TRANS ERASURE, INTERSEX MANIPULATION: THE FIRST AMENDMENT AND OTHER REFLECTIONS FROM *WOMEN IN STRUGGLE V. BAIN*

Zee Scout*

Abstract

This Article breaks new ground with its proposal that litigators should consider the First Amendment to combat the avalanche of state legislation stripping transgender, gender nonconforming, intersex, and queer ("TGNCI") people of their rights. In the last year, opinions from the U.S. Federal Courts of Appeals for the Sixth and Eleventh Circuits have used lawsuits challenging anti-TGNCI legislation to roll back decades of progress made under the Equal Protection Clause for transgender people. This Article answers the question of where litigators should turn next and suggests that anti-TGNCI legislation is a form of First Amendment viewpoint discrimination. Specifically, anti-TGNCI legislation erases protected expression while compelling people to abandon sincerely held beliefs about gender and sexuality in favor of the state's immutable perspective. This Article provides guidance to those interested in TGNCI justice by analyzing the use of this theory in the context of anti-TGNCI bathroom legislation. In particular, it focuses on Women in Struggle v. Bain*, a recent as-applied challenge to Florida Statute Section 553.865*, *which criminalizes the use of affirming restrooms by TGNCI people. Finally, this Article identifies potential counterarguments that litigators must grapple with in order to advance the long battle for TGNCI liberation using the First Amendment as a tool.*

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Introduction

Tsukuru Fors is an agender person with a deep voice and a masculine appearance.[1] A human rights activist and former business consultant, Fors has

[1] *See* Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order at ¶¶ 13, 18, Women in Struggle v. Bain, et al.,

resisted being called a woman his entire life—because he does not identify as a man or a woman.[2] When Fors visited Orlando, Florida in October 2023 for the National March in Support of Trans Youth and Speakout for Trans Lives, he encountered a confounding situation: to avoid criminal prosecution, he would have to use the women's restroom.[3] In his words, it felt like being "stabbed."[4] Lindsey Spero fled to Florida from Pennsylvania at age 18 when their family rejected them because of their trans-masculine identity.[5] Eight years later, Spero remains afraid to use either the men's or women's restrooms, preferring to relieve themselves in secluded private spaces.[6] In case one is unavailable, Spero carries a roll of toilet paper to avoid urinary tract infections when relieving themselves outdoors,[7] and dreams of the day when their non-binary masculine identity will be accepted in the state they call home. Melinda Butterfield, Anaïs Kochan, and Christynne Wood are all women who happen to be transgender.[8] When they visited Florida in support of their transgender, gender nonconforming, intersex, and queer ("TGNCI") siblings, they used the women's restrooms at the Orlando International Airport and Orlando City Hall—even though this use could have resulted in their arrest.[9] Their alternative was to use the men's restrooms or a unisex facility. But such an action would have them abandon their core sense of who they are in favor of the state's harmful and inaccurate view that they are biological men.[10]

No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-7 (Ex. 5) (explaining Fors' gender identity and physical appearance).

[2] *Id.* at ¶¶ 21, 28.

[3] *Id*. at ¶ 29.

[4] Complaint for Declaratory and Injunctive Relief at ¶ 228, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 01.

[5] Declaration of Lindsey Spero in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order at ¶ 3, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-8 (Ex. 6).

[6] *Id.* at ¶ 11.

[7] Center for Constitutional Rights, *Trans and Nonbinary Activists Take Legal Action Ahead of National March to Protect Trans Youth and Speak out for Trans Lives*, Facebook (Sept. 29, 2023), https://www.facebook.com/CenterforConstitutionalRights/videos/732052232270966/ [https://perma.cc/E9YR-PYQB] (Spero describing at the three-minute mark how they carry a roll of toilet paper in case they must use the restroom outdoors).

[8] Declaration of Melinda Butterfield in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order at ¶ 2, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-4 (Ex. 2); Declaration of Anaïs Kochan in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order at ¶ 3, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-9 (Ex. 7); Declaration of Christynne Lili Wrene Wood in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order at ¶ 6, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-5 (Ex. 3).

[9] *See* Declaration of Christynne Lili Wrene Wood in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶¶ 23–24 (describing the potential of being arrested).

[10] *See* Declaration of Melinda Butterfield in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶¶ 19–22.

Florida Statute Section 553.865 ("the Florida Bathroom Ban") is responsible for erasing or threatening all of these trans identities. The ban, which passed in May 2023[11] and went into effect on July 1[12] despite testimony of its many harms,[13] is dangerously worded. The ban levies a trespass charge for entering—and refusing to leave when asked—a multi-stall restroom or changing room of the "opposite sex,"[14] defined as either "female or male"[15] depending on the person's "specific reproductive role" at birth.[16] As such, the Florida Bathroom Ban not only excludes TGNCI people from an affirming public restroom regardless of their gender or their legal sex as reflected on state identification documents[17]; it also imposes a contrary viewpoint that sex is an immutable process that results in two binary genders based on reproductive capacity.[18]

This viewpoint is incomplete, at best: sex is not frozen from birth onward,[19] and observed intersex variations and developments in endocrinology and genetics have led scientists to believe there is not always "a hard-and-fast separation between the sexes."[20] Rather, sex consists of numerous

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[11] Andrew Atterbury, *Florida Republicans Pass Bill Targeting Transgender Restroom Use*, Politico (May 3, 2023), https://www.politico.com/news/2023/05/03/florida-gop-transgender-bathroom-bill-00095168 [https://perma.cc/Z4PC-NCSJ]; *see also* Ron DeSantis (@GovRonDeSantis), Twitter, (May 18, 2023, 12:33 PM), https://twitter.com/GovRonDeSantis/status/1659235742810341376?lang=en [https://perma.cc/H4C2-XJMK] (showing Florida Governor Ron DeSantis commenting on the Florida Bathroom Ban and stating "our wives and daughters deserve protections from woke ideology run amok.").

[12] *See* James Factora, *Florida's New Bathroom Law Has Gone into Effect. What Does That Mean for Trans People?*, Them (July 5, 2023), https://www.them.us/story/florida-trans-bathroom-law [https://perma.cc/3HXZ-JPN4].

[13] *See* Excerpts from the Florida House of Representatives Session May 3, 2023 at 17, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-15 (Ex. 13); *see also* Briana Michel, *Contentious Anti-Trans 'Bathroom Ban' is Quickly Moving Through Fl Legislature*, Fla. Phoenix (Apr. 7, 2023), https://floridaphoenix.com/2023/04/07/contentious-anti-trans-bathroom-ban-is-quickly-moving-through-fl-legislature/ [https://perma.cc/K45U-6UUG] (describing public testimony made in the committee meeting).

[14] Fla. Stat. § 553.865(6)(a)–(e) (2023).

[15] *Id*. at § 553.865(3)(f) (defining female as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing eggs"); *Id*. at § 553.865(3)(h) (defining male as "a person belonging, at birth, to the biological sex which has the specific reproductive role of producing sperm").

[16] *Id.* at § 553.865(3)(l) (defining sex as "the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth").

[17] Plaintiffs' Emergency Motion for a Temporary Restraining Order and Incorporated Memorandum of Law at 12–13, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02.

[18] *See* Fla. Stat. § 553.865(3)(l) (2023) (defining sex based on "sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth").

[19] *See* Charlotte Chucky Tate, Ella Ben Hagai & Faye J. Crosby, Undoing the Gender Binary 8–13 (2020) (detailing various intersex variations that develop during puberty, including DHT deficiency, where people "appear to have vulva and vaginal structures at birth, but, during puberty, testicles descend into the labia majora").

[20] *See id*.; Alexandra Kralick, *We Finally Understand that Gender Isn't Binary. Sex Isn't, Either*, Slate (Nov. 18, 2018), https://slate.com/technology/2018/11/

traits that can develop in non-binary ways and that sometimes result in bodies and identities that do not align with assigned sex at birth.[21] However, this non-binary assemblage of sex traits in a person means that gender—or "the characteristics of women [and] men . . . that are socially constructed"[22]—is not so simple as "male" or "female." Nor is gender static. People may change their gender identity throughout their lives, perhaps because of an intersex variation or a trans awakening, while others stick with their birth gender but experience discrimination due to a variation in sex characteristics.[23]

However, the viewpoint that sex is a binary process that results in two unchangeable genders underlies much of the anti-TGNCI legislation that

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sex-binary-gender-neither-exist.html [https://perma.cc/6PGK-8E8S]; JULES GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD 54–55 (2018) (explaining how some sexologists and biologists in the early twentieth century viewed sex as "the expression of *a combination of male or female* characteristics within an individual"); JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 102 (2002) (detailing how in the mid-1950s North American sexologist Harry Benjamin believed, like many "European doctors who first promoted the concept of human bisexuality," that "sex is never one hundred percent 'male' or 'female'" but is instead "a blend of a complex variety of male-female components" that results from differences in "genetic and endocrine development." These developmental differences resulted in "not only hermaphrodites . . . but also homosexuals, transvestites, and transsexuals.").

[21] Using newer imaging technology, researchers in the twenty-first century have located evidence of the genetic and hormonal processes that twentieth century scientists believed result in mixed-sex gender identities. *See, e.g.*, Ivanka Savic, Alicia Garcia-Falgueras & Dick F. Swaab, *Sexual Differentiation of the Human Brain in Relation to Gender Identity and Sexual Orientation*, *in* PROGRESS IN BRAIN RESEARCH: SEX DIFFERENCES IN THE HUMAN BRAIN, THEIR UNDERPINNINGS AND IMPLICATIONS 41, 41 (Ivanka Savic, ed., 2010) ("[T]he fetal brain develops in the male direction through a direct action of testosterone on the developing nerve cells, or in the female direction through the absence of this hormone surge. According to this concept, our gender identity (the conviction of belonging to the male or female gender) and sexual orientation should be programmed into our brain structures when we are still in the womb. However, since sexual differentiation of the genitals takes place in the first two months of a pregnancy and sexual differentiation of the brain starts in the second half of the pregnancy, these two processes can be influenced independently, which may result in transsexuality."); s*ee also* Lauren Hare, et al., *Androgen Receptor Repeat Length Polymorphism Associated with Male-to-Female Transsexualism*, 65 BIOLOGICAL PSYCHIATRY 93, 95 (2009) ("a decrease in testosterone levels in the brain during development might result in incomplete masculinization of the brain . . . resulting in a more feminized brain and a female gender identity.").

[22] WORLD HEALTH ORGANIZATION, *Gender and Health*, https://www.who.int/health-topics/gender#tab=tab_1 [https://perma.cc/EU8X-GDMA].

[23] *See, e.g.*, Rachael Rettner, *'Guevedoces': Rare Condition Hides Child's Sex Until Age 12*, LIVE SCIENCE (Sept. 21, 2015) (explaining how children with certain DHT deficiencies who appear female at birth undergo a surge in testosterone during puberty and grow male genitalia. Some of these children change their gender from female to male after these changes while others have surgery to remain female), https://www.livescience.com/52247-guevedoces-girls-boys.html [https://perma.cc/CTE4-JR7M]; *see also* HIDA VILORIA & MARIA NIETO, THE SPECTRUM OF SEX: THE SCIENCE OF MALE, FEMALE, AND INTERSEX 125 (2020) (describing how intersex people may identify with their sex assigned at birth but continue to face "severe discrimination for expressing their gender in an atypical way").

conservative lawmakers pursued in record-breaking numbers[24] in 2023.[25] Such logic frames gender as wholly psychological and sex as biological and unchangeable from birth.[26] This distinction between sex and gender ignores the interwoven relationship between the two and how each one affects the other.

Since the 1960s, U.S. society has operated on the assumption that one's legal sex/gender is either male or female depending largely on the genitalia

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[24] Kiara Alfonseca, *Record Number of Anti-LGBTQ Legislation Filed in 2023*, ABC News (Dec. 28, 2023), https://abcnews.go.com/US/record-number-anti-lgbtq-legislation-filed-2023/story?id=105556010 [https://perma.cc/Z45B-VWEB]; Ella Ceron, *2023 is Already a Record Year for Anti-LGBTQ Legislation*, Bloomberg (Mar. 8, 2023), https://www.bloomberg.com/news/articles/2023-03-08/2023-is-already-a-record-year-for-anti-lgbtq-bills-in-the-us [https://perma.cc/M68R-F9MY] (explaining that lawmakers filed 385 anti-LGBTQIA+ laws by March 8 of 2023, topping the 361 such bills that lawmakers introduced between 2018 and 2022).

[25] *See, e.g.*, S.B. 1700, 57th Leg., Reg. Sess., §15-113(B) (Ariz. 2023) (giving parents the right to object to school library books if they find them to be "sexual in nature, to promote gender fluidity or gender pronouns or to groom children into normalizing pedophilia"); S.B. 270, 94th Leg., Reg. Sess., §5(c)(1) (Ark. 2023) (enacted) (defining sex as a person's "immutable biological sex . . . objectively determined by anatomy and genetics existing at the time of birth" for purposes of a bathroom ban that imposes misdemeanor punishment for indecent exposure to children); H.B. 544, 2023 Leg. Sess. (Conn. 2023) (proposing unsuccessfully that birth certificates cannot be amended to include non-binary identities); S.B. 180, 2023 Leg. Sess., at 1 (Kan. 2023) (defining sex for purposes of any state laws or regulations as an "individual's biological sex, either male or female, at birth"); S.B. 99, 68th Leg., Reg. Sess., §3(9) (Mont. 2023) (defining "sex" for purposes of a trans youth healthcare ban as "the organization of body parts and gametes for reproduction in human beings and other organisms." Sex is determined by the "biological and genetic indication of [being] male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present." It is determined "without regard to an individual's psychological, behavioral, social, cultural, chosen or subjective experience of gender."); H.B. 1474, 68th Leg., Reg. Sess., §1-5 (N.D. 2023) (enacted) (amending a statute that contains uniform definitions used throughout the state code to re-define sex as the "biological state of being male or female, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth"); H.B. 8, 135th Leg., Reg. Sess., §1 (Ohio 2023) (defining "biological sex" for purposes of a bill that forces educators to notify parents before they teach any lessons on sexuality as "the biological indication of male and female, including sex chromosomes, naturally occurring sex hormones, gonads, and unambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective experience of gender"); S.B. 1440, 113th Leg., §1(c) (Tenn. 2023) (enacted) (amending a general definitions statute to define "sex" as "a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth"); S.B. 162, 88th Leg., Reg. Sess., §2-3 (Tex. 2023) (forbidding any local or state registrar from changing the sex marker on a birth certificate from the "biological sex" that a doctor determines at birth based on "the sex organs, chromosomes, or endogenous profile of the child"); S.B. 92, 67th Leg., Gen. Sess., §1 (Wyo. 2023) (enacted) (defining sex for purposes of determining which intramural sports teams a student may participate on as "the biological, physical condition of being male or female, determined by an individual's genetics and anatomy at birth").

[26] *But see* Lea Skewes, Cordelia Fine, & Nick Haslam, *Beyond Venus and Mars: The Role of Gender Essentialism in Support for Gender Equality and Backlash*, PLoS ONE 1, July 24, 2018, at 1–2 (arguing that contemporary science "does not support an essentialist view of the sexes" in which "differences between the sexes are sometimes described in categorical ways, and attributed in a deterministic fashion to fixed biological factors").

a doctor observes at birth.[27] However, this process—in which gender stems only from one sex trait—misses how many "male" and "female" parts of the body do not neatly align. For instance, a child may be born with a penis but have a female chromosome and a higher amount of estrogen that results in larger breasts than expected for a "male."[28] If this child does not identify with their gender—which flows from sex assigned at birth—it may not be a wholly "psychological" decision. Instead, it may be based on their nonbinary sex characteristics. The point is that sex influences gender, and that gender can be nonbinary because sex can be nonbinary. Thus, when TGNCI opponents pursue legislation that legally separates sex and gender, what they are really attacking is the freedom to self-determine one's identity outside of this constructed sex/gender binary.

