*, LAMBDA LEGAL, https://www.lambdalegal.org/juvenile-justice [https://perma.cc/2QZN-RLE2] (last visited Sept. 7, 2022) [hereinafter *State-by-State*] (analyzing data from California and Washington, D.C., among other states).
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*

III. ANALYSIS: TRANSGENDER JUVENILES DEMAND THE ABILITY TO RECEIVE GENDER-AFFIRMING CARE

Transgender youth, particularly trans juveniles, deserve and are entitled to gender-affirming care under the U.S. Constitution. Post-*Edmo* and *Brandt*, advocates must use this momentum and expand the right to gender-affirming care to trans juveniles. In section A, I will argue the Ninth Circuit's decision in *Edmo* is correct and shows gender-affirming care is medically necessary for incarcerated youth Additionally, I will argue *Brandt* is likely to be affirmed at a later trial, so states should proactively allow trans youth to receive gender-affirming care and facilitate the prescription of such care for transgender juveniles. In section B, I illustrate policy reasons that supplement the constitutional arguments. State advocates and legislators should use these policy reasons to build support for a legislative initiative that guarantees such care for trans juveniles. Trans juveniles need to be heard and assisted in this fight for gender-affirming care to best honor the rehabilitative mission of the juvenile legal system.

A. Edmo *and* Brandt *Are Correct and Should Be Applied in the Juvenile Context*

Edmo and *Brandt* represent steps in the right direction—transgender individuals are stopping their governments from denying them their right to make their own medical care choices. In this section, I argue why *Edmo* is correct, why the *Brandt* preliminary injunction should be made permanent after trial, and discuss what their impact is for transgender juveniles.

Edmo v. Corizon was monumental in that it directly contrasted with two other federal circuits: the First Circuit and the Fifth Circuit.[275] In doing so, it created a circuit split regarding whether GCS is medically necessary for adult transgender prisoners. Although pro-LGBTQ+ litigation should not be brought to the Supreme Court at this time as the current Court is quite hostile to civil and fundamental rights, medical providers, and scientific expertise,[276] the Ninth Circuit's precedent for other circuits is quite persuasive.

The preliminary injunction from *Brandt v. Rutledge* put state youth

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275. *Compare* Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014), *and* Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) (ruling the WPATH-SOC do not mandate GCS for the transgender prisoners), *with* Edmo v. Corizon, Inc., 935 F.3d 757, 771–75 (9th Cir. 2019) (ruling the WPATCH-SOC do mandate GCS for this transgender prisoner).

276. *See e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (ruling there is no fundamental right to abortion or women's bodily autonomy).

gender-affirming care bans to a grinding halt.[277] It should be celebrated for delivering a message that gender-affirming care bans are a waste of the legislature and courts' time and should not be passed in the first place. By preliminarily enjoining the implementation of this law, transgender youth can continue to safely undergo the treatment they desperately need. Synthesizing these two cases produces three main lessons for LGBTQ+ advocates moving forward: (1) they emphasize the acceptance and universality of the WPATH-SOC; (2) *Edmo,* in particular, returns the *Estelle v. Gamble* test to its original importance; and (3) it shows transgender juveniles have a large toolkit of constitutional arguments available to leverage access to gender-affirming care.

First, a common trend in disputes regarding transgender healthcare is the WPATH-SOC. Parties opposed to providing gender-affirming care for transgender youth argue the guidelines are biased, untrustworthy, and harmful when applied to transgender youth.[278] They justify their stance is based in other restrictions on when teens can drive, smoke, drink alcohol, and vote.[279] Tucker Carlson stated the WPATH-SOC enable treatments that are "chemical castration" for youth and need to be stopped.[280]

Despite these harmful talking points, the courts have consistently declined to follow these factually incorrect claims.[281] The District Court of Idaho stated, "The World Professional Association of Transgender Health ('WPATH') Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People were first promulgated in 1979 and are the internationally recognized guidelines for the treatment of individuals with gender dysphoria" when ruling that Adree Edmo

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277. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021) (preliminary enjoining the implementation of Arkansas SAFE Act).

278. *See Kosilek*, 774 F.3d at 78 (stating the WPATCH-SOC do not represent the national consensus on gender-affirming care); *see generally* Lisa Mac Richards, *Bias, Not Evidence Dominates WPATH Transgender Standard of Care*, CAN. GENDER REP. (Oct. 1, 2019), https://genderreport.ca/bias-not-evidence-dominate-transgender-standard-of-care/ [https://perma.cc/9J8K-8H45].

279. *See* Emily Tencer, *Utah Republican Party Passes Resolution Seeking to Block Gender-Affirming Treatment for Transgender Youth*, FOX13 SALT LAKE CITY (Aug. 15, 2022, 9:25 PM), https://www.fox13now.com/news/politics/utah-republican-party-passes-resolution-seeking-to-block-gender-affirming-healthcare-to-transgender-youth [https://perma.cc/YP6Q-4HRM] ("'We don't let them drink until they're 21. We don't let them get tattoos until they're 18. This should be no different,'" said Carson Jorgensen, chairman of the Utah Republican Party.").

280. Emily Bazelon, *The Battle over Gender Therapy,* N.Y. TIMES MAG. (June 15, 2022) https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html [https://perma.cc/HN7X-PE6E].

281. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021) (preliminary enjoining the implementation of Arkansas SAFE Act); *see generally* Edmo v. Corizon, Inc., 935 F.3d 757, 776–78 (9th Cir. 2019) (finding GCS was medically necessary for Adree Edmo).

deserves access to GCS.[282] On appeal, the Ninth Circuit affirmed the ruling and stated, "[The WPATH Standards of Care] are the gold standard on the issue [of transgender healthcare]."[283] Although these statements were made in dicta,[284] their precedential value is persuasive as future courts may adopt similar reasoning and force government agencies to provide gender-affirming care for WPATH-approved transgender individuals.

Additionally, *Edmo* and *Brandt* have shown most medical organizations support the WPATH-SOC.[285] While writing amicus briefs for these challenges and cases, organizations such as the American Medical Association[286] and the American Psychiatric Association[287]

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282. Edmo v. Idaho Dep't of Corrs., 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018). The District Court also stated that these guidelines are designed to be flexible, so that the focus is what the individual patient requires. Edmo v. Idaho Dep't of Correction, 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018). With that, it easily applicable to a transgender prisoner and the guidelines allow prison officials the ability to apply the guidelines to an incarcerated context. *Id.* Regardless, they can be trusted. *Id.* at 1224.

283. *Edmo*, 935 F.3d at 789 n.16. There is no need to doubt what the WPATH-SOC state is recommended for transgender patients who meet certain criteria.

284. *Id.*

285. *Id.* at 788–89; *see generally Brandt II*, 551 F. Supp. 3d at 887.

286. *See Policy Statement H-160.991 on Health Care Needs of Lesbian, Gay, Bisexual and Transgender Populations*, AM. MED. ASS'N (2016), https://policysearch.ama-assn.org/policyfinder/detail/gender%20identity?uri=%2FAMADoc%2FHOD.xml-0-805.xml [https://perma.cc/YBE4-T2UU]:

> Our AMA: (a) believes that the physician's nonjudgmental recognition of patients' sexual orientations, sexual behaviors, and gender identities enhances the ability to render optimal patient care in health as well as in illness. In the case of lesbian, gay, bisexual, transgender, queer/questioning, and other (LGBTQ) patients, this recognition is especially important to address the specific health care needs of people who are or may be LGBTQ . . . . Our AMA will continue to work alongside our partner organizations, including GLMA, to increase physician competency on LGBTQ health issues. . . .Our AMA will continue to explore opportunities to collaborate with other organizations, focusing on issues of mutual concern to provide the most comprehensive and up-to-date education and information to enable the provision of high quality and culturally competent care to LGBTQ people.

Id.; *see also Professional Organization Statements Supporting Transgender People in Health Care*, LAMBDA LEGAL, https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_trans-professional-statements_09-18-2018.pdf [https://perma.cc/8F8M-KSTU].

287. *Position Statement on Access to Care for Transgender and Gender Diverse Individuals*, AM. PSYCHIATRIC ASS'N (2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf [https://perma.cc/RT5M-2CLC]:

> [T]he American Psychiatric Association: 1. Recognizes that appropriately evaluated transgender and gender diverse individuals can benefit greatly from medical and surgical gender-affirming treatments. 2. Advocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment. 3. Opposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician. 4. Supports evidence-based coverage of all gender-

have put out official statements endorsing the use of the WPATH-SOC. At legislative hearings regarding trans healthcare bans for youth, the same associations and doctors testified regarding their strong opposition to these bills.[288] One doctor stated:

> Our research team from Harvard Medical School and the Fenway Institute published a study showing that access to puberty blockers during adolescence is associated with lower odds of transgender young adults considering suicide. Despite fearmongering, these are safe medications that doctors have been using for decades for cisgender children who go through puberty too early. They also are reversible—if the medication is stopped, puberty will progress.[289]

As such, a positive side effect of these bills and cases is the formation of a strong coalition of doctors, nonprofits, interest groups, medical associations, and families of transgender kids that support the WPATH-SOC and access to gender-affirming care. For transgender juveniles, this support is monumental. Transgender juveniles are too commonly ignored, harassed, and endangered in juvenile detention.[290] If a coalition and framework already exist regarding access to gender-affirming care, the work to apply this momentum to the juvenile detention context can begin. By continuing to support the WPATH-SOC, disagreements regarding the medical necessity of gender-affirming care will become less prevalent during legislative debates, allowing protective laws to be easily passed. Because of *Edmo* and *Brandt*, the path to gender-affirming care became a little easier for transgender juveniles.

Second, *Edmo* restored the correct interpretation of Eighth Amendment medical necessity and deliberate ignorance caselaw. In *Kosilek*, the inaugural case regarding transgender prisoners' right to gender-affirming care, the First Circuit used the correct interpretation of the *Estelle* test: a case-by-case analysis of whether the prisoner's care is medically necessary and whether the prison was deliberately indifferent to these needs.[291] The First Circuit heard evidence from both sides on each issue and ruled by weighing the evidence and credibility of each side.[292] However, in *Gibson,* the Fifth Circuit abandoned this approach

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> affirming procedures which would help the mental well-being of gender diverse individuals.

Id.; *see also* LAMBDA LEGAL *supra* note 286.

288. *See generally Doctors Agree: Gender-Affirming Care Is Life-Saving Care,* ACLU. (Apr. 1, 2021), https://www.aclu.org/news/lgbtq-rights/doctors-agree-gender-affirming-care-is-life-saving-care [https://perma.cc/D4YB-NBMM].

289. *Id.* (statement of Dr. Jack Turban).

290. *See generally* UNJUST, *supra* note 18, at 5 (noting the high rates of sexual assault faced by youth incarcerated in juvenile detention facilities).

291. Kosilek v. Spencer, 774 F.3d 63, 85–91 (1st Cir. 2014) (using the correct test for Eighth Amendment medical necessity).

292. *Id.*

and instituted an outright ban on GCS for transgender prisoners.[293] The Fifth Circuit did not analyze Gibson's claims of medical necessity, failed to review any expert testimony, and ruled based on precedent instead of medical recommendations.[294] This is not the correct interpretation of the *Estelle* test.

In *Edmo*, the Ninth Circuit repeated *Kosilek*'s methods, listened to the experts, weighed the evidence, and decided, albeit in a different way, whether Edmo's Eighth Amendment claim was proven.[295] *Edmo*'s approach is correct and better represents how Eighth Amendment claims are meant to be heard—by analyzing each case individually.[296] As Mike Ferraro noted in his analysis of *Edmo*, the *Gibson* approach is, "such a sweeping judgment [that] arguably undercuts the Eighth Amendment more broadly by questioning medical professionals and focusing on typicality, rather than rooting the analysis in human dignity and the condition of the plaintiff in an Eighth Amendment claim."[297] As such, for transgender juveniles, this decision ensures future courts fully analyze the transgender inmate's claim. Unlike *Gibson*, future courts will not toss out claims based on ignorance and transphobia. Instead, voices will be heard and medical testimony will be prioritized—just as *Estelle* calls for.[298]

Third, *Edmo* and *Brandt* illustrate how transgender juveniles possess an expansive toolkit of constitutional arguments to prove they should be entitled to gender-affirming care while detained in juvenile correctional facilities. Using *Edmo* as precedent, transgender juveniles may assert their Eighth Amendment right against cruel and unusual punishment has been violated when a prison denies their request for gender-affirming care.[299] Although this strategy is rather limited regarding its impact on access to healthcare as a whole,[300] *Edmo* has shown it is a promising strategy when plaintiffs have a team of doctors who back their claim. Additionally, with a decision like *Edmo* in recent history, facilities may concede to pressure to provide gender-affirming care as done in *Iglesias*

293. Gibson v. Collier, 920 F.3d 212, 223 (5th Cir. 2019) (explaining why expert testimony did not need to be heard when denying Gibson's claim that she was entitled to GCS).

294. *Id.*

295. Edmo v. Corizon, Inc., 935 F.3d 757, 786–93 (9th Cir. 2019).

296. *See generally* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

297. John Ferraro, *The Eight for* Edmo*: Access to Gender-Affirming Care in Prisons*, 62 B.C. L. REV. E. Supp. II.-344, Il-363 (2021); *see generally Estelle*, 429 U.S. at 104.

298. *See generally Estelle*, 429 U.S. at 104.

299. *Edmo*, 935 F.3d at 774–75.

300. Because Eighth Amendment medical necessity litigation is on a case-by-case basis, one decision cannot state that all transgender juveniles deserve access to gender-affirming care. *See generally Estelle*, 429 U.S. at 104. There is no such thing as a categorical decision regarding access to a certain type of care. *Id.*

v. Federal Bureau of Prisons.[301] In *Iglesias*, the prison entered into a settlement with a transgender prisoner where it agreed to provide gender-affirming care and changed its policy to facilitate future gender-affirming care for other transgender inmates.[302] The impact of *Edmo* on Eighth Amendment medical necessity claims has already been felt by making it easier for transgender inmates to demand gender-affirming care from prisons.