This attack on the freedom to self-determine gender and identity has translated into particular harms for the TGNCI community, with bans on trans youth sports and healthcare, trans history, and trans home life,[29] and with legislators targeting adult medical coverage, bathroom access, identity documents, and employers who support TGNCI identity.[30] Jurisprudentially, this attack has also resulted in the rollback of heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment for TGNCI people. Even though lower courts have affirmed heightened scrutiny, some circuit courts have resisted these attempts, with both the Sixth and Eleventh Circuit Courts of Appeals distinguishing sex from gender in order to validate restrictions on gender-affirming care for minors and affirming restroom access for trans high schoolers.[31] In this moment of backlash, another litigation strategy may be necessary.

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[27] Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1823 (2022) (describing that since the 1960s, an obstetrician's "'casual pronouncement of [a] newborn as . . . male or female,' 'based upon inspection of the external genitalia' . . . . results in a male or female designation on a child's birth certificate that is sometimes considered the person's legal sex, unless changed through formal processes.") (quoting Edgar Burns, Albert Segaloff & G.M. Carerra, *Reassignment of Sex: Report of 3 Cases*, 84 J. UROLOGY 126, 126 (1960)).

[28] MAYO CLINIC, *Klinefelter Syndrome* (Sept. 21, 2019), https://www.mayoclinic.org/diseases-conditions/klinefelter-syndrome/symptoms-causes/syc-20353949 [https://perma.cc/3ZXX-76XQ].

[29] *See* sources cited *supra* note 25 for examples of these bans.

[30] *See, e.g.*, S.B. 129, 59th Leg., 1st Sess., § 3(A) (Okla. 2023) (attempting to prohibit any "physician or healthcare professional" from providing "gender transition procedures to any individual under twenty-six (26) years of age"); H.B. 599, 2024 Leg., § 1(3) (Fla. 2024) (attempting to prohibit any employer from making their employees use a TGNCI person's correct pronouns or punishing them for failing to do so); H.B. 4535, 125th Gen. Ass. (S.C. 2023) (aiming to separate restrooms and changing facilities according to a definition of sex that excludes trans, gender-nonconforming, and potentially some intersex people).

[31] *See* L. W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 480 (6th Cir. 2023) (rejecting a Fourteenth Amendment Equal Protection Clause challenge to state laws in Tennessee and Kentucky that ban "sex-transition treatments for all minors" because it prohibits everyone from treatment and therefore "does not prefer one sex over the other"); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1229–30 (11th Cir. 2023) (rejecting an Equal Protection Clause challenge to a trans youth healthcare ban in Alabama because it targeted people

This Article proposes that First Amendment doctrine contains an unlikely solution, particularly for legislation that erases TGNCI people from accessing gender-affirming restrooms.[32] The TGNCI litigants mentioned above used the First Amendment in *Women in Struggle v. Bain*, a recent as-applied challenge to the Florida Bathroom Ban. In addition to protecting pure speech, the First Amendment subjects government restrictions on "expression because of its message, its ideas, its subject matter, or its content"[33] to strict scrutiny or per se invalidity.[34] This Article asserts that this protection extends to TGNCI

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on the basis of their age, not their sex; moreover, the court held that it did not matter if only gender-nonconforming individuals, by and large, received this treatment, as discrimination against a "medical procedure that only one sex can undergo" is permitted so long as there is no evidence that the regulation is a pretext for a bare desire to harm the group.) (internal citation omitted); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 807 (11th Cir. 2022) (upholding a bathroom separation policy based on "biological sex" and ruling that "gender identity [is not] akin to biological sex," because "to do so would refute the Supreme Court's longstanding recognition that 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.'") (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

[32] Although this Article focuses on bathroom bans, advocates should consider using viewpoint discrimination arguments against other legislation that erases TGNCI identities, including bills that redefine sex and gender throughout entire state codes or for purposes of identity documents. These kinds of bills would also erase the legal existence of trans people and make it easier for hostile state governments to calculate the number of TGNCI people and enforce other anti-TGNCI laws in their state. *See, e.g.*, Erin Reed, *Florida Bill Would Require Mass Biological Affidavits, Ending All Trans Legal Recognition*, Erin in the Morning (Jan. 4, 2024), https://www.erininthemorning.com/p/florida-bill-would-require-mass-biological?utm_source=post-email-title&publication_id=994764&post_id=140363622&utm_campaign=email-post-title&isFreemail=false&r=1i8nto&utm_medium=email [https://perma.cc/GHJ8-ZUMM] (explaining that a bill proposed in Florida "seeks to end all legal recognition of transgender people" by "mandat[ing] mass biological sex affidavits for both transgender and cisgender Floridians. These affidavits would be necessary at the DMV for license renewals, enabling the state to gather records of the biological sex of all individuals in Florida who apply for driver's licenses. The affidavits could allow the state to compile lists of transgender people with Florida driver's licenses. They could then be used to enforce other anti-trans laws in the state. Additionally, the bill would impact every law in Florida that references sex, effectively removing all legal recognition of transgender people in the state."); H.B. 1233, §6, 2024 Leg. (Fla. 2024) (aiming to prohibit the Department of Motor Vehicles from issuing an "original or replacement driver license or identification card that specifies a person's sex as different from that specified on the person's original certificate of live birth. The department must require an applicant to sign an affidavit certifying that the sex specified on the application submitted for a new or replacement driver license or identification card is identical to that specified on the applicant's original certificate of live birth. If the department determines that the applicant made a false attestation, the department must revoke his or her driver license or identification card."); *see also* Melissa Sanchez, *She's Risked Arrest by Driving with a Suspended License for Seven Years. This Week She Got Some Big News*, ProPublica (July 26, 2019), https://www.propublica.org/article/illinois-license-suspensions-drivers-ticket-debt-chicago-mayor-lightfoot-reforms [https://perma.cc/D4WX-KZC7] (explaining the risks that come with a suspended or revoked license, such as arrest, court fines, and potentially decreased employment).

[33] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[34] Lackland H. Bloom Jr., *The Rise of the Viewpoint Discrimination Principle*, 72 SMU L. Rev. F. 20, 36 (2019) (noting that the Court's recent jurisprudence suggests that it has "fashioned a per se rule against viewpoint discriminatory regulation with no opportunity for the government to save the law by satisfying strict scrutiny"). This per se invalidity

people's viewpoints about themselves and their communities because *gender is the expression of an idea about one's self.* When people use a certain name, wear certain clothes, access certain restrooms, or identify with certain communities, they express their gender and often their belief that legal sex is non-binary and inclusive of gender identity. This is true for TGNCI and non-TGNCI people even though, at the present moment, TGNCI people, particularly of color,[35] are harassed for their sincere expressions that legal sex can be inclusive of numerous factors, including gender identity.

The First Amendment considers the values underlying gender expression—self-determination, autonomy, and truth-seeking—to be sacrosanct and deserving of protection.[36] Governments may not suppress peaceful manifestations of these values and replace them with their own ideas. But "slates of hate,"[37] the bundles of anti-LGBTQIA+ bills that lawmakers pass in

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rule may only apply to a government "forum" that people have either traditionally used for free expression or that the government has specifically designated as a place for free expression. *Id.* at 27. *See, e.g.*, Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1126 (11th Cir. 2022) (striking down an anti-discrimination policy at a public university because "'[r]estrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited,' seemingly as a *per se* matter.") (internal citations omitted). Extensive public forum analysis is beyond the scope of this Article, but one should nonetheless pay attention to how viewpoint discrimination interacts with public forum analysis. This is true even though the Court has not been clear about the level of scrutiny that applies to viewpoint discrimination. Bloom, *supra* note 34, at 35. Not only is viewpoint discrimination prohibited in any kind of government forum, including a non-public forum, for "[r]egulation of speech in nonpublic forums is subject only to rationality analysis, *as long as the regulation is not viewpoint discriminatory*," but the Court "has never sustained a regulation that it has characterized as viewpoint discriminatory." *Id*. (emphasis added).

[35] *See, e.g.,* LeahAnn Mitchell, *I was Harassed at an In-N-Out for Being a Black Trans Woman*, Guardian (Oct. 7, 2019), https://www.theguardian.com/society/2019/oct/07/in-n-out-trans-woman-harassment-california [https://perma.cc/BH7M-BU2T]; *see also* Sarah Frostenson & Zachary Crockett, *It's not Just Transgender People: Public Restrooms Have Bred Fear for Centuries*, Vox (May 27, 2016), https://www.vox.com/2016/5/27/11792550/transgender-bathroom [https://perma.cc/GS4F-E6NL]; Gillian Frank, *The Anti-Trans Bathroom Nightmare Has its Roots in Racial Segregation*, Slate (Nov. 10, 2015, 4:55 PM) (https://slate.com/human-interest/2015/11/anti-trans-bathroom-propaganda-has-roots-in-racial-segregation.html [https://perma.cc/J8DU-8Q4Y] ("The conservative idea that civil rights protections sexually endanger women and children in public bathrooms is not new. In fact, conservative sexual thought has been in the toilet since the 1940s. During the World War II era, conservatives began employing the idea that social equality for African-Americans would lead to sexual danger for white women in bathrooms. In the decades since, conservatives used this trope to negate the civil rights claims of women and sexual minorities.").

[36] *See infra* Part I, Section A.

[37] *See* Cullen Peele, *Human Rights Campaign Condemns Latest Slate of Hate Out of the Kansas Legislature, Rebukes Lawmakers for Advancing Anti-LGBTQ+ Attacks Mostly Targeting Transgender Youth*, Hum. Rts. Campaign (Feb. 23, 2023), https://www.hrc.org/press-releases/human-rights-campaign-condemns-latest-slate-of-hate-out-of-the-kansas-legislature-rebukes-lawmakers-for-advancing-anti-lgbtq-attacks-mostly-targeting-transgender-youth [https://perma.cc/TB3N-FA36]; Press Release, Am. C. L. Union of N.D., *Senate Lawmakers Pass 'Slate of Hate,' Sending Eight Discriminatory Anti-Trans Bills to Gov. Burgum; ACLU Responds* (Apr. 3, 2023), https://www.aclund.org/en/press-releases/senate-lawmakers-pass-slate-hate-sending-eight-discriminatory-anti-trans-bills-gov [https://perma.cc/8RWX-AFDB].

one session, across the country attempt to do just that. This Article breaks new ground by demonstrating how interested parties can use three distinct First Amendment theories to combat the viewpoint erasure that underlies numerous kinds of anti-TGNCI legislation: protected expressive conduct, protection from viewpoint discrimination, and protection from compelled speech.

This Article proceeds as follows. Part I reviews the literature and case law surrounding TGNCI liberation in the courts and recent legislative and judicial efforts to roll back decades of progress. Part II makes the case that TGNCI gender expression is protected expressive conduct under the First Amendment because it embodies the right to self-determine one's reality. It also argues that TGNCI identity (and expression, by extension) often contains a viewpoint: that sex is a multifaceted, nonbinary process that impacts gender and identity. This part focuses on how governments may not invidiously suppress this viewpoint in restrooms, and welcomes the use of this theory in other anti-TGNCI contexts depending on the situation. Finally, Part III addresses potential counterarguments to this strategy, as learned from the recent case *Women in Struggle v. Bain*, and highlights areas where further research is needed.

I. Current Landscape For TGNCI Rights

This section details the landscape for TGNCI rights, beginning with an overview of the legal claims that advocates have used to advance TGNCI rights in federal and state courts. This overview pays close attention to the counterarguments that opponents have exploited within each claim to persuade courts to uphold anti-TGNCI legislation. This section then discusses the main tool TGNCI opponents have used to roll back traditional legal protections: definitions of sex that exclude gender identity and therefore exclude TGNCI people from affirming sex-segregated spaces.[38]

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[38] For example, Montana defines sex as the "biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender." *See* S.B. 458, 68th Leg., §1-1-201(1)(f) (Mont. 2023). This definition fails to recognize gender identity as one of the criteria that determines whether someone is male, female, or nonbinary. Accordingly, statutes like these suggest gender identity is "psychological," even though research shows that biological processes hardwire a gender identity into everyone during pregnancy. *See, e.g.*, Hare, et al., *supra* note 21, at 95. This exclusion of gender identity from the legal definition of sex is not merely semantic; it has material impacts on TGNCI people. This is because statutes like these require one to be cisgender—i.e., to identify with the sex and corresponding gender one is assigned at birth—to access affirming public spaces. Consider a transgender man. By definition, he was assigned a female gender at birth because a doctor noticed certain reproductive genitalia. But his gender identity—or his hardwired sense of who he is—is male, and therefore differs from that female gender assignment. To align his body with his internal sense of self, he may undergo hormone replacement therapy—which would involve taking testosterone and developing secondary sex characteristics common in cisgender men such as facial hair, broader shoulders, and a deeper voice. Because he looks like a man and identifies as a man, he may want to use the

A. TGNCI Claims

To understand how anti-TGNCI opponents use redefinitions of sex and gender to exploit the usual claims that advocates use, one must understand the claims themselves. Those claims include Fourteenth Amendment Equal Protection, Fourteenth Amendment substantive Due Process, Fourteenth Amendment protections against invidious discrimination, and the Americans with Disabilities Act. What follows is a basic summary of each claim.

i. *The Fourteenth Amendment*

Equal Protection: Real Differences Theory

TGNCI people have achieved many gains using equal protection theories under the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. But opponents can exploit the "real differences" doctrine embedded within this jurisprudence to argue that "men" and "women" have different biological characteristics that permit certain regulations. Under this framing, sex is biological and immutable, whereas gender (and gender identity) are psychological and constructed. This framing is not only inaccurate; it has allowed two federal appellate courts to uphold harmful anti-TGNCI regulations on the theory that they treat all people equally *on the basis of sex* or that they are necessary *because of differences in sex*.[39] First Amendment claims—and viewpoint discrimination, in particular—may better challenge the assumptions that underlie "real differences" doctrine and encourage courts and lawmakers to think differently as well.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws."[40] From this language, the U.S. Supreme Court created tiers of scrutiny that differ depending on the classification at issue. For instance, gender or race are more suspect than other classifications, such as age.[41]

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men's restroom. But he would be unable to in Montana, because S.B. 458's definition of sex has erased his trans male identity. Indeed, he is not considered a man under this statute: a man is someone born with testes and XY chromosomes, and a person cannot "choose" to be male or female. Any "chosen" identity is considered gender, and access to public spaces is organized around "sex," not "gender." This is an example of "trans erasure."

[39] *See, e.g.,* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023).

[40] U.S. Const. amend. XIV, § 1.

[41] Katie Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1324–30 (2018); *see, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995) ("[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.' [Loving v. Virginia, 388 U.S. 1, 11(1967)]. The various opinions in *Frontiero v. Richardson,* 411 U. S. 677 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed v. Reed,* 404 U.S. 71 (1971).").