Brandt illustrates how transgender juveniles may use the Fourteenth Amendment Equal Protection Clause to demand access to care. Whereas Arkansas banned gender-affirming healthcare in *Brandt*,[303] when juvenile detention facilities prohibit access to or restrict gender-affirming care, transgender juveniles may assert it denies them equal protection under the Constitution. If other inmates that are not transgender are receiving their necessary medical care, why are transgender juveniles unable to receive care that will improve their mental and physical health? *Brandt* shows this strategy has merit and may succeed in the courtroom. There is no government interest that justifies prohibiting transgender youth from accessing life-saving healthcare.[304]

Finally, *Brandt* shows courts are welcome to apply fundamental rights to the medical context for transgender youth. However, whereas in *Brandt*, the parents asserted their fundamental right to raise their children how they wish was implicated and violated,[305] a transgender juvenile may not be able to use this litigation strategy. Whereas the *Brandt* plaintiffs come from privileged families with money and resources,[306] transgender juveniles are more likely to be alienated from their families and homeless.[307] As a result, *Brandt*'s fundamental right litigation strategy may not always be possible as the juvenile may not have a parent to bring this claim on their behalf.

Nevertheless, a trans juvenile may implicate an alternative fundamental right under the Due Process Clause. For example, a trans juvenile may claim their right to privacy and bodily autonomy,

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301. *See generally* Iglesias v. Federal Bureau of Prison et al., No. 19-CV-415-NJR (S.D. Ill. 2022) (order granting preliminary injunction forcing federal prison to provide gender-affirming care for the transgender prisoner).

302. *See Iglesias*, No. 19-CV-415-NJR (settlement stating the conditions for ending the suit after the preliminary injunction).

303. *See generally* Arkansas, *supra* note 218.

304. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021) (discussing why neither of the state's interests justified banning gender-affirming care for transgender youth).

305. *Id.* at 892–93.

306. *See Dylan Brandt Bio*, ACLU, https://www.aclu.org/bio/dylan-brandt [https://perma.cc/FWJ6-KMRD] (discussing where the plaintiffs of *Brandt v. Rutledge* came from and their familial background).

307. UNJUST, *supra* note 18, at 6.

recognized under *Griswold v. Connecticut*,[308] has been violated when facilities restrict their gender-affirming care. Like contraception, the choice to pursue gender-affirming care is a medical decision that should be left to a patient and their physician.

Unfortunately, given recent statements regarding the right to privacy, this litigation strategy may be less persuasive. When a person's right to an abortion was overturned in *Dobbs v. Jackson Women's Health Organization*,[309] Justice Thomas concurred and stated other "erroneous" fundamental rights may be reconsidered.[310] For LGBTQ+ advocates, Justice Thomas's statement had wide-ranging dangerous implications. Because many pro-LGBTQ+ rulings are based in fundamental rights precedence, litigation may not be the best path to force public policy change. If a trans juvenile brings a case to the Supreme Court regarding their medical care, they jeopardize losing the case and setting back the movement by decades. One bad decision may never be corrected. As such, taking a fundamental rights litigation route in the current judicial climate should be cautioned.

Moving forward, although the Eighth Amendment and Equal Protection Clause strategy may still have promise, this Comment argues a different approach. Rather than pursuing class actions or impact litigation, transgender activists should gather their coalition of families, doctors, nonprofit leaders, and most importantly, legislators, to codify the right to medical care in juvenile facilities. By prioritizing this systemic reform strategy, all trans juveniles will be aided, and they do not have to rely on an inconsistent, transphobic, and hostile bench. *Edmo* and *Brandt* show that reformists have a constitutional mandate supporting their legislative action as denying access to gender-affirming care has been shown to violate the Eighth and Fourteenth Amendments. However, as many advocates may know, legalese and constitutional arguments are not sufficient to persuade legislators and the public to support a new initiative—public policy research is needed to bring others to their side. As shown in the next section, public policy research overwhelmingly shows transgender juveniles benefit from and most importantly, need, gender-affirming care.

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308. Griswold v. Connecticut, 381 U.S. 479 (1965). *Griswold* is a landmark SCOTUS case that recognized the fundamental right to contraception for married women. *Id.* at 485–86. It has been expanded to include a general right to privacy that encompasses a wide assortment of fundamental rights, including the right to an abortion and the right to have intimate relations with whomever someone chooses. *See generally* Joanna L. Grossman, Griswold v. Connecticut*: The Start of the Revolution*, VERDICT (June 8, 2015), https://verdict.justia.com/2015/06/08/griswold-v-connecticut-the-start-of-the-revolution [https://perma.cc/BP3Q-3S56].

309. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2234, 2242 (2022).

310. *Id.* at 2301–02 (Thomas, J., concurring).

B. Policy Arguments

Apart from constitutional arguments, transgender juveniles have several policy reasons that support increased access to gender-affirming care. Quite literally, access to proper healthcare to treat their gender dysphoria saves their lives. In this section, I detail four policy reasons supporting why legislatures, and juvenile detention centers should affirmatively provide transgender juveniles the right to gender-affirming care while in the custody of states. Although I address the following four policy reasons separately, they quite often intersect and feed off each other, thus compounding their effect on an individual's gender dysphoria.

1. Mental Health

It is no secret that there is a mental health crisis occurring among United States youth. With the advent of social media, the COVID-19 pandemic, and recent political events, youth mental health issues are at an all-time high.[311] According to the Center for Disease Control, one in three high school students experiences poor mental health.[312] Suicide is the second-leading cause of death for people aged ten to thirty-four.[313] Nearly half of all high school students report feeling sad or helpless.[314] Compared to other countries, the United States' youth suicide rate is the highest among developed nations.[315] The situation has become so grave that U.S. Surgeon General, Dr. Vivek Murphy, issued a health advisory calling on states, doctors, and families to address the mental health epidemic.[316] With COVID-19 still rampaging communities, Dr. Murphy

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311. *See* Daniel H. Gillison, *The Crisis of Youth Mental Health,* NAT'L ALL. ON MENTAL HEALTH (Apr. 19, 2022), https://nami.org/Blogs/From-the-CEO/April-2022/The-Crisis-of-Youth-Mental-Health [https://perma.cc/WA86-2LDJ] (summarizing the recent CDC statics showing an alarming rise in mental health issues among youth.) This site was a launching point for my research on mental health issues facing all youth in the United States.

312. Sherry Everett Jones et al., *Mental Health, Suicidality, and Connectedness Among High School Students during the COVID-19 Pandemic—Adolescent Behaviors and Experiences Survey, United States, January-June 2021*, 71 U.S. DEPT. OF HEALTH & HUM. SERV. CTR. FOR DISEASE CONTROL & PREVENTION 16, 17 (2022), https://www.cdc.gov/mmwr/volumes/71/su/su7103a3.htm?s_cid=su7103a3_w [https://perma.cc/63C9-5LNC] (discussing key findings of their large study). The authors note that their findings have several limitations including it not being a longitudinal study, and they cannot conclude that how this compares to other time periods; Gillison, *supra* note 311.

313. Gillison, *supra* note 311. This post also emphasized this statistic was pre-COVID-19 and suicide rates have likely gone up as well post-COVID-19. *Id.*

314. Jones, *supra* note 312, at 18.

315. *See* Mitchell J. Prinstein, *US Youth Are In A Mental Health Crisis—We Must Invest in Their Care*, AM. PSYCH. ASS'N (Feb. 7, 2022) https://www.apa.org/news/press/op-eds/youth-mental-health-crisis [https://perma.cc/W6GP-F46X] (commenting on the US Surgeon General releasing an advisory comment regarding youth mental health).

316. *See generally id.*; U.S. DEPT. OF HEALTH AND HUMAN SERVICES, U.S. SURGEON GENERAL ISSUES ADVISORY ON YOUTH MENTAL HEALTH CRISIS FURTHER EXPOSED BY COVID-19

stressed funding must be allocated to address these troubling findings regarding the mental health of American youth.[317]

Nearly all of these statistics report an even more troubling trend—these percentages and trends are *worse* for LGBTQ+ youth.[318] According to the Trevor Project, 14 percent of LGBTQ+ youth attempt suicide, compared to 10 percent of their cisgender and heterosexual peers.[319] Forty-five percent of LGBTQ+ youth seriously contemplate suicide, compared to 33 percent of cisgendered and heterosexual peers.[320] Nearly three-quarters of all LGBTQ+ youth experience anxiety daily, and more than half experienced major episodes of depression.[321] The Trevor Project also found that these statistics are likely even worse for LGBTQ+ youth who live in LGBTQ+ hostile communities, schools, and/or households.[322]

These findings also show that mental health is *even worse* for transgender youth. Whereas roughly 30 percent of cisgender boys and girls considered suicide this past year, roughly 50 percent of transgender boys and girls considered suicide.[323] Trans youth were also twice as likely to attempt suicide as their cisgender counterparts.[324] Rates of anxiety and depression are also higher for transgender youth.[325] The Trevor Project additionally found that anti-trans legislation exasperates the LGBTQ+ mental health crisis.[326] Ninety-three percent of all transgender youth worried about being denied gender-affirming care

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PANDEMIC (Dec. 7, 2021), https://www.hhs.gov/about/news/2021/12/07/us-surgeon-general-issues-advisory-on-youth-mental-health-crisis-further-exposed-by-covid-19-pandemic.html [https://perma.cc/M9ZJ-VK6T] [hereinafter HHS ADVISORY].

317. HHS ADVISORY, *supra* note 316.

318. *See generally* Gillison, *supra* note 311.

319. THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 5–10 (2022), https://www.thetrevorproject.org/survey-2022/#anxiety-by-gender [https://perma.cc/T5PQ-TCCL] (The Trevor Project is a national research and advocacy organization that has published groundbreaking studies regarding the LGBTQ+ community).

320. *Id.* For both statistics, it included those aged 13–24. *Id.* Even though it includes participants outside of the traditional child-age range, it does break it down into two group: 13–17 and 18–24. *Id.* For the younger age group, the rates are much higher and more alarming. *Id.* This is crucial as transgender healthcare bans and those in juvenile detention facilities typically must be under 18. The fact that this age range has much higher rates of mental health issues makes this issue even more deserving of attention.

321. *Id.* at 8.

322. *Id.* at 18–22. Coincidentally, areas that are more hostile to LGBTQ+ individuals are the places where gender-affirming care is being restricted.

323. *Id.* at 6. The Trevor Project isolates transgender from non-binary/gender queer youth whereas previous studies into the Juvenile Legal System often combine the two. As such, combining trans and non-binary youth as the juvenile legal system studies do likely would widen the gap between trans and cisgender mental health statistics.

324. *Id.*

325. *Id.* at 9.

326. *Id.* at 14. *See generally infra* Part III.B.

daily.[327]

In addition to common mental health concerns that are universal in nature and may apply to all members of society, there are unique concerns that only transgender youth may face. A common consequence of gender dysphoria is "hate and disgust" toward their genitalia.[328] As seen in *Kosilek*,[329] *Gibson*,[330] and *Edmo*,[331] transgender individuals who do not receive treatment for their gender dysphoria self-harm at alarmingly higher rates. Specifically, Adree Edmo partially castrated herself while in her prison cell and had to be hospitalized for weeks after removing one of her testicles.[332] For trans youth who are going through puberty, this "hate and disgust" toward their genitals exasperates their mental health struggles. Every day that they go through puberty without puberty blockers or HRT, their desperation to stop puberty gets worse and their mental health suffers.[333]

The situation for trans juveniles offenders is similar and is once again *much worse* than previously thought. Sixty-five-to-seventy percent of trans juvenile offenders have a diagnosable mental health issue,[334] 75 percent have experienced traumatic victimization, and 93 percent of juveniles report experiences with child abuse, violence in the home, and

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327. *Id.*

328. *See* J. Lauren Turner, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. R. 552, 555 (2009) (citing Larry Nuttbrock et al., *Transgender Identity Affirmation and Mental Health*, 6 INTL J. TRANSGENDERISM 1, 18 (2002), *and* HARRY BENJAMIN, THE TRANSSEXUAL PHENOMENON (Julian Press, 1966)). Turner's article argued a similar point to mine by stating children in foster care ought to have access to gender-affirming care. *See* Turner, *supra*.

329. Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014) (recounting how Kosilek first attempted self-castration).

330. Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) (recounting how Gibson first attempted self-castration).

331. Edmo v. Corizon, Inc., 935 F.3d 757, 773–74 (9th Cir. 2019) (recounting how Edmo first attempted and partially succeeded self-castrating herself).

332. *Id.*

333. Turner, *supra* note 328, at 555 (citing Peggy T. Cohen & Stephanie H.M. van Goozen, *Sex Reassignment of Adolescent Transsexuals: A Follow-Up Study*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 263, 264 (1997)).

334. Mental Health America, *Position Statement 51: Children with Emotional Disorders in the Juvenile Justice System*, MENTAL HEALTH AM., https://www.mhanational.org/issues/position-statement-51-children-emotional-disorders-juvenile-justice-system [https://perma.cc/Q5JW-Z5QA] [hereinafter *Position Statement 51*] (citing NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST., MODELS FOR CHANGE BETTER SOLUTIONS FOR YOUTH WITH MENTAL HEALTH NEEDS IN THE JUV. JUST. SYS. (2013), http://thecrimereport.s3.amazonaws.com/2/77/9/2596/whitepaper-mental-health-final.pdf [https://perma.cc/84KU-WSTZ]; J.S. Shufelt & J.C. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State, Multi-System Prevalence Study*, NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST. (2006), https://www.ojp.gov/ncjrs/virtual-library/abstracts/youth-mental-health-disorders-juvenile-justice-system-results-multi [https://perma.cc/RG8Y-VZSC]).

serious illnesses.[335] Commitment to a juvenile detention center is supposed to come with benefits such as counseling and therapy which may alleviate some of these mental health issues. However, if transgender juveniles are dealing with stress and anxiety unique only to them, how are they supposed to benefit from these treatment plans? The mission of the juvenile legal system is rehabilitation, however, as discussed, trans-only issues plague their mental health, and before addressing any universal mental health issue common to most juvenile offenders, gender-affirming care should be provided.