Laws that rely on "gross generalizations"[42] about sex or gender receive intermediate scrutiny, meaning the state must offer an "exceedingly persuasive justification"[43] for regulating on the basis of sex. However, if a court does not believe that a law affects a suspect class of people, it requires at a minimum that the government have "at least a rational reason" for treating people "who appear similarly situated" differently.[44]

The idea that gross generalizations about sex and gender should not underlie state actions is known as the "anti-stereotyping" principle.[45] The principle began to take hold in 1973 when the Court struck down a United States military policy that subjected female service members to more obstacles if they sought benefits for their spouses.[46] Since then, the anti-stereotyping principle has invalidated numerous laws and policies that relied on "overbroad generalizations about the different talents, capacities, or preferences" of cisgender men and cisgender women.[47]

However, as Professor Courtney Megan Cahill notes in her scholarship, states have circumvented the anti-stereotyping principle with their appeal to "real differences" between cisgender men and cisgender women, typically in the form of "anatomical and biological differences."[48] These "real differences" arguments rely on gender stereotypes "about bodies and their capabilities and about mothers and fathers"[49] to justify regulations that discriminate on the basis of sex. Consider *Nguyen v. INS*,[50] a 2001 case where the Court had to determine if the federal government could subject foreign-born children of unwed U.S. citizen fathers to greater citizenship burdens than foreign-born children of unwed U.S. citizen mothers. The Court, applying intermediate scrutiny, said the federal government *could* impose these burdens.[51] Among other things, the Court reasoned that fathers are not "similarly situated" to mothers during birth because they are not the ones who carry the child.[52]

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[42] Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 Yale L. J. 1065, 1071 (2023).

[43] United States v. Virginia, 518 U.S. 515, 531 (1996).

[44] Engquist v. Oregon Dept. of Agric., 553 U.S. 591, 602 (2008).

[45] Cahill, *supra* note 42, at 1097–98.

[46] *Id*. at 1098 (citing Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973)).

[47] *Virginia*, 518 U.S. at 533; *see, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975) (Social Security Act); Stanton v. Stanton, 421 U.S. 7, 14 (1975) (child support); Craig v. Boren, 429 U.S. 190, 224 (1976) (alcohol sales); Orr v. Orr, 440 U.S. 268, 282-3 (1979) (alimony); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (nursing program admissions); J.E.B. v. Alabama, 511 U.S. 127, 140 (1994) (peremptory challenges to jurors).

[48] Cahill, *supra* note 42, at 1086.

[49] *Id*. at 1102.

[50] 533 U.S. 53, 61–64 (2001).

[51] *Id*. at 61.

[52] *See id*. at 63; *but see Can Trans Men Get Pregnant?*, Planned Parenthood, (May 15, 2023), https://www.plannedparenthood.org/blog/can-transgender-men-get-pregnant [https://perma.cc/C5ZU-N6YA] ("Gender affirming hormone therapy—including testosterone—isn't birth control. This means that trans men can get pregnant even if they're on testosterone (T) and even if they don't have their period."); Jamie Eske, *Can Men Become Pregnant?*, Med. News Today (Dec. 18, 2023), https://www.medicalnewstoday.

Because a cisgender father's relationship to the child cannot be verified at the time of a birth like a mother's,[53] the Court concluded that the government *did* have a substantial justification for making a foreign-born child of an unwed father provide more proof of paternity than a foreign-born child of an unwed mother.[54]

In addition to erasing trans identity and the ability of trans men and nonbinary people to get pregnant, the *Nguyen* Court appeared to vacillate between tiers of scrutiny. Although Justice Anthony Kennedy applied intermediate scrutiny, he also referred to men and women as "not similarly situated"—which is the focus of the rational-basis test—to demonstrate that the government had substantial reasons for differential treatment between the genders.[55] As Cahill suggests, this overlap in analysis may be because the "real differences" doctrine functionally converts a sex-based regulation into a non-sex regulation that receives less scrutiny.[56] Thus, a court may purport to apply intermediate scrutiny, but rely on binary assumptions about sex and gender to suggest that a regulation appropriately addresses "real differences" between men and women. Or, a court may openly embrace "real differences" doctrine and only apply rational-basis scrutiny to a regulation that affects an aspect of a person's sex. The Court recently pursued the latter methodology when it held in *Dobbs v. Jackson Women's Health Organization* that criminal abortion laws do not trigger heightened scrutiny because abortion is a "procedure that only one sex can undergo."[57]

Equal Protection: Alternative Arguments

But this framing assumes sex and gender are only binary, and it carries particular harms for TGNCI people. This is because the "real differences" doctrine suggests gender and identity are irrevocably connected to reproductive anatomy, with less regard for the nonbinary combinations of sex traits. Some of these traits may not align in non-trans people either. For instance, a cisgender man could have higher estrogen levels, an extra X chromosome resulting in XXY chromosomes, but sex traits expected for a male such as

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com/articles/can-men-become-pregnant [https://perma.cc/WR22-48AR] ("A person who was born with male reproductive organs and is living as a man cannot get pregnant. However, some transgender men and nonbinary people can become pregnant.").

[53] Nguyen v. INS, 533 U.S. 53, 62 (2001) ("In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood.").

[54] *Id.* at 68.

[55] *Id*. at 61, 63.

[56] *See* Cahill, *supra* note 42, at 1086 ("Sometimes, courts in constitutional sex-equality cases appeal to biology in order to neutralize a sex classification, reasoning that the uniqueness of a sex characteristic means that laws based on that characteristic are nonsex classifications deserving of rational-basis review only rather than the intermediate scrutiny typically accorded sex classifications under the Constitution.").

[57] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 236 (2022).

a penis.[58] However, if he continues to identify as a male, he is not diverging from the gender assigned to him at birth. In this way, "real differences" doctrine would not erase him, because he complies with the idea that certain differences—specifically, reproductive anatomy—result in a specific gender and identity. Like the cisgender man, some TGNCI people may have sex traits that develop in accordance with their assigned sex (and gender) at birth. For instance, a transgender man likely has higher levels of estrogen, wider hips, and softer skin than cisgender men; XX chromosomes; and the reproductive anatomy of a cisgender woman prior to beginning hormone replacement therapy.[59] However, the transgender man differs from cisgender women because he does not believe that his gender is female, regardless of the reproductive anatomy that a doctor observed at birth. This innate disagreement results from his inner sense of gender, or "gender identity," which arguably develops during pregnancy as a result of biological processes.[60]

Unfortunately, "real differences" doctrine's appeal to one binary sex difference has long impacted the ability of courts to understand and protect queer people and gender-diverse people. As Cahill writes:

> Transgender people could be denied marital, parental, and employment rights because their biology did not fit their gender identity. Individuals could not change their legal sex on official documents like birth certificates because sex was immutable. Same-sex couples could not legally engage in consensual sex nor marry because they could not procreate with each other.[61]

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[58] Mayo Clinic, *supra* note 28; *see also* Everlywell, *What Causes High Estradiol Levels in Males?*, https://www.everlywell.com/blog/testosterone/what-causes-high-estradiol-levels-in-males/ [https://perma.cc/3SNZ-ZMDY]; Endocrine Society, *Reproductive Hormones* (Jan. 24, 2022), https://www.endocrine.org/patient-engagement/endocrine-library/hormones-and-endocrine-function/reproductive-hormones [https://perma.cc/4LG9-SRCJ] (describing how higher estrogen in men can cause enlarged breasts, a secondary sex characteristic typically associated with women).

[59] *See* Nat'l Ctr. for Transgender Equal., *Frequently Asked Questions About Transgender People* (July 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/NN9Y-XRL4] ("A transgender person is usually born with a body and genes that match a typical male or female, but they know their gender identity to be different.").

[60] *See, e.g.,* Savic et al., *supra* note 21, at 41 (explaining that in the intrauterine period, "the fetal brain develops in the male direction through a direct action of testosterone on the developing nerve cells, or in the female direction through the absence of this hormone surge. According to this concept, our gender identity (the conviction of belonging to the male or female gender) and sexual orientation should be programmed into our brain structures when we are still in the womb. However, since sexual differentiation of the genitals takes place in the first two months of a pregnancy and sexual differentiation of the brain starts in the second half of the pregnancy, these two processes can be influenced independently, which may result in transsexuality."); Hare et al., *supra* note 21, at 95 (noting "significant association" between certain gene features affected by brain "masculinization" in early development and male-to-female gender identity).

[61] Cahill, *supra* note 42, at 1076.

However, three developments shifted this landscape for TGNCI and queer people throughout the late twentieth and early twenty-first century. First, queer equality movements worked to upend "real differences" jurisprudence by persuading courts that certain phenomena, such as male pregnancies, children being "born" to two men or two women, and nonbinary sex designations on state identity documents, are not fully reflected in "real differences" arguments.[62]

Second, the Court expanded the anti-stereotyping principle in *Price Waterhouse v. Hopkins*,[63] a 1989 case that held private employers engage in sex discrimination under Title VII of the Civil Rights Act of 1964 when they act upon gender stereotypes in the workplace, including through withholding promotion opportunities from a woman based on her conduct not conforming to stereotypes of feminine behavior.[64] This development broadened Title VII into a tool that prohibited employment discrimination "because of . . . sex" assigned at birth *and because of gender nonconformity*.[65] Trans people could argue as a result that their identities diverged from the gender norms expected of someone with their assigned sex. Meaning, any time an employer fired a person for being trans, they fired them for gender nonconformity itself, which courts began to consider a version of Title VII sex discrimination.[66]

This approach did not challenge the binary assumptions underlying gender and sex assigned at birth, but it did gain traction. The Court validated this perspective in 2020 when it held in *Bostock v. Clayton County* that Title VII's prohibition against discrimination "because of sex" also prohibited discrimination based on gender identity and sexual orientation.[67] Litigators soon argued that *Bostock* also applied to Title IX of the 1972 Education Amendments, which prohibits discrimination "on the basis of sex" in public schools

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[62] *Id.* For context, transgender men typically have a uterus and the reproductive anatomy of cisgender women—unless they receive surgery—and can get pregnant and carry a child to term. When Cahill uses the term "born of," she explains that courts have expanded the term to include adoptions and invitro fertilization, not just traditional pregnancies. Finally, non-binary sex designations refer to the ability of a person to change the gender marker on their identity documents to something other than male or female, usually "X."

[63] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102–166, 105 Stat. 1071.

[64] *Id*. at 258. An employer may avoid a finding of liability by proving, by a preponderance of evidence, that it would have made the same decision even if it had not taken gender into consideration. *Id.*

[65] Katie Eyer, *Transgender Constitutional Law*, 171 Univ. Pa. L. Rev. 1405, 1440 (2023) ("[T]he 1989 case of *Price Waterhouse v. Hopkins* played perhaps the most substantial role in the decisions of study courts that anti-transgender discrimination ought to be deemed sex discrimination (and thus entitled to intermediate scrutiny).").

[66] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004) (reasoning that *Price Waterhouse* provided no "reason to exclude Title VII for non sex-stereotypical behavior simply because the person is a transsexual."); Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 12, 2012) (finding employment discrimination based on "gender identity, change of sex, and/or transgender status" is cognizable under Title VII).

[67] Bostock v. Clayton Cnty., 590 U.S. 644, 646 (2020).

that receive federal assistance.[68] Until recently, some federal courts accepted this expansion of Title IX.[69] Perhaps most prominently, the Fourth Circuit Court of Appeals held in 2020 that a high school in Virginia could not maintain a birth-sex bathroom policy that barred a transgender boy from using the boy's restroom.[70]

Third, TGNCI people began to convince district courts, even prior to *Bostock*, that discrimination against trans people deserved heightened scrutiny typically reserved for sex or gender because of their historical mistreatment as a class.[71] As Professor Katie Eyer notes in her analysis of trans constitutional litigation, this argument convinced at least two federal circuit courts of appeal between 2019 and 2020 to hold that "the transgender community ought to receive heightened scrutiny under the Equal Protection Clause," because the community as a class warrants heightened scrutiny on its own.[72]

Rollback of Equal Protection

Some federal circuit courts of appeals, however, have begun to reverse course on these advancements. *Bostock* allows this reversal because, there, the Court assumed for purposes of argument that "sex" referred "only to

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[68] 20 U.S.C. § 1681(a).

[69] *See, e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1044–50 (7th Cir. 2017) (concluding that a transgender high school student was likely to succeed on the merits of his equal protection and Title IX claims); B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725, 725 (S.D. Ind. 2022), *aff'd sub nom.* A.C. *ex rel.* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023) (granting a preliminary injunction motion and holding that transgender students were likely to succeed on the merits of their Title IX claims); A.C. *ex rel.* M.C. v. Metro. Sch. Dist. of Martinsville, 601 F. Supp. 3d 345, 354 (S.D. Ind. 2022), *aff'd*, 75 F.4th 760 (7th Cir. 2023) (finding a transgender schoolchild was likely to succeed on the merits of his Equal Protection and Title IX claims); A.H. *ex rel.* Handling v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 570–73, 578 (M.D. Pa. 2019) (partial summary judgment in favor of a transgender schoolchild on her Equal Protection and Title IX claims); J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F. Supp. 3d 833, 842–43 (S.D. Ind. 2019) (granting partial summary judgment to a transgender schoolchild on his Equal Protection and Title IX claims); M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 726 (D. Md. 2018) (denying a motion to dismiss a transgender schoolchild's Equal Protection and Title IX claims).

[70] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020).

[71] *See, e.g.*, M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d at 719–21 (finding classifications based on transgender status to require heightened scrutiny because transgender people, as a class, have been historically subject to discrimination; exhibit immutable distinguishing characteristics; are a minority; and that their transgender status bears no relation to ability to contribute to society); *Grimm*, 972 F.3d at 607 (finding transgender people constitute at least a quasi-suspect class in a bathroom policy challenge); Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (finding transgender people as a class should receive somewhere between rational basis and strict scrutiny in a challenge to military ban); Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) (transgender people received heightened scrutiny as a class in an Equal Protection challenge to an exclusionary identity documents policy).

[72] Eyer, *supra* note 65, at 1415; *see Karnoski*, 926 F.3d at 1200–01; *Grimm*, 972 F.3d at 610–13.

biological distinctions between male and female" that a doctor identifies at birth.[73] In other words, *Bostock* upheld "real differences" logic by framing sex as reproductive genitalia observed at birth and the binary differences they purportedly always bring. However, sex assigned at birth misses gender identity or certain intersex variations that develop later or that are undetectable. *Bostock*, then, relegated these characteristics to something other than "biological sex," even though some researchers believe that gender identity and intersex variations are the result of biological processes just like other sex traits.[74] The latest wave of bills that separate gender from sex suggest TGNCI opponents are using *Bostock*'s definition of biological sex to exclude gender identity from legally protected conceptions of sex.[75] Once there, gender identity is separate from "biological sex" and something that states can regulate without running afoul of equal protection's "real differences" doctrine.

The Sixth and Eleventh Circuit have agreed that gender identity falls outside of biological sex. The Eleventh Circuit acted first in December 2022 in *Adams ex rel. Kasper v. School Board of St. Johns County* when an en banc panel reversed a prior decision in favor of a transgender high school student.[76] There, the court upheld a school policy that separated restrooms according to "biological sex."[77] The court did not shy away from labeling the policy a sex classification when the student, Drew Adams, alleged an Equal Protection violation.[78] Applying intermediate scrutiny, the court reasoned that student privacy constituted an important government interest and that the school district accomplished this interest by segregating spaces according to "biological sex."[79] While explaining how the policy cleared intermediate scrutiny, the court noted that "gender identity is different from biological sex,"[80] which it defined as "chromosomal structure and anatomy at birth."[81]

"The district court did not make a finding equating gender identity as akin to biological sex," the court wrote of the trial court's decision from 2018.[82] "Nor could [it have] made such a finding that would have legal significance," the circuit continued.[83] "To do so would refute the Supreme Court's longstanding recognition that 'sex . . . is an immutable characteristic determined solely by the accident of one's birth.'"[84] The Supreme Court case

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[73] Bostock v. Clayton Cnty., 590 U.S. 644, 655 (2020).