However, there is a light at the end of the tunnel for our transgender youth. There have been numerous studies that conclude access to gender-affirming care to treat gender dysphoria decreases rates of anxiety, depression, suicidal behavior, and psychological distress.[336] For example, one study found that transgender youth who had access to gender-affirming care, including puberty blockers or HRT, had 60 percent lower odds of depression and 73 percent lower odds of suicidal thoughts.[337] Trans juveniles may still be exposed to the universal mental health struggles that cisgendered and heterosexual youth experience. Yet, by erasing some of the differences between transgender and cisgendered youth with gender-affirming care, their rates of poor mental health may become equal. Thus, it allows juvenile offenders to focus on other mental health issues present in all youth.[338] Gender-affirming care has been shown to minimize the impact that their gender dysphoria has on their everyday life and may give them a chance to benefit from the treatment and programming of the juvenile legal system.[339]

The youth mental health crisis is out of control for all youth, but for trans juveniles, it is *much* worse. Like every other youth, trans juveniles

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335. *Position Statement 51*, *supra* note 334 (citing M.T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 8 (2014)).

336. *Outlawing*, *supra* note 56, at 2168–69 (citing Rosalia Costa et al., *Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria*, 12 J. SEXUAL MED. 2206, 2212 (2015); Annelou L.C. de Vries et al., *Young Adult Psychological Outcome after Puberty Suppression and Gender Reassignment*, PEDIATRICS 1, 6–7 (Oct. 2014); Anna Martha Vaitses Fontanari et al., *Gender Affirmation Is Associated with Transgender and Gender Nonbinary Youth Mental Health Improvement*, 7 LGBT HEALTH 237, 243 (2020); Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, PEDIATRICS 1, 5 (Mar. 2016); Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, 1, 5 (Feb. 2020); Anna I.R. van der Miesen et al., *Psychological Functioning in Transgender Adolescents Before and After Gender-Affirmative Care Compared with Cisgender General Population Peers*, 66 J. ADOLESCENT HEALTH 699, 703 (2020)).

337. Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 J. AM. MED. ASSOC. NETWORK OPEN 1, 1 (2022).

338. *Outlawing*, *supra* note 56, at 2168–69.

339. UNJUST, *supra* note 18, at 1.

suffer with poor mental health, but due to their transness, they have extra weight on their shoulders. Gender-affirming care must be provided to trans juveniles to remove some of this weight and equate their mental health with other cisgendered juveniles. In doing so, just like cisgendered juveniles, they may devote their time and attention while in custody to rehabilitating other mental health issues that may have brought them to the facility in the first place.

2. Negative Juvenile Detention Experiences

After commitment to juvenile detention centers, transgender juveniles are mistreated emotionally, physically, and sexually more than their cisgendered and heterosexual fellow juveniles.[340] At the beginning of their placement at a juvenile detention center, transgender juveniles endure discrimination regarding where they are placed.[341] Under the Prison Rape Elimination Act,[342] transgender prisoners and juvenile offenders are to be placed according to their gender identity.[343] In practice, every juvenile detention facility is different. Some correctly place them with their chosen gender identity; some house them with their assigned sex at birth, directly placing them in dangerous situations where they may experience emotional, physical, and sexual violence; some have ambiguous policies regarding where transgender juveniles are placed, thus providing potential discriminatory discretion to facility officials.[344]

Unfortunately, some states resort to a devastating third option by relegating transgender juveniles to solitary confinement.[345] Juvenile

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340. *Id.*

341. *See generally* UNJUST, *supra* note 18, at 5.

342. *See generally* The Prison Rape Elimination Act, 42 U.S. §§ 15601–15609 (2003) (transferred to 34 U.S.C. §§ 30301–30309). The Prison Rape Elimination Act is a federal law passed in 2003 and implemented in 2012 that mandates data collection of the prevalence of sexual assault in state and federal prisons. *Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR., https://www.prearesourcecenter.org/about/prison-rape-elimination-act [https://perma.cc/SZM8-ARVM] (introducing the law and its general guidelines). The Act created the National Prison Rape Elimination Commission which conducted research and ultimately provided guidelines for prisons on how best to combat prison rape. *Prison Rape Elimination Act*, *supra*. States that implemented these guidelines received additional corrections funding. *Id.*

343. NAT'L. PRISON RAPE ELIMINATION COMM'N REP. 74 (2009), https://www.ojp.gov/pdffiles1/226680.pdf [https://perma.cc/UN9H-KQ22].

344. *See generally* UNJUST, *supra* note 18, at 5; CHRISTINA WILSON REMLIN ET AL., SAFE HAVENS: CLOSING THE GAP BETWEEN RECOMMENDED PRACTICES AND REALITY FOR TRANSGENDER AND GENDER-EXPANSIVE YOUTH IN OUT-OF-HOME CARE 21 (2017), https://legacy.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf [https://perma.cc/26HH-EVZL].

345. UNJUST, *supra* note 18, at 5; *see generally* JESSICA FEIERMAN ET AL., JUVENILE LAW CENTER, UNLOCKING YOUTH: LEGAL STRATEGIES TO END SOLITARY CONFINEMENT IN JUVENILE FACILITIES (2017), https://jlc.org/sites/default/files/publication_pdfs/JLC_Solitary_Report-FINAL.pdf [https://perma.cc/3ZNQ-X2FV] (arguing solitary confinement is unconstitutional

facilities claim to use solitary confinement for the child's safety, however, the Juvenile Law Center found that solitary confinement has devastating effects on transgender juveniles.[346] First, transgender youth are disproportionately subjected to solitary confinement.[347] Juvenile detention center staff isolate them due to unfounded beliefs that LGBTQ+ youth are more deviant or untreatable.[348] a Second, solitary confinement has devastating consequences on the mental health and neurological development of all juveniles.[349] Separating youth for hours, days, or even weeks at a time worsens their mental health and counteracts the juvenile system's mission of rehabilitating youth.[350]

Regardless of where transgender juveniles are placed, once committed, trans juveniles are mistreated emotionally, sexually, and physically by fellow juveniles and staff.[351] Emotionally, in an ACLU civil rights lawsuit against a Hawaii juvenile facility,[352] Ia transgender girl, known as C.P., was placed in solitary confinement with only a bible for twenty-three hours.[353] When she was outside of her cell, she was subjected to harassment, slurs, and threats of violence by the guards and incarcerated juveniles.

.[354] Physically, over 29 percent of LGBTQ+ juveniles report they have been attacked while in a juvenile detention center.[355] Sexually, 20.6 percent of LGB[356] males reported sexual assault by a fellow incarcerated

under the Eighth Amendment). Because juvenile detention officers are commonly ignorant of trans issues and lack training, too much discretion leads to discrimination.

346. FEIERMAN ET AL., *supra* note 345, at 17.

347. *Id.* at 14. Among incarcerated juveniles, 7.3 percent of juveniles in solitary confinement are transgender whereas 0.6 percent of the general population identify as transgender. *Id.*

348. *Id.* at 14–15. Additionally, transgender youth are more likely to have experienced trauma outside of the facility, thus, making them more likely to act out. *Id.* Solitary confinement should not be used as punishment but rather acting out should be evidence that they need more help.

349. *Id.* at 10.

350. *See generally id.*

351. *See generally infra* notes 373–384 and accompanying text.

352. *See generally* R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006). This case was later settled out of court and Hawaii agreed to enact a nondiscriminatory policy that protects LGBTQ+ juveniles. Hawai'i-R.G. et al. v. Koller et al., ACLU, https://www.aclu.org/cases/hawaii-rg-et-al-v-koller-et-al [https://perma.cc/UTC2-W283] (last visited July 27, 2023).