[74] *See, e.g.,* Savic et al., *supra* note 21 (describing how fetal sexual differentiation of the genitals and brain occur at different points of pregnancy and may result in transsexuality).

[75] *See, e.g.*, S.B. 458, 68th Leg., at 2 (Mont. 2023) (defining sex as the "biological . . . indication of [being] male or female . . . at birth").

[76] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 817 (11th Cir. 2022).

[77] *Id.*

[78] *Id.* at 803–06.

[79] *Id.* at 804–05.

[80] *Id.* at 807.

[81] *Id*. at 796.

[82] *Id.* at 807.

[83] *Id.*

[84] *Id*. (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)).

that the circuit cited—*Frontiero*—is telling. That decision validated the anti-stereotyping principle while also validating the idea that there are "real" (sex) differences between men and women.[85] But it also comes from 1973 and is outdated with respect to new findings scientists have made around sex differentiation and TGNCI identity.

The analysis in *Adams* is important for two reasons. First, it demonstrates that when courts say "biological sex," what they mean is birth anatomy that aligns with other primary and secondary sex characteristics. But this framing of sex ignores the non-binary aspects of human sexuality that impact how one identifies with their gender. Second, it shows that claims alleging discrimination on the basis of sex are susceptible to this framing due to the "real differences" doctrine embedded in North American sex and gender jurisprudence. Even *Bostock* assumed an immutable vision of binary sex while issuing a landmark decision for trans and queer people. *Adams*, then, is a wakeup call that there is a ceiling to how much relief TGNCI people can attain under equal protection if their bodies and identities do not fit within its paradigm.

It is crucial to find a doctrine that articulates how this wave of TGNCI backlash *suppresses the ideas* that TGNCI people raise about binaries and bodies. Otherwise, courts will continue to misunderstand why TGNCI people should be allowed to do the same things as their non-TGNCI contemporaries. Consider the logic of the Sixth Circuit Court of Appeals in *L.W. ex. rel Williams v. Skrmetti*,[86] a September 2023 decision that reversed the temporary enjoinment of trans youth healthcare bans in Tennessee and Kentucky. The circuit rejected an equal protection challenge to the ban, reasoning that it did not "prefer one sex over the other" because it prohibited "all minors" from "sex-transition treatments."[87] But it failed to analyze how these bans *do not apply to all minors*. Minors who experience precocious puberty or who want to remove body parts that cause "physical injury" *can* still access puberty blockers.[88] Why the hand-wringing about the adverse effects of puberty blockers if

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[85] *See* Frontiero v. Richardson, 411 U. S. at 686-87 ("Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .' And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.") (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

[86] *See* L.W. *ex rel*. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023).

[87] *Id*. at 480.

[88] *See, e.g.*, Tenn. Stat.§ 68-33-103(b)(1)(A) (stating that it is not a violation of this law "if a healthcare provider knowingly performs, or offers to perform, a medical procedure on or administers, or offers to administer, a medical procedure to a minor if: (A) The performance or administration of the medical procedure is to treat a minor's congenital defect, precocious puberty, disease, or physical injury."); *but see* Doe v. Ladapo, No. 4:23-CV-114, 2023 WL 3833848, at *10 (N.D. Fla. June 6, 2023) (noting that puberty-blocker

non-TGNCI people are allowed to use them? It would appear TGNCI youth are only prohibited from accessing this treatment because they have different ideas about sex, gender, and identity.[89]

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bans treat transgender and cisgender people differently because "[c]isgender individuals can be and routinely are treated with GnRH agonists, testosterone, or estrogen, when they and their doctors deem it appropriate" but "not so for transgender individuals.").

[89] Government actors often argue that European countries are banning or severely restricting the practice of prescribing puberty blockers and other gender-affirming treatments such as breast-reduction or hormone replacement therapy. *See, e.g.*, 15 CSR 60-17.010 Experimental Interventions to Treat Gender Dysphoria (Mo. 2023) (showing Missouri Attorney General Andrew Bailey suggest in a since-withdrawn emergency rule that "[m]any medical organizations have determined that [pubertal suppression, cross-sex hormone therapy, and gender transition surgery] lack solid evidentiary support. For example, Sweden's National Board of Health and Welfare recently declared that there is a 'lack of reliable scientific evidence concerning the efficacy and the safety' of pubertal suppression and cross-sex hormone therapy.'"); Jack Johnson, Opinion, *Sen. Jack Johnson: Why We Seek to Prohibit Gender-Affirming Care for Minors*, Tennessean (Feb. 13, 2023), https://www.tennessean.com/story/opinion/contributors/2023/02/13/jack-johnson-why-we-seek-prohibit-gender-affirming-care-minors/69898696007/ [https://perma.cc/C53F-WQUL] (co-sponsor of Tennessee's gender-affirming care ban for youth explaining that "progressive European countries are reversing course on gender affirming care."); Kaja Klapsa, *The Real Story on Europe's Transgender Debate*, Politico (Oct. 8, 2023), https://www.politico.com/news/2023/10/06/us-europe-transgender-care-00119106 [https://perma.cc/XD4Z-L3NM] (quoting U.S. Representative Wesley Hunt, of Texas, saying during a House Judiciary hearing in summer 2023 that "Sweden, France, Norway, and the U.K. are reversing course and asking questions. . . . What do their doctors know that our doctors don't?"); *Skrmetti*, 83 F.2d at 477 ("[S]ome of the same European countries that pioneered these treatments now express caution about them and have pulled back on their use. How in this setting can one maintain that long-term studies support their use—and that the Constitution requires it?"). However, a news organization that reviewed gender-affirming care in Europe "found more nuance." *See* Chelsea Cirruzzo & Ben Leonard, *GOP takes its cue from European trans youth care*, Politico (Oct. 10, 2023), https://www.politico.com/newsletters/politico-pulse/2023/10/10/gop-takes-its-cue-from-european-trans-youth-care-00120627 [https://perma.cc/2AF8-AE4N] ("While Europeans debate who should get care and when, only Russia has banned the practice. The reassessment of standards in some European countries has aimed to tighten eligibility for gender-affirming care but has also sought to boost research studies that include minors."). Indeed, Politico reporters concluded that England plans to "open new clinics with stringent eligibility criteria" while France guidelines "warn that overdiagnosis is real" but continue to allow "breast removal from age 14" and "hormone treatments at any age" but "typically" at age 16 or older. Klapsa, *supra* note 89. In Norway, an independent healthcare investigation board "recommended defining gender-affirming care for minors as 'experimental,'" but the government agency in charge has not "implemented the recommendations after a year and a half," instead maintaining "current rules that allow children to receive puberty blockers once puberty has started." *Id.* Finally, a hospital in Sweden stopped prescribing hormones to youth in 2021 after "allegedly rushing kids into treatment," saying "they should only be offered in trials," but a government agency recently said "puberty blockers, mastectomies and hormones" are allowed in 'exceptional cases.'" *Id.* However, as additional news reports point out, "none" of these "surgical care limitations in Europe result from legal bans like those instituted in some U.S. states" but instead "stem from agreed-upon medical guidelines, and, in Sweden's case, sterilization laws." Grace Abels, *Gender-affirming surgery is not banned for minors in Europe, but is mostly inaccessible*, Politifact (Sept. 6, 2023), https://www.politifact.com/factchecks/2023/sep/06/instagram-posts/gender-affirming-surgery-is-not-banned-for-minors/ [https://perma.cc/NUY3-KW63]. Because these guidelines "pertain *only to the national health systems* in these countries," adolescents "can still access gender-affirming care through private clinics" if they do not meet more stringent government criteria. *See* Alex Koren, *The GOP's War on Trans Kids Relies on Myths About a 'Progressive' Europe*,

Other recent cases show how traditional sex discrimination jurisprudence creates an alibi for courts to rule against TGNCI litigants. Consider *Eknes-Tucker v. Governor of Alabama*, a 2023 Eleventh Circuit opinion that reversed the temporary enjoinment of a trans youth healthcare ban out of Alabama.[90] Like *Skrmetti*, the court noted that non-TGNCI men and women experience equal treatment under the ban.[91] However, the court also suggested the ban was not a sex classification subject to intermediate scrutiny because the statute only referred to sex to explain the medical procedures it was regulating.[92] In this case, those procedures were puberty blockers and cross-sex hormones, both of which are "sex-based."[93] But the reference to sex did not translate to sex discrimination, the court reasoned, because it impacted both sexes the same.[94] That reasoning is possible under "real differences" doctrine, particularly if one characterizes gender identity as psychological instead of biological.

This analysis also ignores how the Alabama healthcare ban is about *controlling the definition of sex in order to control how people identify their gender*. After all, the statute begins with the legislature's pronouncement that sex "is the biological state of being female or male . . . and is genetically encoded into a person at the moment of conception, and it cannot be changed."[95] This finding that sex is immutable and results in only two genders makes clear that Alabama is interested in regulating *who people are and how they identify*. Lawmakers did not incidentally mention sex because it would otherwise be impossible to regulate gender dysphoria treatment, as the court suggests. Instead, lawmakers used the bill to declare what sex and gender *are.* One can regulate the safe administration of trans healthcare without making an ideological pronouncement.

Equal protection claims may struggle to illuminate the legal erasure of TGNCI people for one other reason: some federal appellate courts are beginning to question whether TGNCI people are a suspect class who deserve heightened scrutiny.[96] The *Eknes-Tucker* court, for instance, expressed "grave

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The Stranger (Apr. 6, 2023), https://www.thestranger.com/queer/2023/04/06/78936831/the-gops-war-on-trans-kids-relies-on-myths-about-a-progressive-europe [https://perma.cc/HF4D-4T25] (emphasis added). Thus, there is not an outright ban, but the situation "is creating a two-tiered system where wealthier families can get gender-affirming care for their kids while less-affluent families can't." *Id.* (quoting Elias Fjellander, president of RFSL Ungdom, the Swedish Youth Federation for LGBTQIA rights).

[90] 80 F.4th 1205, 1231 (11th Cir. 2023).

[91] *Id*. at 1228.

[92] *Id*. at 1227–28.

[93] *Id*. at 1228.

[94] *Id.* (citing *Skrmetti* to conclude that Alabama's regulation restricts puberty blocker treatment "for *all* minors.").

[95] Ala. Code § 26-26-2(1).

[96] *See, e.g.*, L.W. *ex rel*. Williams v. Skrmetti, 83 F.4th 460, 486 (6th Cir. 2023) ("The plaintiffs and the federal government separately invoke a distinct theory of equal protection—that the Act violates the rights of a suspect class: transgender individuals. But neither the Supreme Court nor this Court has recognized transgender status as a suspect class. Until that changes, rational basis review applies."); *Eknes-Tucker*, 80 F.4th at 1230.

doubt" that transgender status demanded quasi-suspect analysis.[97] Then, it proceeded to extend *Dobbs*'s reasoning that "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny" to gender nonconforming people, ruling that no heightened scrutiny applies because only gender nonconforming people would use puberty blockers.[98] This finding is problematic for two reasons. First, it ignores that non-TGNCI people use puberty blockers for precocious puberty[99] and that non-TGNCI adults use hormone therapy treatment and other forms of gender-affirming care for numerous medical reasons.[100] Second, it cuts off a legal tool of TGNCI litigants. In addition to their traditional intermediate scrutiny sex discrimination claims, TGNCI litigants could argue that lawmakers were passing laws that deserved higher scrutiny because they uniquely harmed TGNCI people as a class. But, if other courts agree with the *Eknes-Tucker* court, this argument may no longer be available.

Bostock will not necessarily come to the rescue. The *Eknes-Tucker* court declined to apply *Bostock* because the 2020 case "dealt with Title VII," which contains different language than the Equal Protection Clause, which in turn creates a different textual analysis.[101] As the court noted, the *Bostock* court combined the Title VII phrases "because of," "otherwise . . . discriminate against," and "individual" to reason that "homosexual or transgender status" should not be relevant to employment decisions, and therefore not be discriminated against.[102] Conversely, the *Eknes-Tucker* court noted that the Equal Protection Clause promises "the equal protection of the laws" and that it contains none of the material language of Title VII. Therefore, it could not adopt *Bostock*'s reasoning.[103]

Advocates, then, should consider alternative claims before courts can further turn back the clock on TGNCI equal protection claims. The Supreme Court may soon decide whether Equal Protection and Title IX sex discrimination claims are effective against "biological sex" policies: The losing TGNCI

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[97] *Eknes-Tucker*, 80 F.4th at 1230.

[98] *Id*. at 1229–30 (quoting Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022)).

[99] Eun Young Kim, *Long-term Effects of Gonadotropin-releasing Hormone Analogs in Girls with Central Precocious Puberty*, 58 Korean J. Pediatrics 1, 1 (2015) ("Gonadotropin-releasing hormone analogs (GnRHa)," also known as puberty blockers, "have been widely used for more than 30 years to solve these problems in patients" with central precocious puberty.).

[100] Yvette Brazier, *Uses, Types, and Effects of HRT*, Medical News Today, https://www.medicalnewstoday.com/articles/181726 [https://perma.cc/BEE6-GPFH] (explaining that HRT, or hormone replacement therapy, can be used to manage menopausal symptoms such as hot flashes, night sweats, or bone thinning. *See also* Caroline Hopkins, *With Puberty Starting Earlier than Ever, Doctors Urge Greater Awareness and Care*, NBC News (Dec. 25, 2023), https://www.nbcnews.com/health/kids-health/puberty-starting-earlier-treatment-children-rcna125441 [https://perma.cc/ZHN8-VSBF] (explaining the rise of precocious puberty, which requires careful treatment and attentiveness by doctors).

[101] *Eknes-Tucker*, 80 F.4th at 1228–29.

[102] *Id*.

[103] *Id*. at 1229.

plaintiffs in *Skrmetti* petitioned the Court in November to resolve the circuit split on trans youth healthcare bans, and in October, the losing school district in an unrelated TGNCI restroom case out of Indiana asked the justices to decide a similar issue with respect to bathrooms.[104] The Court's rightward tilt[105] does not portend a TGNCI-friendly outcome, should it agree to hear either case. As such, now is the time to challenge the *ideological assumption* that legal sex is immutable, binary, and exclusive of gender identity.

Due Process & Parental Rights

TGNCI communities have also made progress under the Due Process Clause of the Fourteenth Amendment. But this doctrinal avenue may not hold much weight under originalism, particularly for TGNCI youth who must argue that puberty blockers and cross-sex hormone treatment are centuries-old rights.

The Due Process Clause of the Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law."[106] Courts interpret the word "liberty" to mean rights so fundamental to an ordered society that citizens have long possessed them.[107] Courts look to history and tradition to determine whether a liberty right is deeply rooted,[108] an approach that has allowed TGNCI adults to locate unenumerated privacy rights in the Constitution. For instance, TGNCI adults have argued that categorical bans against trans people changing their identity documents violate a person's privacy right to not have to "out" themselves.[109] Black, brown,

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[104] Petition for Writ of Certiorari at 3, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-477) (asking the Supreme Court to resolve the circuit split of whether states can ban gender-affirming medication for trans youth and whether rational-basis scrutiny or a more heightened scrutiny applies to these bans); Petition for Writ of Certiorari at 1–2, A.C. *ex rel.* M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760 (7th Cir. 2023) (No. 23-932). *See also* Chris Geidner, *Trans Care Bans Reach Supreme Court as Tennessee Families Ask Court to Take Case*, Law Dork (Nov. 1, 2023), https://www.lawdork.com/p/tenn-trans-care-ban-reaches-supreme-court [https://perma.cc/52W8-NDV7]; Chris Geidner, *Judge Won't Block Idaho Bathroom Ban; Indiana School Asks SCOTUS to Hear a Similar Case*, Law Dork (Oct. 13, 2023), https://www.lawdork.com/p/idaho-bathroom-ban-indiana-case-scotus [https://perma.cc/4KCU-Z5SC] (noting that the petition asks the Court to decide "whether Title IX or the Equal Protection Clause dictate a single national policy that prohibits local schools from maintaining separate bathrooms based on students' biological sex.").

[105] *See* Stephen Jessee et al., *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, PNAS (June 6, 2022), https://www.pnas.org/doi/epdf/10.1073/pnas.2120284119 [https://perma.cc/X6VD-U2T7].

[106] U.S. Const. amend. XIV, § 1.

[107] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (explaining how substantive Due Process "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.").

[108] *Id.*

[109] *See* Gonzalez v. Nevares, 305 F.Supp. 3d 327, 333 (D.P.R. 2018) (striking down Puerto Rico's categorical ban on transgender people changing their birth certificate gender markers because unenumerated privacy rights include "the individual interest in avoiding the disclosure of personal matters").

and indigenous TGNCI people, in particular, experience high rates of poverty, homelessness, and incarceration because of their intersectional identities.[110] Therefore, the right to edit documents to properly reflect one's gender—and therefore "pass" in public, or at least not be outed as TGNCI—is essential to TGNCI safety and well-being.

Trans youth have also used substantive Due Process claims to attack healthcare bans that prohibit them from accessing puberty blockers or hormone replacement therapy.[111] Puberty blockers delay the irreversible changes of puberty, give youth the time to decide whether they want to pursue a gender transition, and help alleviate anxiety, depression, and suicidal ideation in TGNCI youth who take them and later pursue hormone replacement therapy.[112]

These youth argued—with some success at the district court level[113]—that their parents have a deeply rooted right to oversee their medical treatments without substantial interference from the state. However, opponents of trans rights have countered that trans youth healthcare is too new and "experimental" for there to be an established right in the county's history and tradition.[114] These anti-trans arguments have worked on appeal in two circuits. The Sixth Circuit rejected a parental rights challenge in *Skrmetti* in September, reasoning that the country "does not have a custom of permitting parents to obtain banned medical treatments for their children and to override contrary legislative policy judgments in the process."[115] The Eleventh Circuit rejected a similar claim in *Eknes-Tucker*, noting that the use of puberty-blocking medications "in general – let alone for children"—"almost certainly is not 'deeply rooted' in our nation's history and tradition."[116] The court, writing through Judge Barbara Lagoa, explained:

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[110] *See* Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 U. St. Thomas L. J. 276, 279–93 (2023) (explaining the numerous factors that result in disproportionate percentages of poverty and state violence for TGNCI people of color).

[111] *See, e.g.*, Doe v. Ladapo, No. 4:23-CV-114, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023) (finding plaintiffs likely to prevail on a parental right claim because the state provided no "rational basis" for denying these treatments to trans youth while allowing them for others).

[112] Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, Pediatrics, February 2020, at 1–2, 5 (finding that "treatment with pubertal suppression among those who wanted it was associated with lower odds of lifetime suicidal ideation when compared with those who wanted pubertal suppression but did not receive it.").

[113] *See, e.g.*, Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1144–46 (M.D. Ala. 2022), *vacated sub nom.*, Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023) (finding that a parental rights substantive due process claim was likely to succeed because Alabama failed to produce any "credible evidence" that "transitioning medications" are too experimental to be safely administered).

[114] *See, e.g.*, Brief for Alabama et al. as Amici Curiae Supporting Appellants at 9, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) (Alabama Attorney General Steve Marshall and other Republican Attorneys General argue that puberty blocker and cross-hormone replacement therapy treatments for gender dysphoria are experimental).

[115] *Skrmetti*, 83 F.4th at 475.

[116] *Eknes-Tucker*, 80 F.4th at 1220.

> Although there are records of transgender or otherwise gender nonconforming individuals from various points in history, the earliest-recorded uses of puberty blocking medication and cross-sex hormone treatment for purposes of treating the discordance between an individual's biological sex and sense of gender identity did not occur until well into the twentieth century. Indeed, the district court's order does not feature any discussion of the history of the use of puberty blockers or cross-sex hormone treatment or otherwise explain how that history informs the meaning of the Fourteenth Amendment at the time it was ratified—July 9, 1868.[117]

To be sure, puberty blockers and hormone replacement therapy are newer phenomena if one views medical treatments in the context of a 300-year-old constitutional regime. But this analysis misunderstands the reality of medical advancements: do people lack a right to penicillin because its use only dates back to 1943? This analysis also misses how medical exploitation and neglect delayed mainstream access to certain treatments for TGNCI people, particularly those of color, meaning the starting point for whether this right to treatment is deeply rooted may be inaccurate. Although a strict reading of due process may not concern itself with newer medical procedures and equitable access, such an interpretation could allow the judiciary to reject any new and valuable treatment without a rational basis, and permit even greater state intrusion into bodily autonomy.

Recent scholarship demonstrates how the medical industry withheld TGNCI healthcare from TGNCI people while allowing many others to access it. As trans historian Jules Gill-Peterson has written, people could obtain synthetic hormones once they hit the market in the 1940s.[118] Although some TGNCI adults—largely white and middle class—accessed these treatments around the same time,[119] many struggled to obtain them from the medical establishment because of the numerous hurdles that came with a diagnosis of "transsexuality."[120] Some clinicians, for instance, framed trans adults as repressed homosexuals and directed them to a kind of psycho-conversion therapy meant to dissuade them from medical and surgical changes.[121] Other clinicians, armed with less modern knowledge about the biological bases for gender identity, were "unwilling to fathom why people without any medical conditions would want to transition" and "viewed them as sexual deviants."[122] As Gill-Peterson writes of the way clinicians viewed TGNCI people seeking early versions of these treatments:

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[117] *Id*. at 1220–21 (citing Morrissey v. United States, 871 F.3d 1260, 1269–70 (11th Cir. 2017)).

[118] Jules Gill-Peterson, *Doctors Who?*, The Baffler (Oct. 2022), https://thebaffler.com/salvos/doctors-who-gill-peterson [https://perma.cc/GLR3-3U5X].

[119] *Id*.

[120] *Id*.

[121] *See, e.g.*, Gill-Peterson, *supra* note 20, at 84–90.

[122] Gill-Peterson, *supra* note 118.

> [E]ither they did not perfectly "pass" as generic women or men; they were not heterosexual enough; they did not dress in a conservative fashion; or they weren't white, didn't have blue- or white-collar jobs, and were therefore broadly undeserving. . . . This regime of medical gatekeeping made transition through official means inaccessible to most and miserable for the few willing to attempt it.[123]

For TGNCI youth seeking gender-affirming care, a similar exclusion is taking place. Non-TGNCI youth have accessed puberty blockers since the Food and Drug Administration approved their usage in 1993.[124] However, when TGNCI youth seek these treatments for gender dysphoria, their usage is considered off-label and experimental.[125] Misinformation abounds about puberty blocker usage,[126] but researchers largely agree that monitored usage

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[123] *Id*.

[124] U.S. Food and Drug Administration, *Search Orphan Drug Designations and Approvals*, https://www.accessdata.fda.gov/scripts/opdlisting/oopd/detailedIndex.cfm?cfgridkey=28688 [https://perma.cc/3LST-GYQA] (last accessed March 5, 2024) (approving the marketing of leuprolide acetate, known under the trade name Lupron Injection, to treat central precocious puberty in 1993); Jadranka Popovic, et al., *Gonadotropin-releasing hormone analog therapies for children with central precocious therapy in the United States*, Frontiers in Pediatrics, October 4, 2022, at 3, 6 (noting that monthly Lupron injections received FDA approval for precocious puberty treatment in 1993 while three-month formulations received FDA approval in 2011; another puberty-blocking drug taken every 24 weeks, Triptorelin pamoate, received FDA approval for treatment in 2017).

[125] *See, e.g.*, Gerald Posner, Opinion, *The Truth About 'Puberty Blockers'*, Wall St. J., (June 7, 2023), https://www.wsj.com/articles/the-truth-about-puberty-blockers-overdiagnosis-gender-dysphoria-children-933cd8fb [https://perma.cc/95E3-PUSN] (explaining how puberty blockers are prescribed 'off label' to treat gender dysphoria and comparing the treatment to another off-label use: the "chemical castration of repeat sex offenders."); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 478 (6th Cir. 2023) ("Gender-transitioning procedures often employ FDA-approved drugs for non-approved, "off label" uses. Kentucky and Tennessee decided that such off-label use in this area presents unacceptable dangers."). *But see* Maia Spoto, *What Transition-Related Healthcare is Available to Transgender Kids in Texas? Here's What You Should Know*, Tex. Trib., Mar. 24, 2023 ("Puberty blockers are used off-label for transgender patients. Off-label use—when physicians prescribe FDA-approved drugs for an unapproved use—is both common and legal. The Agency for Healthcare Research and Quality reported 1 in 5 prescriptions were written for off-label use in 2015."); U.S. Food and Drug Administration, *Understanding Unapproved Use of Approved Drugs 'Off Label'*, https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label [https://perma.cc/XQ7K-E4FV] (last accessed March 5, 2024) (explaining that "once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient," and reasons for off-label use include a lack of approved drugs to treat a medical condition or trying "all approved treatments without seeing any benefits.").

[126] *See, e.g.*, Tim Fitzsimons, *A Viral Fake News Story Linked Trans Health Care to 'Thousands' of Deaths*, NBC News (Sept. 27, 2019), https://www.nbcnews.com/feature/nbc-out/viral-fake-news-story-linked-trans-healthcare-thousands-deaths-n1059831 [https://perma.cc/ANM4-5QF3] (explaining how right-wing media "alleged that the drugs used to treat gender dysphoria . . . are linked to 'thousands' of deaths," likely by pointing to "terminally ill cancer patients who receive hormone blockers to fight hormone-sensitive cancers, like prostate cancer"); The Associated Press, *Tweet distorts health care for trans children* (June 9, 2022), https://apnews.com/article/

has no long-term side effects on fertility, [127] and otherwise addressable side effects.[128] Researchers have found that non-TGNCI youth who took puberty blockers for precocious puberty retained their fertility and reproductive function.[129] If people discontinue their use of puberty blockers, routine puberty resumes.[130] TGNCI people who delay their puberty may begin cross-sex hormone replacement therapy once they turn 16,[131] but the standards of care

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fact-check-transgender-children-hormone-treatment-age-five-760207688998 [https://perma.cc/ZV9V-BHZE] (debunking a widely shared tweet suggesting that "5-year-olds are receiving hormone treatments" by "likening it to children driving cars or smoking"). *But see* Andrew Weber, *There's a Lot of Misinformation About Gender-Affirming Care in Texas. Let's Clear Some of that Up*, KERA NEWS (Mar. 28, 2022) (explaining misconceptions about trans healthcare, including the ways in which some public officials have allegedly misrepresented existing findings and research); Simona Giordano & Søren Holm, *Is Puberty Delaying Treatment 'Experimental Treatment*,' 21 INT'L. J. TRANSGENDER HEALTH 113, 115–18 (2020) (explaining that standards of care developed in the earlier 2000s show that puberty-delaying treatments for youth are not experimental or unresearched).

[127] Popovic et al., *supra* note 124, at 9 (explaining that existing clinical studies do not strongly support claims that long-term puberty blocker usage impacts reproductive function and citing to "a recent review by an international consortium [that] reported a lack of evidence that GnRHa treatment impairs adult reproductive function or fertility, and a separate study found that 84.4% of pregnancies in women previously treated with GnRHa's for CPP occurred within 1 year of trying to conceive, suggesting that fertility in adulthood was not negatively impacted") (internal citations omitted).

[128] Press Release, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH & UNITED STATES PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *USPATH and WPATH Respond to NY Times Article "They Paused Puberty, But Is There a Cost?" published on November 14, 2022* (Nov. 22, 2022) [https://perma.cc/5924-9TVE] (explaining that while experts are concerned about the decrease in bone density from puberty-blocker usage, "[t]he blockers themselves do not impact bone density. Bone density is impacted by the fact that sex steroid production is temporarily halted when puberty blockers are initiated." Moreover, "bone density loss is generally not a concern" once youth initiate cross-sex hormone replacement, particularly those who increase their estrogen, which protects against bone-density loss); Press Release, ENDOCRINE SOCIETY, Longer Treatment with Puberty-Delaying Medication in Transgender Youth Leads to Lower Bone Mineral Density (June 12, 2022), https://www.endocrine.org/news-and-advocacy/news-room/2022/longer-treatment-with-puberty-delaying-medication-leads-to-lower-bone-mineral-density [https://perma.cc/E7T9-FG6Y] (explaining that while longer usage of puberty blockers can lead to lower bone density in youth patients, "other studies have shown that bone mineral density values improve once individuals stop taking puberty-delaying medication or start gender-affirming hormones.").

[129] Popovic et al., *supra* note 124, at 9. *See also* Maria Alexandra Magiakou et al., *The Efficacy and Safety of Gonadotropin-Releasing Hormone Analog Treatment in Childhood and Adolescence: A Single Center, Long-Term Follow-Up Study*, 95 J. CLIN. ENDOCRINOLOGY & METABOLISM 109, 109 (2010), https://academic.oup.com/jcem/article/95/1/109/2835177?login=false [https://perma.cc/H6PN-C476] ("Girls treated in childhood with GnRHa have normal BMI, BMD, body composition, and ovarian function in early adulthood.").

[130] *See, e.g.*, Giordano & Holm, *supra* note 126, at 117 (explaining how it would be possible for a natal male who begins puberty blockers to discontinue their use "long enough for spermatogenesis to start if they wish to collect and store sperm for reproductive purposes").

[131] Samantha Schmidt, *FAQ: What You Need to Know About Transgender Children*, WASH. POST (Feb. 25, 2022), https://www.washingtonpost.com/dc-md-va/2021/04/22/transgender-child-sports-treatments/ [https://perma.cc/VMA2-256Q] ("the Endocrine Society recommends waiting to begin [cross-sex hormone therapy] until after a person has 'sufficient mental capacity to give informed consent,' which the society said most adolescents have by age 16.").

issued by the eminent authority on TGNCI healthcare, the World Professional Association for Transgender Health (WPATH), ensure there are checks and balances along the way. Indeed, youth are encouraged to begin puberty blockers following a "sustained experience of gender incongruence" and should undergo a mental health evaluation and "several years of gender diversity/incongruence" before beginning more permanent hormone replacement therapy.[132]

All to say, gender-affirming treatments for teenagers and young adults are not as experimental or widespread as TGNCI opponents suggest. There is plenty of professional discussion about how to ethically and safely administer this care for TGNCI communities.[133] Moreover, although the number of people identifying as transgender has increased, the increase is not as astronomical as some opponents suggest,[134] and may be attributable to younger generations developing new language around TGNCI identity and researchers having more complete data to work with.[135] For further context, a 2022 Reuters report that analyzed insurance claims and medical records for 330 million American families found that at least 121,882 youth from ages six to seventeen

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[132] World Prof'l Ass'n for Transgender Health, Standards of Care 60 (8th ed. 2022) (hereinafter WPATH), ("Given potential shifts in gender-related experiences and needs during adolescence, it is important to establish the young person has experienced several years of persistent gender diversity/incongruence prior to initiating less reversible treatments such as gender-affirming hormones or surgeries. Puberty suppression treatment, which provides more time for younger adolescents to engage their decision-making capacities, also raises important considerations . . . suggesting the importance of a sustained experience of gender incongruence/diversity prior to initiation.").

[133] *See, e.g.*, Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, Am. Ass'n of Pediatrics, 1, 4–5 (2018) (providing TGNCI treatment suggestions for pediatric primary care providers and addressing concerns).