353. Molly Kruse et al., *LGBTQ Youth Confront Inconsistent, Unreliable Pattens of Incarceration*, KIDS IMPRISONED (Aug. 21, 2020) https://kidsimprisoned.news21.com/lgbtq-kids-discrimination-justice-system/ [https://perma.cc/NK98-KBDZ].

354. *Id.*

355. *See generally* UNJUST, *supra* note 18, at 6.

356. *Disproportionality and Disparities*, *supra* note 74, at 1554. An important limitation of this Comment is it did not explicitly control for transgender inmates. This only took data for juveniles identifying as LGB. Although this Comment did not cover transgender inmates, it does conclude that LGBTQ+ inmates are much more likely to experience sexual trauma in juvenile facilities. Because the transgender experience has been much worse on average, I include it to argue that rates for transgender sexual assault prevalence are similar. No such research has been conducted regarding sexual assault among transgender juveniles.

juvenile whereas a fraction, 1.9 percent of heterosexual males reported similar abuse.[357] For sexual interactions with staff, 15 percent of LGB males were assaulted by staff whereas 8.8 percent of heterosexual males reported assaults.[358] For females, the differences were lower, however, LGB females were still more likely to experience assault over heterosexual females.[359]

With these trends, the question is how could gender-affirming care help solve any of the issues? The answer may lie in a trans individual's confidence and their ability to be accepted by fellow incarcerated juveniles. Before transitioning, transgender youth typically have lower self-esteem and are dissatisfied with their body.[360] During puberty, this is worsened when some teens dress in their gender identity, but their external secondary sex characteristics develop and contradict their gender identity. For example, a trans woman may keep her hair long and dress in feminine clothing but must worry about having to shave every single day or hiding a deeper voice. These differences place a target on their back, explaining the higher prevalence of physical, emotional, and sexual abuse as discussed previously.[361]

By providing gender-affirming care, transgender individuals may be able to "pass." As previously discussed, for pre-pubescent youth, puberty blockers stop the development of secondary sex characteristics such as a deeper voice or thicker facial hair for males assigned at birth and breast development in females assigned at birth.[362] For youth who have already gone through puberty, HRT allows them to minimize their secondary sex characteristics, so their transgender identity is not as obvious.[363] As such, providing gender-affirming care may remove that target on their back and lessen the likelihood that trans juveniles are bullied, assaulted, and abused in juvenile detention.

Additionally, providing gender-affirming care will allow a juvenile

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357. *Id.*
358. *Id.*
359. *Id.* Whereas 4.6 percent of LGB females report sexual contact with staff, only 2.2 percent of heterosexual females report it. *Id.* Further, while 6.7 percent of LGB females report sexual assault by a fellow juvenile, only 4.1 percent of heterosexual females report it. *Id.*
360. *Outlawing*, *supra* note 56, at 2169–70 (citing Jenifer K. McGuire et al., *Body Image in Transgender Young People: Findings from a Qualitative, Community Based Study*, 18 BODY IMAGE 96, 103 (2016) (stating transgender adolescents typically feel social stress when they exhibited secondary sex characteristics that do are not the same as their gender identity)).
361. *Outlawing*, *supra* note 56, at 2169–70 (citing Brynn Tannehill, *For Many Trans People, Not Passing Is Not an Option*, SLATE (June 27, 2018, 11:54 AM), https://slate.com/human-interest/2018/o6/not-passing-or-blending-is-dangerous-for-many-trans-people.html [https://perma.cc/4WD3-5JY5].
362. *See infra* notes 44–53 and accompanying text (discussing the effects of puberty blockers and HRT).
363. *Id.*

detention facility to correctly place the juvenile in the correct gendered wing of the facility. Facilities may refuse to place a trans juvenile in their gender's wing to protect the juvenile,[364] however, a healthier alternative would be to provide gender-affirming care, so the trans juvenile can safely live in their preferred wing. Such care will minimize their differences in appearance and make abuse or maltreatment less likely.

Finally, prescribing transgender individuals gender-affirming care helps them become more confident in their body image and socially adjusted with their fellow juveniles.[365] Being able to walk through their juvenile detention facility proud of their body and not ashamed of it allows them to form friendships, escape bullying,, and essentially "pass" more easily as their identified gender.[366]

By providing gender-affirming care, facilities can eliminate the negative experiences such as discrimination and maltreatment that trans juveniles endure in the state's care. Although gender-affirming care may not fully dissipate the mistreatment and abuse trans juveniles endure, it is a first step to stop the discrimination that transgender juveniles commonly endure in juvenile facilities.

3. Stopping Treatment: Withdrawal

Some transgender youth thankfully receive gender-affirming care prior to entering a juvenile detention facility. Whether they come from an accepting family with access to such care or buy the prescription off the street, they have grown accustomed to its effects and depend on it for their daily functioning. However, like Alyssa Rodriquez,[367] their juvenile detention facility may deny the opportunity to continue taking their medication. This may occur by refusing to prescribe more medication, denying opportunities to see doctors specialized in transgender healthcare, or by having a policy that prohibits gender-affirming care while in the custody of the state.[368] Whatever the policy is, stopping puberty blockers or HRT has devastating health consequences on transgender juveniles.[369]

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364. For example, officials may claim placing a female assigned at birth with males assigned at birth may "endanger" them if they do not pass as a transgender male. *See* R.G. v. Koller, 415 F. Supp. 2d 1129, 1148 (D. Haw. 2006) (citations omitted) ("In response to grievances filed by J.D. in August of 2004 regarding the continuous harassment he faced from other wards at HYCF, Tufono–Iosefa directed that J.D. be placed in isolation for his 'safety.' J.D. was originally placed in isolation for a medical evaluation. Although he was cleared by medical staff on August 16, J.D. was kept in isolation 'to provide [him] with a reasonably safe environment' . . . .").

365. *Outlawing*, *supra* note 56, at 2169–70 (citing McGuire et al., *supra* 360).

366. *Id.*

367. *Supra* Part I.

368. MAJD ET AL., *supra* note 2, at 112.

369. *Id.*; Turner, *supra* note 328, at 555.

When HRT is stopped, withdrawal symptoms include nausea, cramps, headaches, increased facial hair, mental distress,[370] severe depression, and suicidal ideation.[371] Like Alyssa's story shows, withdrawal interrupts the rehabilitative mission of the juvenile legal system by distracting the juveniles from their treatment plan. Instead of receiving treatment for other mental illnesses, traumatic life experiences, or anger management, they are holed up in their cell, dealing with the side effects of losing their medication. When puberty blocker medication is stopped, the side effects may not be physical, however, mentally, there are numerous consequences. As discussed previously, puberty blockers merely stop puberty, so when they are stopped, puberty resumes.[372] For transgender individuals, this only adds fuel to their gender dysphoria by providing even more differences between their gender identity and secondary sex characteristics. By stopping gender-affirming care, juvenile detention facilities are creating more mental health issues for their incarcerated juveniles which could have been avoided by simply allowing present and future prescriptions to continue. As such, gender-affirming care should be proactively continued, so facilities do not de-stabilize trans incarcerated juveniles and can ensure their rehabilitation has an equal opportunity to be successful.