[134] *See, e.g.*, Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States*, UCLA Sch. of L. Williams Inst. (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ [https://perma.cc/6JY6-9LZP] (analyzing 2021 Youth Risk Behavior Survey and finding that 1.4% of youths ages thirteen to seventeen identify as transgender, which amounts to about 300,000 transgender young people; this increased from 0.7 percent of youths ages thirteen to seventeen who openly identified as transgender in the 2017 Youth Risk Behavior Survey).

[135] *See* Jody L. Herman, Andrew R. Flores & Kathryn O'Neill, *Why More Teens Feel Safe Identifying as Trans*, PBS (July 7, 2022), https://www.pbs.org/newshour/nation/why-more-teens-feel-safe-identifying-as-trans [https://perma.cc/CW82-CSUA] (explaining that the increase from 0.7% to 1.4% should not necessarily be read as a doubling of the trans youth population for two reasons: first, the Youth Risk Behavior Survey "did not include a transgender status question until 2017," so UCLA researchers had to extrapolate from census data and from fifteen individual states that did record transgender status data to "arrive at a credible estimate of 0.7%" for 2017. "Therefore, it's possible that the higher proportion in 2022 is less an indication of change over time and more a reflection of better measures"; second, "the language around trans identities has evolved over time, creating new identity categories—such as nonbinary, gender nonconforming or genderqueer—that fit under the umbrella term 'transgender'"; therefore, an increase in the trans youth population may also reflect this expanding language, which is more present among newer generations).

were diagnosed with gender dysphoria between 2017 and 2021.[136] Of that number, only 17,683, or roughly fifteen percent, began puberty blocker treatment.[137]

Ultimately, a small percentage of the TGNCI people who take puberty blockers and undergo cross-sex hormone replacement therapy have regrets about these treatments.[138] There are unknowns about how to maintain fertility if one undergoes cross-sex hormone replacement therapy right after puberty blockers.[139] Based on available research, some young people interested in preserving the option of having biological offspring would probably need to halt these treatments and let their bodies undergo puberty.[140] However, young people with intense gender dysphoria who desire medical transition to avoid the effects of puberty are not alone in making this decision. WPATH[141] and other researchers[142] stress that doctors should counsel young people about the current realities of fertility preservation before beginning puberty blockers or cross-sex hormone therapy. Even if young people opt to decline preservation, those who receive pre-treatment fertility counseling experience an "improved quality of life over those who [do] not."[143]

Thus, although the science is developing around some aspects of these treatments, namely fertility preservation, the bottom line is that the overwhelming majority of people stick with safe puberty blocker and cross-sex hormone therapy treatments, continue to identify with their gender as opposed

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[136] Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, Reuters (Oct. 6, 2022), https://www.reuters.com/investigates/special-report/usa-transyouth-data/ [https://perma.cc/2S99-NYBT].

[137] *Id*.

[138] WPATH, *supra* note 132, at 541 (explaining that "[t]he decision to detransition appears to be rare" and that detransition estimates are "likely to be overinflated due to research blending different cohorts"); Lindsey Tanner, *How Common is Transgender Treatment Regret, Detransitioning?*, AP (Mar. 5, 2023), https://apnews.com/article/transgender-treatment-regret-detransition-371e927ec6e7a24cd9c77b5371c6ba2b [https://perma.cc/6PLY-MV3A] (noting that a 2021 review of 27 studies involving "almost 8,000 teens and adults who had transgender surgeries, mostly in Europe, the U.S. and Canada" found that only one percent on average expressed regret and that "[f]or some, regret was temporary, but a small number went on to have detransitioning or reversal surgeries."). *See also* Kristina R. Olson, et al., *Gender Identity Five Years After Social Transition*, Pediatrics, August 2022, at 1 (finding that ninety-four percent of 317 trans youth continued to identify as "binary transgender youth" five years after their initial social transitions; nearly four percent out of the six percent who desisted from their binary trans identity instead identified as non-binary, and 2.5% ultimately identified as cisgender).

[139] Giordano & Holm, *supra* note 126, at 117 (explaining some of the unknowns, including how a youth assigned male at birth might need to undergo puberty for a period of time if they want to retain reproductive capacity before later starting hormone replacement therapy. "[T]his of course would mean that they would have to accept the masculinizing effects of endogenous testosterone on the body during this period[]. They can then continue with treatment for transition to female gender.").

[140] *Id*.

[141] WPATH, *supra* note 132, at 5158–5159.

[142] Janella Hudson, et al., *Fertility Counseling for Transgender AYAs*, 6 Clin. Pract. Pediatr. Pscyhol. 84, 86–87 (2018).

[143] *Id*. at 86.

to their assigned sex, and have better mental health outcomes.[144] While due process jurisprudence may treat these treatments as too new, an alternative view of their medical history points to persistent use since their availability, with medical experts providing ethical treatment plans for ongoing questions such as fertility. Originalist analysis does not seem to stray from its inquiry into whether a right is *deeply embedded enough* in history for purposes of substantive due process. But it is worth making informed arguments about these treatments even if some federal courts refuse to recognize the substantive due process rights of parents to facilitate puberty blocker and hormone replacement therapy treatments for their children.

Invidious Discrimination

None of these detrimental developments are reasons to discontinue using Fourteenth Amendment due process and equal protection intermediate scrutiny claims in friendlier judicial circuits.[145] However, circuit splits are likely to continue until the Supreme Court takes up the issue. If the Court does take up the issue, advocates may be hoping for a *Lawrence v. Texas*,[146] the 2003 case where the justices ruled that same-sex relations fell within a protected sphere of personal behavior. But it could just as likely lead to a *Bowers v. Hardwick*[147] moment, where the Court, in 1986, found there was no constitutional protection for the very same same-sex relations.

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[144] Turban et al., *supra* note 112, at 5; Olson, *supra* note 138, at 1 (finding that ninety-four percent of 317 trans youth continued to identify as "binary transgender youth" five years after their initial social transitions; nearly four percent out of the six percent who desisted from their binary trans identity instead identified as non-binary, and 2.5% ultimately identified as cisgender).

[145] Cahill has noted that feminist and queer liberation movements can unite in their common usage of the Fourteenth Amendment to challenge "real [sex] differences" jurisprudence under the Equal Protection Clause. As Cahill writes: "Common themes unite this vast body of law . . . One such theme is that sex is neither binary nor (just) biological. Another is that women and men are the same or similar in the very areas that sex equality insists they are different: fathers can bear children, children can be 'born . . . of' two men or two women, and maternal identity can be as uncertain and contested as paternal identity. Yet another theme is that even discrimination based on 'biology alone' can be a sex stereotype if it grossly overgeneralizes about male and female anatomy, prioritizes averages over individuals, and is grounded in hidebound conceptions of sex, the body, procreation, and parenthood—all of which the anti-stereotyping principle prohibits. In this sense, LGBTQ equality is laying the foundation for sex equality 2.0, wherein all biological justifications for sex discrimination are open to critique on sex-stereotyping grounds." Cahill, *supra* note 42, at 1109.

[146] 539 U.S. 558, 566 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), because the law there involved a statute of "far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home").

[147] 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (upholding a state law criminalizing sodomy because, there, no right of privacy "extend[ed] to homosexual sodomy").

A theory that invidious discrimination against TGNCI people violates the Equal Protection Clause under rational basis review could be more promising. Scholars such as Scott Skinner Thompson have recommended this aspect of Equal Protection law to limit the amount of damage that courts are inflicting on TGNCI people using sex discrimination jurisprudence.[148] Even if courts eschew heightened scrutiny in claims of TGNCI discrimination, rational-basis review prohibits legislators from exhibiting animus or "a bare . . . desire to harm" toward a community disempowered from equal participation in society.[149] Litigators can demonstrate this invidious discrimination with (1) "statements or proclamations by lawmakers and bill sponsors" and (2) a "total lack of fit between the means chosen to achieve the purported (legitimate) legislative goal and the presence of a totally fabricated or pretextual legislative goal."[150]

There are ample examples of lawmakers engaging in hateful and ignorant rhetoric toward TGNCI communities in 2023.[151] Skinner-Thompson suggests, though, that it may not be effective for litigators to point to these statements in isolated legal challenges.[152] Courts are loath to conclude that a handful of hateful comments represent the views of an entire statehouse.[153] Moreover, many of these laws purport to address legitimate issues such as children's wellbeing, fairness in women's sports, privacy and safety for women, and more.[154] Litigators, then, may need to point to the larger anti-trans movement to demonstrate that many of these laws are overwritten or underwritten such

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[148] Scott Skinner-Thompson, *Trans Animus,* B.C. L. Rev. (forthcoming) (manuscript at 63) (available on SSRN) (explaining that invidious discrimination claims focus on how "transgender people are often targeted because [they] are transgender (male, female, or nonbinary)" whereas sex-discrimination equal protection arguments are not "the most precise or descriptively fulsome way to capture the nature of [this] motivation," in addition to reinforcing the gender and sex binary due to "real differences" doctrine).

[149] Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (striking down a provision that prohibited households from giving food stamps to unrelated people because the legislative history revealed a disdain for communities made of unrelated people who pooled these benefits).

[150] Skinner-Thompson, *supra* note 148, at 9. *See also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.") (citing Zobel v. Williams, 457 U.S. 55, 61–63 (1982)).

[151] Skinner-Thompson, *supra* note 148, at 48–58 (collecting anti-trans comments).

[152] *Id*. at 3 (arguing that "scholarship and litigation tend[s] to analyze each piece of legislation in isolation, understating the all-encompassing, cumulative impact of the laws on transgender lives and the motivation behind them."). *Cf.* Church of Lukumi Bablu Aye., Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (analyzing multiple ordinances for an invidious discrimination claim and concluding that "when considered together, [they] disclose an object remote from these legitimate concerns[:] . . . religious gerrymander[ing].") (internal citations omitted).

[153] *See, e.g.*, Williams v. Wilson, No. 4:19-CV-00773, 2020 WL 2820208, at *4 (N.D. Ala. May 4, 2020), *report and recommendation adopted*, No. 4:19-CV-00773, 2020 WL 2812714 (N.D. Ala. May 29, 2020) ("[P]roof of [this] discriminatory intent or purpose" is essential for either prong of equal protection, as "the mere labeling of actions as 'discriminat[ory],' fails to state a claim.") (quoting Parks v. City of Warner Robins, 43 F.3d 609, 616 (11th Cir. 1995)).

[154] *See* sources cited *supra* note 25.

that they fail to accomplish their objectives and are therefore pretexts for a bare desire to harm TGNCI communities.

Skinner-Thompson also points to a handful of decisions that struck down anti-queer laws because of a lack of fit between a legislative goal and the means chosen to achieve it. For example, *Romer v. Evans*, a 1996 case, featured a Colorado amendment that repealed any local ordinance seeking to "prohibit discrimination on the basis of homosexual, lesbian or bisexual orientation, conduct, practices or relationships," including in the "private and governmental spheres."[155] The amendment also "prohibited any state or local government from taking any action to protect" this class.[156] But the Supreme Court found the amendment overstepped its purported goal of preventing this LGB class from having "special rights" in two ways. First, the amendment imposed "a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."[157] Second, the "sheer breadth" of the law was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[158] In other words, the means chosen for the goal were suspiciously overbroad.

A successful invidious discrimination challenge in the federal courts of Florida offers an example of this lack of fit between a legislature's means and its goal. Attorneys in *Dekker v. Weida* argued that state officials lacked a legitimate reason to pass a facially discriminatory regulation that declined to cover medically necessary TGNCI healthcare under Medicaid such as puberty blockers, hormone replacement therapy, and some surgeries.[159] Litigators built a record that showed the four plaintiffs—and their parents, in the case of TGNCI youth—pursued these treatments after numerous deliberations with multidisciplinary medical professionals.[160]

However, litigators also showed how the state accomplished this medical ban through overbroad means: the defendants who implemented this regulation relied on a "fact sheet" that recommended prohibiting social transition as a treatment.[161] The Florida Department of Health issued this fact sheet in April 2022 in response to information that the United States Department of Health and Human Services released in support of gender dysphoria

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[155] Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting the Colorado Amendment, known as "Amendment 2").

[156] Skinner-Thompson, *supra* note 148, at 10 (citing *Romer*, 517 U.S. at 624).

[157] *Romer*, 517 U.S. at 632. *See also* Skinner-Thompson, *supra* note 148, at 10.

[158] *Romer*, 517 U.S. at 632. *See also* Skinner-Thompson, *supra* note 148, at 11.

[159] Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at pp. 35–37, Dekker v. Weida, No. 4:22-CV-325 (N.D. Fla. filed Apr. 28, 2023), ECF No. 200; *see also* Dekker v. Weida, No. 4:22-CV-325, 2023 WL 4102243, at *2 (N.D. Fla. June 21, 2023) (noting that defendants acknowledge that pushing someone away from their gender identity is not a legitimate state interest).

[160] *Dekker*, 2023 WL 4102243 at *8–10, 14.

[161] *Id.* at *14.

treatments.[162] This fact sheet questioned the evidence supporting the effectiveness of trans youth healthcare and recommended that nobody under eighteen years of age should be allowed to socially transition, be prescribed puberty blockers or hormone therapy, or undergo gender reassignment surgery.[163] But doctors already do not allow people under the age of eighteen to undergo gender reassignment surgery except in special circumstances,[164] and they can safely administer puberty blockers and cross-sex hormone replacement therapy.[165]

Moreover, outlawing social transition was illogical because that treatment can simply involve changing one's name and pronouns. As Judge Robert L. Hinkle of the United States District Court of Northern Florida wrote, social transition involves "no medical intervention at all."[166] This raised the question: Why would the state recommend a social transition ban if it was concerned with experimental *medical* interventions? Was there animus for TGNCI identity itself? The state defendants conceded that "dissuading a person from conforming to [their] gender identity rather than to [their] natal sex [was] not a legitimate state interest."[167] Judge Hinkle, then, had little difficulty concluding that the "[s]tate's disapproval of transgender status … was a substantial motivating factor in [the] enactment of the challenged rule and statute," as "nothing [else] could have motivated this remarkable intrusion into parental prerogatives."[168]

Dekker shows that invidious discrimination claims have the ability to operate on many fronts. The doctrine not only showcases the widespread animus for TGNCI communities. It also demonstrates that a state's removal of parental rights can be a pretext for this animus. However, advocates should keep two things in mind. First, emphasis on family and parental rights alone may not remove the animus surrounding TGNCI identity. Decades of impact litigation on behalf of professional, often white, cisgender, gay and lesbian people has made clear that a perfect plaintiff is only so effective against a landscape

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[162] Press Release, Fla. Dep't Health, Fla. Dep't Health, Treatment of Gender Dysphoria for Children and Adolescents (Apr. 20, 2022), https://www.floridahealth.gov/_documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-guidance.pdf [https://perma.cc/4P34-6G8Z].

[163] *Id.*

[164] *See* Philip Marcelo, *Toddlers Can't Get Gender-Affirming Surgeries, Despite Claims,* Associated Press, (Apr. 21, 2023), https://apnews.com/article/fact-check-transgender-surgery-medicine-legislation-lgbtq-491630629027 [https://perma.cc/29Y2-BZ38] (quoting Dr. Michael Irwig, the director of trans healthcare at Beth Israel Deaconess Medical Center, as saying "the general recommendation is for gender affirming surgeries to be done after age 18 with limited exceptions."); WPATH, *supra* note 132, at 65 (explaining that the "only existing longitudinal studies evaluating gender diverse youth and adult outcomes," based on models known as the "Dutch Approach," suggest pubertal suppression may begin at age 12; hormone replacement therapy at age 16; and "surgical interventions after age 18 with exceptions in some cases").

[165] *See supra* notes 124–44.

[166] *Dekker*, 2023 WL 4102243 at *14.

[167] *Id*.

[168] *Id*.

of bigotry and propaganda.[169] This moment of hatred offers a unique chance for advocates to help young people empower themselves and connect to larger intersectional struggles. Advocates should not shy away from facilitating those connections. Second, invidious discrimination claims require significant amounts of evidence to demonstrate that a purported interest is pretextual. Litigators who seek to build such a record in their complaint should be mindful: some federal courts are keen to dismiss such accounts as overly lengthy "shotgun pleadings."[170]

ii. *Americans with Disabilities Act*

This Article has so far discussed three claims that TGNCI advocates bring under the Fourteenth Amendment. Due to the "real differences" doctrine under the Equal Protection Clause and the originalism permeating the federal courts, intermediate scrutiny sex-discrimination claims and substantive due process claims may not be as powerful as they once were. The third claim, invidious discrimination, is promising but difficult because it requires strong statutory analysis and well-researched explanations of the broader anti-trans movement. The final tool discussed in this Article is disability law, which has statutory bases for its protections: the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973. Although disability is embraced less often than equal protection, one federal appellate court has upheld accommodations for TGNCI people with gender dysphoria under the ADA, and at least one district court has followed suit.[171] The ADA's strength is that it could mandate improvements for people with disabilities in private businesses that own, lease, or operate twelve types of places considered "public

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[169] *See* Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation*: *Building a Movement for Transformative Change*, 8 Seattle J. Soc. Just. 579, 585 (2010) (explaining how past iterations of queer movements failed to "offer an intersectional analysis or reflect the needs or priorities of low-income, transgender communities of color"); Scott Skinner-Thompson, *The First Queer Right*, 116 Mich. L. Rev. 881, 894 (2018) (explaining how queer-liberation impact litigation has featured white, white-collar professionals when many members of the queer community face disproportionate levels of poverty and state violence compared to their straight peers).

[170] *See* Women in Struggle v. Bain, No. 6:23-CV-01887, 2023 WL 6541031, at *3 (M.D. Fla. Oct. 6, 2023) (rejecting emergency relief for TGNCI litigants challenging the Florida Bathroom Ban).

[171] Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022); Griffith v. El Paso Cnty., No. 21-CV-00387-CMA-NRN, 2023 WL 2242503, at *17 (Feb. 27, 2023 D. Colo.) (finding persuasive the "recent thorough and closely-reasoned decision issued by the Fourth Circuit in *Williams v. Kincaid*" and that "[a]bsent any Tenth Circuit authority to the contrary, the Court is likewise convinced that gender dysphoria is a disability included in the ADA's protections."). *See also* Orion Rummler, *In Some States Gender Dysphoria is a Protected Disability, and Momentum Could be Growing*, 19th News (July 20, 2023), https://19thnews.org/2023/07/gender-dysphoria-protected-americans-with-disabilities-act [https://perma.cc/P2AV-AHNR] (describing the efforts of advocates to secure legal acknowledgment of trans people within the ADA and recent cases).

accommodations."[172] If gender dysphoria is considered a disability, TGNCI people could receive invaluable access to sex-segregated spaces from which they have been excluded.[173] Although the finer points of ADA claims are beyond the scope of this Article, this subsection briefly discusses these claims.

Professor Kevin Barry writes that to prevail under anti-discrimination disability statutes:

> A [litigant] must establish that (A) [they are] protected by the statute, i.e., one is a qualified individual with a disability; (B) [they were] subjected to discrimination by reason of one's disability; and (C) the statute applies to the defendant, i.e., the defendant is a covered entity.[174]

Barry further explains the "three-prong" ADA definition of "disability" protects any person:

> (1) with a physical or mental impairment that substantially limits . . . a major life activity or bodily function; (2) who has a "record of"—that is, a history of—"such an impairment"; or (3) who is "regarded as having such an impairment," which is defined to mean being subjected to discrimination based on a real or perceived physical or mental impairment—regardless of whether it substantially limits a major life activity.[175]

The ADA has provided a path for TGNCI people to argue gender dysphoria is a protected disability, particularly since its 2008 amendment calling on courts to interpret the definition of a disability "in favor of broad coverage."[176] Though one might hesitate to call gender dysphoria a "disability" out of fear that opponents will use that definition to pathologize TGNCI people, there are many models of disability that avoid this problem. The social model of disability says individual needs or limitations are not the cause of disability.

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[172] 42 U.S.C. § 12181(7)(F) (explaining that a "public accommodation" is one of 12 kinds of private entities whose operations affect commerce, including "places of lodging" to "places of recreation" and "service establishment[s]"). *See also* Kevin Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 U.D.C. L. Rev. 97, 126-7 (2020) (describing the broad interpretation of "public accommodation" in the ADA and by the Supreme Court in *PGA Tour, Inc. v. Martin*).

[173] Barry, *supra* note 172, at 97–98 (explaining how TGNCI people are rejected from "homeless shelters, denied custody of their children, harassed by law enforcement, and deprived of access to appropriate single-sex services in schools, prisons, and immigration detention centers—because they are transgender.").

[174] *Id*. at 106 n.63 (citing 42 U.S.C. §§ 12112, 12182 (2018)).

[175] Barry, *supra* note 172, at 107; 42 U.S.C. § 12102(1), (3) (2018).

[176] Barry, *supra* note 172, at 107 ("For nearly two decades, proving 'disability' under the ADA was extraordinarily difficult as a result of several Supreme Court decisions that 'narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.' This is no longer the case. As amended by the ADA Amendments Act of 2008. . . , the ADA's definition of disability is to be 'construed in favor of broad coverage.'") (internal citations omitted); 42 U.S.C. § 12102(4).

Instead, it is "society's failure to provide appropriate services and adequately ensure that the needs of disabled people are taken into account in societal organization."[177] For example, the use of a wheelchair is not disabling; the lack of a wheelchair ramp is disabling.

Bearing this model of disability in mind, litigators have convinced multiple federal district courts that gender dysphoria could be a disability covered under the ADA.[178] To show that gender dysphoria is a "physical or mental impairment that substantially limits one or more major life activities,"[179] advocates have argued that untreated gender dysphoria can "result in depression, anxiety, suicidality, and death," and impairs numerous major life activities and functions including getting pregnant, "caring for oneself, interacting with others, eating, sleeping, concentration, and communicating."[180] For the second prong, litigators have shown a "record of impairment" if people have a gender dysphoria diagnosis.[181] Finally, a sizable portion of U.S. society perceives gender dysphoria as an undesirable mental illness or a made-up phenomenon, and lawmakers have curtailed numerous TGNCI civil rights in line with these perceptions.[182] Therefore, advocates can show the final prong

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[177] Sarah Buder & Rose Perry, *The Social Model of Disability Explained*, Social Creatures (Apr. 12, 2023), https://www.thesocialcreatures.org/thecreaturetimes/the-social-model-of-disability [https://perma.cc/Y69M-MQUE].

[178] Barry, *supra* note 172, at 109 n.81. *See also* Doe v. Mass. Dep't of Corr., No. 17-12255, 2018 WL 2994403, at *7 (D. Mass. June 14, 2018) (denying a motion to dismiss based on "a dispute of fact as to whether Doe's [gender dysphoria] falls outside the ADA's exclusion of gender identity-based disorders as they were understood by Congress twenty-eight years ago"); Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017) (denying motion to dismiss gender dysphoria ADA claim).

[179] 42 U.S.C. § 12102(1)(A).

[180] Barry, *supra* note 172, at 108. *See also* Mass. Dep't of Corr., 2018 WL 2994403, at *5 (an imprisoned trans woman who succeeded on a gender dysphoria ADA claim maintained that "the 'major life activity' impaired by gender dysphoria [was] her ability to reproduce.")

[181] Barry, *supra* note 172, at 108 ("a person who has been diagnosed with gender dysphoria has a 'record of' a substantially limiting impairment and is therefore protected by the ADA, even if they have successfully treated the condition.")

[182] *Id*. (nothing that a person refused transition-related care due to being TGNCI "has been subjected to discrimination based on gender dysphoria and is therefore protected under the broad 'regarded as' prong of the definition of disability."). *See also* Julia Clark & Chris Jackson, *Global Attitudes Toward Transgender People*, Ipsos (Jan. 29, 2018), https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people [https://perma.cc/L2P5-CWS4] ("Among western countries, the United States is most likely to believe that transgender people have a mental illness (32%) and the most likely out of all countries surveyed to believe that transgendered people are committing a sin (32%)."); Dillon Richards, *Oklahoma Lawmaker Accused of Bigotry After Saying Transgender People 'Have Mental Illness*,*'* Koco News (Apr. 15, 2021), https://www.koco.com/article/oklahoma-lawmaker-accused-of-bigotry-after-saying-transgender-people-have-mental-illness/36136880 [https://perma.cc/29DY-ZQXU]; Dave Boucher, *Tennessee Lawmaker: Transgenderism a 'Mental Disorder*,*'* Tennessean (May 13, 2016), https://www.tennessean.com/story/news/politics/2016/05/13/tennessee-lawmaker-transgenderism-mental-disorder/84326140/ [https://perma.cc/FCW6-83Y4]; Ty Rushing, *Rep. Jeff Shipley Says Trans Iowans Have Mental Illness, Compares Them to Cancer*, Iowa Starting Line (Feb. 22, 2022), https://iowastartingline.com/2022/02/22/rep-jeff-shipley-says-trans-iowans-have-mental-illness-compares-them-to-cancer/ [https://perma.cc/82SJ-MFWT].

of disability—specifically, that society discriminates against TGNCI people because of how it perceives their impairment.[183]

Critically, although gender dysphoria claims meet the definition of disability, the ADA purports to exclude "gender identity disorders" not resulting from physical impairments" and "transsexualism."[184] Citing this exclusion, some jurists say gender dysphoria is synonymous with gender identity disorder ("GID") and transsexualism, pointing to how the former replaced the latter in the Diagnostic Statistical Manual of Mental Disorders in 2013.[185] However, these diagnoses have crucial internal and external differences. For one, GID focused on a person's outward appearance—specifically, the visible incongruence between their appearance and their sex assigned at birth.[186] Moreover, GID existed before modern research began to uncover the physical interplay between hormones and genes that likely results in a hardwired gender identity.[187] Gender dysphoria, on the other hand, is not solely about the atypicality of a person's outward expression. Rather, "it is the clinically significant distress, termed dysphoria, that some people experience as a result of the mismatch between their gender identity and their assigned sex."[188] In other words, the definition for gender dysphoria takes a page from the social model of disability and emphasizes how the distress can result from the expectation

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[183] Barry, *supra* note 172, at 108.

[184] 42 U.S.C. § 12211(b)(1) (2018) (providing that under this chapter, the term ''disability'' shall not include—(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."). *See also* Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 Touro L. Rev. 25, 36–45 (2019) (explaining the legislative history behind this exclusion).

[185] Williams v. Kincaid, 45 F.4d 759, 784 (4th Cir. 2022) (Quattlebaum, J., dissenting) ("What is more, there is evidence that the DSM-5's change from gender identity disorder to gender dysphoria primarily involved nomenclature. In fact, the APA said as much. In its preview of the upcoming changes to the DSM-5, the APA stated that: In the upcoming fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), people whose gender at birth is contrary to one they identify with will be diagnosed with gender dysphoria. This diagnosis is a revision of DSM-IV's criteria for gender identity disorder . . . .").

[186] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (hereinafter "DSM-5") ("Gender dysphoria refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender . . . The current term is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se."); Barry, *supra* note 172, at 109–10 (explaining that the criteria for gender dysphoria and gender identity disorder are different because "[u]nlike the outdated diagnosis of gender identity disorder, the hallmark or presenting feature of gender dysphoria is not a person's gender identity. Rather, it is the clinically significant distress, termed dysphoria, that some people experience as a result of the mismatch between their gender identity and their assigned sex. Reflecting this distinction, the diagnostic criteria for gender dysphoria in the DSM-5 are different than those for gender identity disorder.") (internal citations omitted).

[187] *See supra* note 21.

[188] Barry, *supra* note 172, at 109.

that one's gender must match their assigned sex.[189] Treatment varies depending on the person.[190]

The Fourth Circuit Court of Appeals is the only federal appeals court to validate this argument so far. Ruling on behalf of a trans woman placed in a men's prison and denied the hormone replacement therapy that she had been taking for 15 years, the court in *Williams v. Kincaid* framed gender dysphoria as "distress . . . rather than simply being transgender" and held that gender dysphoria was different from GID.[191] The ADA's mandate to broadly construe the definition of the word "disability" further inspired the court to allow the trans woman's ADA gender dysphoria claims to survive a motion to dismiss.[192] So far, a federal district court in Colorado has cited the Fourth Circuit's analysis favorably.[193] But this ruling is on appeal, so whether it remains good law is an open question.

A handful of district courts prior to *Kincaid* have disagreed with this reasoning, concluding that gender dysphoria and GID are the same because courts must look to the understanding that lawmakers had about GID at the time of the ADA's enactment.[194] This perspective disregards the psychiatric shift toward understanding gender dysphoria as something that all people can experience to varying degrees. However, absent a congressional amendment to the exemption, some jurists seem unwilling to trust the evolving science on gender dysphoria. The dissent in *Kincaid*, for instance, stated that the scientific research is too unsettled to conclude that gender identity results from "physical impairments."[195] Because this reasoning turned TGNCI identity into a GID that *does not* result from "physical impairments," it was easy for the dissent to conclude that gender dysphoria disability claims are excluded under the ADA.

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[189] DSM-5, *supra* note 186, at 451 ("Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and / or surgery are not available.").

[190] Nat'l Health Servs., *Overview: Gender Dysphoria*, (last reviewed May 28, 2020), https://www.nhs.uk/conditions/gender-dysphoria/ [https://perma.cc/6KKP-55QE] ("For some people, treatment may just involve acceptance and affirmation or confirmation of their identity. For others, it may involve bigger changes, such as changes to their voice, hormone treatment or surgery.").

[191] Williams v. Kincaid, 45 F.4d 759, 768 (4th Cir. 2022).

[192] *Id*. at 769–70.

[193] Griffith v. El Paso Cnty., Colorado, No. 21-CV-00387, 2023 WL 3099625, at *17 (D. Colo. Mar. 27, 2023).

[194] *See, e.g.*, Doe v. Northrop Grumman Sys. Co., 418 F.Supp.3d 921, 929–30 (N.D.Ala. 2019) (rejecting plaintiff's argument that "gender dysphoria" is not specifically excluded in the ADA, and thereby different from GID, because "that response overlooks the fact . . . that [the exclusion] has not been amended since it was enacted on July 26, 1990").

[195] *Kincaid*, 45 F.4d at 787 n.6 (Quattlebaum, J., dissenting) (acknowledging that "the DSM-5 refers to some emerging research about possible associations of gender dysphoria and certain genetic characteristics. . . . [But] the DMS-5 does not state that gender dysphoria always results from a physical impairment. In fact, the DSM-5 concedes that 'current evidence is insufficient' to make some of these determinations as to genetic and physiological associations.").