4. Poor Future Outcomes

Finally, identifying as transgender comes with several societal consequences due to discrimination, lack of government services and familial support, and poor mental health.[373] Because there has been limited research on transgender juveniles, looking at a study of a recently post-adolescent transgender community may shed light on what happens during transgender young adulthood.

In a longitudinal study tracking the incarceration and life experiences of two hundred trans women, staggering results show the common history of system involvement.[374] Thirty-eight percent of these women dropped out of school, and now 76 percent of them are unemployed.[375] Over 27 percent of these women resorted to sex work at some point in their lives, and now 19.9 percent are HIV-positive.[376] In addition, 48.4 percent have been homeless, 56.1 percent have been arrested in their lifetime, and 32

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370. MAJD ET AL., *supra* note 2, at 112.
371. Turner, *supra* note 328, at 555.
372. *See infra* Part II.A (discussing the effects of puberty blockers and HRT).
373. *See generally* UNJUST, *supra* note 18, at 1.
374. Jaclyn M. White Hughto et al., *A Multisite, Longitudinal Study of Risk Factors for Incarceration and Impact on Mental Health and Substance Use among Young Transgender Women in the USA*, 41 J. PUB. HEALTH 100, 104 (2019).
375. *Id.*
376. *Id.*

percent have been incarcerated.[377] While incarcerated, 79.2 percent of them were housed with men, thus not with their gender identity.[378] These statistics show transgender women suffer from poor negative outcomes regardless of whether they were incarcerated as a juvenile.

However, involvement with the juvenile legal system likely sets transgender individuals on the path to these negative outcomes due to a lack of gender-affirming care while in custody of the state. First, once released from a juvenile detention facility, a transgender individual may have nowhere to go. At times, transgender juveniles enter the system after being kicked out of their own home and getting into legal trouble.[379] If they are denied gender-affirming care while in custody, they will not be able to maximize their potential treatment plan due to bullying, harassment, difficulties with their gender dysphoria, and physical trauma.[380] As such, opportunities to get an education, deal with their past trauma, or learn valuable employment skills may be ignored.[381] Upon release, transgender juveniles may not have a set plan for their future, so at higher rates, they encounter homelessness, resort to sex work, and increase their exposure to HIV, rape, murder, and future incarceration.[382]

Additionally, because of Medicaid and insurance exclusions of gender-affirming care,[383] many transgender individuals do not have the capabilities to receive the healthcare they require after release from a juvenile detention center.[384] Studies show some transgender individuals resort to self-treatment through genital-mutilation or buying hormones on the street.[385] Resorting to these measures comes with severe health consequences, such as physical harm and HIV exposure from shared needles.

By providing access to gender-affirming care in juvenile detention facilities, a microcosm of the transgender community can get the skills

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377. *Id.*
378. *Id.*
379. *See generally* UNJUST, *supra* note 18, at 1, 6.
380. *See infra* Part III.B.1–2 (noting the policy reasons behind supplying gender-affirming care to transgender juveniles).
381. *See generally* UNJUST, *supra* note 18, at 8 ("Departments should improve training for staff to proactively address safety concerns to reduce instances of sexual assault; educate youth about their rights to safety and procedures for reporting misconduct and sexual assault by staff and fellow youth; and allow youth to quickly and easily file complaints and do so without fear of retribution or punishment.").
382. Turner, *supra* note 328, at 556; *see generally* UNJUST, *supra* note 18, at 6.
383. *See infra* Part II.B (discussing recent state actions to limit healthcare rights of transgender youth, with denial of gender-affirming care by Medicaid and insurance companies to all transgender individuals as an extension of this policy).
384. Turner, *supra* note 328, at 556.
385. *Id.* (citing Dan H. Karasic, *Progress in Health Care for Transgendered People*, 6 GAY & LESBIAN MED. ASS'N 157, 157 (2000)).

they need to avoid the trends that plague the transgender community. It allows them to focus on their rehabilitation like the juvenile legal system claims it prioritizes. Although the future outcomes may not be avoided entirely, providing gender-affirming care is a small and easy way to work to prevent these outcomes from becoming a reality.

IV. MOVING FORWARD: A LEGISLATIVE PROPOSAL TO GUARANTEE THE RIGHT TO GENDER-AFFIRMING CARE FOR TRANSGENDER JUVENILES

Transgender youth have been ignored, harassed, and endangered in juvenile detention facilities for too long. After admittance, they are housed in the incorrect wing, abused by fellow juveniles and staff, and denied life-saving gender-affirming care. Much of the discussion in this Comment has been focused on litigation (1) to force prisons to provide gender-affirming care to adult trans prisoners, or (2) to stop states from prohibiting care for transgender youth, so the logical progression may be to adopt the same strategy for transgender juveniles. I argue this should not be the case moving forward.

As seen in *Kosilek*,[386] *Gibson*,[387] and *Edmo*,[388] litigation can take years to force an entity to provide gender-affirming care, if a court even chooses to rule for the offender. Transgender juveniles do not have this luxury. Some may be detained for thirty days, whereas some are detained for several years. Regardless, trans juveniles do not have the time or ability to file a lawsuit to force care. For those lucky enough to have gender-affirming care before entering the facility, the consequences of withdrawal are immediate and severe.[389] For those who want to start gender-affirming care, delaying care may have drastic effects on their mental health.[390] For all without gender-affirming care, puberty may worsen their gender dysphoria.[391] Furthermore, Eighth Amendment claims are decided on a case-by-case basis,[392] whereas I argue all transgender juveniles should have the right to gender-affirming care once they step foot in their facility. As a result, litigation is not the best strategy to move forward—instead, legislation should be prioritized.

In this Comment, I present an ideal set of proposals that would

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386. Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014) (ruling Kosilek was not entitled to GCS).
387. Gibson v. Collier, 920 F.3d 212, 223 (5th Cir. 2019) (ruling Gibson was not entitled to GCS).
388. Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (ruling Edmo was entitled to GCS). After entering prison in 2012, a court did not order the prison to provide her GCS until 2019. *Id.* at 767, 772, I am unsure if since the 2019 case, Edmo has received GCS.
389. *See infra* Part II.B.3 (discussing the consequences of withdrawal after stopping gender-affirming care).
390. *See infra* Part III.B.1 (discussing the mental health consequences of delaying gender-affirming care).
391. *Id.*
392. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

eradicate the discrimination that transgender juveniles face while being detained. I start with wide-sweeping proposals that aid all transgender individuals and end with narrow specific guidelines that will directly impact transgender juveniles.

First, courts must continue invalidating the gender-affirming care bans in Arkansas, Alabama, Arizona, Oklahoma, Tennessee, and Texas. Regardless of what far-right organizations say about gender-affirming care, most of the United States approves of gender-affirming care usage for youth,[393] renowned medical associations recommend it,[394] and most importantly, gender-affirming care saves transgender lives. I call on the courts of these respective states to declare these laws unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses and the First Amendment's Right to Freedom of Speech.

Second, states must pass legislation that prohibits discrimination based on gender identity and sexual orientation by insurance companies and Medicaid.[395] These bills should add explicit language that all gender-affirming care is covered by insurance and Medicaid. Whereas traditionally, states have only issued regulations interpreting these statutes to cover gender-affirming care,[396] statutes are more permanent and less likely to be rescinded by a later administration.[397] As such, no matter how specific a proposal is, it should be included in statutory language to ensure its potential rescission is minimized. By explicitly covering all gender-affirming care, no trans individual should expect to pay out-of-pocket costs for live-saving care.

Third, states must pass legislation that prohibits discrimination based on gender identity and sexual orientation in juvenile detention facilities. Numerous states have regulations with this language,[398] however, statutory language is much stronger, so if a trans individual ever endures

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393. Fifty-four percent of U.S. adults favor allowing transgender youth the ability to access life-saving gender-affirming care. KIM PARKER ET AL., PEW RSCH. CTR. AMERICANS' COMPLEX VIEWS ON GENDER IDENTITY AND TRANSGENDER ISSUES 6 (2022) (explaining the difference in statistics between Democrats and Republicans favoring policies that would protect trans individuals)

394. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 n.3 (E.D. Ark. 2021) (stating the number of organizations that submitted amicus briefs in support of the plaintiffs).

395. *See e.g.*, An Act to Protect Health Care Coverage for Maine Families, S.P. 110, ch. 5, § 4320-L(1) (2019) (stating health insurance companies cannot discriminate based on gender identity or sexual orientation); S. Assemb. 4568, 217th Leg., Reg. Sess. § 1 (N.J. 2017) (stating Medicaid must cover gender-affirming care).

396. *See, e.g.*, Letter from Cal. Governor Edmund G. Brown Jr. to All Medi-Cal Managed Care Health Plans, Ensuring Access to Medi-Cal Services for Transgender Beneficiaries (Oct. 6, 2016) (stating CA Medicaid must cover gender-affirming care).

397. *See State-by-State*, *supra* note 270, at 1 (stating statutes are more permanent than regulations).

398. *Id.*

discrimination, they have a strong enforcement measure to back their claims. Because transgender juveniles have endured repeated harassment and abuse in juvenile detention facilities, this statute should also include language proclaiming their right to gender-affirming care while being detained.[399] Statutory language is needed to show juvenile facilities that the state prioritizes the medical care of trans youth that is so often ignored.

Fourth, apart from statutory language, states should adopt uniform regulations and policies on how to treat trans juveniles that apply in all juvenile detention facilities statewide. Implementing policies with specific guidelines ensures every trans juvenile, regardless of where they are detained, is treated appropriately while detained. In the Appendix, I detail an ideal policy that states should implement regarding the treatment and medical care of transgender youth.[400]

CONCLUSION

No youth, transgender or not, should ever experience the same treatment that Alyssa and Kyle endured in their juvenile detention facilities. Their concerns were repeatedly ignored. They were harassed by judges, attorneys, fellow juveniles, and detention staff.[401] Their lives were endangered after they were released from custody with untreated gender dysphoria.[402] Using the pro-trans lessons of *Edmo* and *Brandt*, there is a constitutional right to gender-affirming care for the transgender juvenile community. Public policy research shows it is beneficial to the juvenile and society to provide gender-affirming care to trans juveniles in detention.

Although litigation cannot provide care for every trans juvenile, legislative reform can. I call on every state to make the legislative reforms necessary to ensure transgender juveniles do not receive the same experience as Alyssa and Kyle. The juvenile legal system was created to rehabilitate children who have run-ins with the law and to ensure they become law-abiding and productive members of society. Currently, trans juveniles enter the system with fractures and leave the system in pieces when they are refused gender-affirming care. To guarantee trans juveniles leave detention achieving the goal of the juvenile legal system,

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399. *See, e.g.*, CA. WELF. & INST. CODE § 224.71(i) (2012) (stating juveniles could not be discriminated against based on gender identity or sexual orientation).

400. I used two sources as inspiration for my ideal regulatory language in the Appendix: CAL. CODE REGS. tit. 15, § 1352.5 (2023) (listing expectations for juvenile facilities with respect to transgender juveniles); A.B. 2119, 2018 Leg., Reg. Sess. § 1(j) (Cal. 2018) (noting a similar bill for foster care transgender youth).

401. *See generally supra* notes 1–17 and 340–359 and accompanying text.

402. *See generally supra* notes 373–379 and accompanying text.

they should not be ignored, harassed, or endangered; they should be protected, accepted, and supported with gender-affirming care.

APPENDIX: TRANSGENDER YOUTH IN JUVENILE DETENTION FACILITIES

§ 1 Identification and Housing of Transgender Youth

The facility administrator shall develop written policies and procedures ensuring respectful and equitable treatment of transgender youth. The policies shall provide that:

(a) Facility staff must undergo training regarding how to best interact with transgender youth, including gender identity, pronoun usage, gender-affirming care, and unique concerns that impact transgender youth.

(b) Facility staff must respect every youth's gender identity and must refer to the youth by the youth's preferred name and gender pronouns, regardless of the youth's legal name.

(c) Facility staff must permit youth to dress and present themselves in a manner consistent with their gender identity and must provide youth with clothing consistent with their gender identity.

(d) Facility staff must house transgender youth in the wing that best meets their individual needs and promotes their safety and well-being.

(1) Staff may not automatically house youth according to their external anatomy and must document the reasons for any decision to house youth in a unit that does not match their gender identity.

(2) In making a housing decision, staff must consider the youth's preferences, as well as any recommendations from the youth's health or behavioral health provider.

(3) Solitary confinement must never be used for youth unless it is required for their safety and is approved by their health or behavioral health provider.

(e) Consistent with the facility's reasonable and necessary security considerations and physical plant, facility staff shall make every effort to ensure the safety and privacy of transgender youth when the youth are using the bathroom or shower or dressing or undressing.

§ 2: Medical Care of Transgender Youth

The facility administrator shall develop written policies and procedures ensuring transgender youth receive adequate medical care for their gender identity. The policies shall provide that:

(a) Facility staff must ensure that youth have access to medical and behavioral health providers qualified to provide gender-affirming care to transgender youth.

(b) The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-V) must be used to determine if the youth has gender dysphoria.

(c) The *World Professional Association for Transgender Health Standards of Care* (WPATH-SOC) must be used to determine what gender-affirming care the youth is eligible for and may be given.
(d) Gender-affirming care may include, but is not limited to, the following:

(1) Behavioral health counselling and therapy

(2) Puberty blockers

(3) Hormone replacement therapy (HRT)

(4) If recommended by the physician and the patient is eligible under the WPATH-SOC, gender confirmation surgery.

(e) For youth already receiving gender-affirming care when admitted to the facility:

(1) Facility must continue gender-affirming care without interruption.

(2) Facility must provide renewals of care once the juvenile runs out.

(3) Facility must allow the youth the option to continue seeing their original counselor and/or physician, and the facility must accommodate travel concerns. Otherwise, the facility must provide a new physician that is specialized in transgender medical care.

(4) If the care does not alleviate their gender dysphoria, facility must allow the youth to undertake new types of care including but not limited to puberty blockers or HRT if their physician recommends it.

(e) For youth who do not have a physician specialized in transgender medical care:

(1) Facility must recommend a physician specialized in transgender medical care and accommodate travel to the physician.

(2) Facility must implement any recommended treatments for the youth whether it be accommodating a counselor specialized in gender dysphoria or allowing the youth to take puberty blockers or HRT.