It is hard to tell which view of ADA gender dysphoria claims will prevail. Although *Kincaid* remains good law, the opinion predates *303 Creative LLC v. Elenis*, when the Supreme Court held that an anti-discrimination statute could not compel a woman operating a private business to act against her sincerely held anti-gay marriage religious beliefs.[196] *Elenis* should not affect gender dysphoria claims under the ADA, which is also an anti-discrimination statute: Religious entities are exempt from the section of the ADA—Title III—that mandates public accommodations in certain privately-owned buildings.[197] Meaning, if a religious entity's belief system includes refusing to provide access to an affirming restroom for a TGNCI person with severe gender dysphoria, the ADA does not force the religious entity to provide that access, because religious entities are exempt from Title III enforcement. Moreover, the ADA prohibits an "individual without a disability" from bringing a claim alleging "discrimination [due to] the individual's lack of disability."[198] This language would suggest that someone with religious beliefs cannot bring an ADA claim for reverse discrimination in response to someone receiving accommodations for gender dysphoria, because religious beliefs are not a disability. On the other hand, the Court in a recent case upheld religious freedoms over disability rights,[199] so advocates should keep this tension in mind before pursuing otherwise invaluable ADA claims.

B. How TGNCI Opponents Define Sex and Gender in Law

Having reviewed the claims that TGNCI advocates often use, this Article will now discuss how opponents are defining "sex" and "gender" in the law. These laws contain two notable trends. First, they exclude gender identity from the definition of legal sex and frame gender as a "psychological" feeling that cannot be a basis for entering biological-sex-segregated spaces. This framing makes it difficult for TGNCI people to argue that lawmakers are discriminating on the basis of sex or on the basis of their status as transgender

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[196] 303 Creative LLC v. Elenis, 600 U.S. 570, 582, 602–03 (2023).

[197] 42 U.S.C. § 12187 ("The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000–a(e)) [42 U.S.C. 2000a et seq.] or to religious organizations or entities controlled by religious organizations, including places of worship.").

[198] 42 U.S.C. § 12201(g) ("Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.").

[199] *See, e.g.*, Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. 732 (holding that ministerial exception under the First Amendment Freedom of Religion Clause barred a Catholic school worker from bringing disability claims); Arlene Kantor, Opinion, *Religious Freedom is no Reason to Deny People with Disabilities the Right to Equality in the Workplace*, The Hill (July 26, 2020), https://thehill.com/opinion/judiciary/509032-religious-freedom-is-no-reason-to-deny-people-with-disabilities-the-right/ [https://perma.cc/RU6Z-PYZ4] ("With this decision, churches and all other religious institutions are free to discriminate against employees on the basis of disability, as well as race, age, sex or any other protected trait 'for reasons having nothing to do with religion.'").

people. Second, these laws manipulate intersex identity by exempting intersex individuals from these laws if they receive invasive surgery or treatment that makes their bodies more binary. Together, these two trends demonstrate that states want to suppress TGNCI viewpoints and/or expressions of sex and gender and erase their equal participation in society by instituting exclusionary and sometimes punitive definitions instead.

In 2023 alone, lawmakers in forty-nine states introduced nearly 600 bills targeting the rights of lesbian, gay, bisexual, transgender, queer, and intersex ('LGBTQI+') people.[200] Of the 85 bills that passed during this record-breaking legislative attack on LGBTQI+ lives, the majority rolled back still-forming protections for transgender youth in the form of prohibitions on gender-affirming healthcare for minors, trans participation on sports teams, access to affirming restrooms and accurate identification documents, drag shows, the discussion of queer history and critical race theory in classrooms, and books on queer history.[201] In Florida, an epicenter of transphobic bills, lawmakers gave juvenile courts jurisdiction over child custody cases where a Florida parent opposes gender dysphoria treatment that an out-of-state parent is overseeing for a child.[202] Lawmakers also targeted adult TGNCI healthcare in 2023, including in states such as Missouri, where the effort failed.[203]

These bills are the result of a coordinated lobbying effort.[204] Many use similar language, and occasionally criminal penalties, to enforce their aims.[205] Organizations like the Alliance Defending Freedom have fed model bills to state legislatures since 2015, aiming to restrict the rights of trans people to access affirming restrooms.[206] When these "bathroom bills" faltered,

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[200] 2023 Anti-Trans Bills Tracker, Trans Legislation Tracker, https://translegislation.com/ [https://perma.cc/LY7H-TB96].

[201] *Id*. *See also* Skinner-Thompson, *supra* note 148, at 2–3; Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. Times (Jan. 20, 2023), https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html [https://perma.cc/ERN9-CJG8].

[202] Fla. Stat. §61.517(1)(c) (2023) (granting courts emergency temporary jurisdiction over child custody disputes when "it is necessary in an emergency to protect the child because the child has been subjected to or is threatened with being subjected to sex-reassignment prescriptions or procedures").

[203] Annelise Hanshaw, *Missouri Attorney General Withdraws Emergency Rule Banning Transgender Healthcare*, Missouri Independent (May 16, 2023), https://missouriindependent.com/2023/05/16/missouri-attorney-general-withdraws-emergency-rule-banning-transgender-health-care/ [https://perma.cc/NLK6-FLDR].

[204] Adam M. Rhodes, *Anti-Trans Bills Flood States in 'Centrally Coordinated' Attack on Transgender Existence*, The Appeal (Mar. 22, 2023), https://theappeal.org/anti-trans-bills-transgender-state-legislation/ [https://perma.cc/P6LU-DM4F]; The Anti-Trans Hate Machine: A Plot Against Equality, *Money, Power, and a Radical Vision,* Translash, (Sept. 16, 2021), https://podcasts.apple.com/us/podcast/money-power-and-a-radical-vision/id1570901784?i=1000535524892.

[205] Rhodes, *supra* note 204.

[206] David Kirkpatrick, *The Next Targets for the Group that Overturned Roe*, New Yorker (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/J3L3-Z4PS]. *See also* Spencer Macnaughton, *Inside the Alliance Defending Freedom, the Anti-LGBTQ Org Where Mike Johnson Spent Almost a Decade*, Rolling Stone (Oct. 29, 2023), https://www.rollingstone.com/politics/

anti-TGNCI organizations pivoted in 2018 to the "explosive" issue of trans participation in sports.[207] Through their sheer volume, bills in 2023 have introduced a pressing issue in the fight for TGNCI lives: state-mandated definitions of sex, male and female, that exclude TGNCI people.[208] This strategy aligns with the conservative legal movement's general goal to curtail body autonomy,[209] exemplified by the elimination of the federal right to an abortion in *Dobbs v. Jackson Women's Health Organization*.[210]

Many anti-TGNCI bills in early 2023 targeted one aspect of trans identity at a time: access to affirming restrooms in one bill, access to healthcare in another, and sports participation in a third, for example.[211] But legislative opponents may be shifting strategy: Some pre-filed bills for 2024 combine more than one of these objectives into a single bill.[212] The reason for this shift to omnibus bills could be practical, i.e., reducing the overall number of bills to avoid news stories about "record-breaking" quantities of legislation. The cause also appears ideological, as some bills from 2023 imposed exclusionary

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politics-features/mike-johnson-alliance-defending-freedom-anti-lgbtq-1234865340/ [https://perma.cc/A9QT-LEV4].

[207] Madeleine Carlisle, *Inside the Right-Wing Movement to Ban Trans Youth from Sports*, Time (May 16, 2022), https://time.com/6176799/trans-sports-bans-conservative-movement/ [https://perma.cc/89XM-6QS7].

[208] *See supra* note 25.

[209] *See* Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 Law & Soc. Inquiry 516, 519 (2011); *see also* Molly Racsko, The End of Roe: How the Conservative Legal Movement Eroded Protections for Abortion and Contraceptive Care (December 2022) (Honors Thesis, State Univ. of New York New Paultz) (on file with SUNY Open Access Repository) (describing the litigation and interest group advocacy by the conservative legal movement against the rights to abortion and contraception). Targeting rights of the body is a common means of legally constructing social differences. *See, e.g.*, Nadia Brown & Sarah Allen Gershon, *Body Politics*, 5 Politics, Groups, & Identities, 1,1 (2017) ("Bodies are sites in which social constructions of differences are mapped onto human beings. Subjecting the body to systemic regimes – such as government regulation – is a method of ensuring that bodies will behave in socially and politically accepted manners. The body is placed in hierarchized (false) dichotomies, for example, masculine/feminine; mind/body; able-bodied/disabled; fat/skinny; heterosexual/homosexual; and young/old. Furthermore, these dichotomies illustrate that public/private borders are unstable. For example, governments either choose to recognize the rights for minorities or justify discrimination and marginalization for minorities."); *see generally* Raia Prokhovnik, *Introduction: The Body as a Site for Politics: Citizenship and Practices of Contemporary Slavery*, 18 Citizenship Studies 465 (2014) (exploring recent ideas about the body as a site for politics to explore citizenship and slavery).

[210] 597 U.S. 215 (2022).

[211] *See, e.g.*, S.B. 14, 88th Leg. (Tex. 2023) (prohibiting certain medical and surgical treatments for trans youth); S.B. 15, 88th Leg. (Tex. 2023) (implementing a trans sports ban at the collegiate level).

[212] *See, e.g.*, H.B. 68, 135th Gen. Ass. (Ohio 2023) (combining a trans youth healthcare ban and a trans youth sports ban into one bill); *see also* Eric Bazail-Eimil, *Ohio Governor Vetoes Ban on Gender-Affirming Care, School Sports for Trans Youth*, Politico (Dec. 29, 2023), https://www.politico.com/news/2023/12/29/ohio-trans-sports-dewine-00133314 [https://perma.cc/JV84-KBMU] (reporting Ohio Governor Mike DeWine vetoing H.B. 68, which passed both chambers of the Ohio legislature in early December, because "Ohio would be saying that the state, that the government knows better what is medically best for a child than the two people who love that child the most, the parents.").

definitions of "biological sex" and "gender" throughout entire state codes.[213] These definitions use similar language, regardless of the statehouse or the subject matter of the bill. They frequently cast sex as "the biological and genetic indication of male or female," often in the context of reproductive potential or capacity, and including "sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth."[214] Conversely, these bills regard gender as "an individual's psychological, behavioral, social, chosen, or subjective experience."[215] Notably, the definition for sex leaves out any ability for bodies to change from birth onward, including through an individual's understanding of their gender identity.

This distinction manipulates modern understandings of sex and gender to erase gender identity and TGNCI people from civic life. Scientists believe after nearly a century of observations and study that complex multicellular interactions between chromosomes, hormones, and brain morphology do not always make for neat sex classifications or genders.[216] For instance, some scientists estimate that nearly two percent of the human population is naturally born with "physical variations that don't fit into categories of 'male' or 'female.'"[217] This is what is known as intersexuality, "an umbrella term for differences in sex traits or reproductive anatomy," including "differences in genitalia, hormones, internal anatomy, or chromosomes, compared to the usual two ways that human bodies develop."[218] But not all intersex variations are visible or detectable at birth,[219] and when a person develops these

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[213] *See, e.g.*, S.B. 458, 68th Leg. (Mont. 2023) (providing that unless otherwise stated, the word "sex" in Montana state code means "biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia at birth, without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender"); S.B. 1440, 113th Gen. Ass. (Tenn. 2023) ("'[S]ex' means a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex.").

[214] S.B. 458, 68th Leg. (Mont. 2023).

[215] *Id*.

[216] *See supra* note 20.

[217] Associated Press, *How Many Trans and Intersex People Live in the U.S.? Anti-LGBT Laws Affect Millions* (July 27, 2023), https://www.nbcnews.com/nbc-out/out-news/many-transgender-intersex-people-live-us-rcna96711 [https://perma.cc/Y9TR-7HA3] ("That estimate is based on a review published in the American Journal of Human Biology that looked at four decades of medical literature from 1955 to 1998. The estimate includes people with extra or missing sex-linked chromosomes, and those born with other physical variations that don't fit into categories of 'male' or 'female.'"); Melanie Blackless, et al., *How Sexually Dimorphic are We? Review and Synthesis*, 12 Am. J. of Human Biology 151, 161 (2000). *But see* Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex Research 174–78 (2002) (arguing the term intersex should be restricted such that the true intersex population is approximately 0.02 percent).

[218] What Is Intersex?, InterACT, https://interactadvocates.org/faq/#definition [https://perma.cc/LT4E-CDVL].

[219] Rettner, *supra* note 23; *See also* Amber Felton, *What is Intersex?*, WebMD [https://perma.cc/LHL5-F2YE]) ("While intersex is usually detected and assigned at birth, intersex anatomy isn't always present then. Sometimes a person must reach the age of puberty before discovering they're intersex. Some people may not even discover that they're intersex

variations later in life, it may impact their gender identity and other sex characteristics. For instance, a person with an androgen insensitivity condition might experience genital and hormonal changes during puberty that differ from their sex assigned at birth and that cause them to no longer identify with their corresponding gender.[220] Similarly, trans people have an undetectable gender identity that differs from their sex assigned at birth. When they become aware of this core sense of self, they often change their sex characteristics and often no longer identify with the gender corresponding with their sex assigned at birth.[221]

When lawmakers define sex as a handful of unchanging birth traits—in particular, reproductivity—that make a person male or female forever, they simply ignore the complexities of sex and gender that are integral to understanding the identities of TGNCI people. But their ignorance (or sheer animosity depending on the lawmaker) will exclude TGNCI people from affirming spaces and open them to new dangers. Before this wave of animus, TGNCI people convinced businesses, certain state governments, and some federal administrations to grant insurance protections, restroom and sports access, and identity document changes on the basis of gender identity.[222] These bills

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until adulthood, when they discover that they're infertile. In rare instances, intersex people are only diagnosed after they have passed away and are discovered through an autopsy.").

[220] TATE, *supra* note 19, at 13 (describing how people with dihydrotestosterone-deficiency condition "appear to have vulva and vaginal structures at birth, but, during puberty, testicles descend into the labia majora . . . and a penile shaft emerges (which is the same biological material as the clitoris and the vaginal canal)").

[221] *See generally* Cécile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY & UROLOGY 877, 878–79 (2016) (explaining that "[t]estosterone therapy is used to suppress female secondary sex characteristics and masculinize transgender men" while "[e]strogens are the mainstay therapy for trans female patients" and "intended to feminize patients by changing fat distribution, inducing breast formation, and reducing male pattern hair growth.").

[222] *See, e.g.*, *Gender Inclusive Restrooms: Why They Make More Sense Than Ever*, SLOAN BLOG (June 8, 2023), https://www.sloan.com/blog/gender-inclusive-restrooms-why-they-make-more-sense-ever [https://perma.cc/P3MD-DH3K] ("As of today, 23 states have adopted gender-neutral restroom laws and more than 200 cities and counties have ordinances to ensure that all people, regardless of their gender identity, have access to safe and sanitary restrooms."); THE WHITE HOUSE, *FACT SHEET: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans* (Mar. 31, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/ [https://perma.cc/3ZEH-4EKS] (detailing changes that federal agencies have made on behalf of TGNCI people, such as recognizing non-binary identities on travel documents and updating airport screening devices to avoid fewer false alarms and pat-downs of TGNCI people); Louise Norris, *Does Health Insurance Cover Transgender Healthcare?*, VERYWELL HEALTH (Mar. 25, 2023), https://www.verywellhealth.com/transgender-healthcare-and-health-insurance-4065151 [https://perma.cc/GZ3J-A8LV] (describing some of the healthcare protections the Obama—and now Biden—administration have pursued for TGNCI people); U.S. DEP'T OF ED., *FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams* (Apr. 6, 2023), https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams [https://perma.cc/M6ZF-WR49] (explaining how the agency's "proposed rule would establish that [school] policies violate Title IX when they categorically ban transgender students from participating on

represent a reactionary suppression of that idea—specifically, that "gender identity" is a valid way of determining one's legal sex in a sex-segregated society.

Although equal protection, substantive due process, and ADA claims are strong tools in the fight against these anti-TGNCI regulations, each may be susceptible to anti-TGNCI laws that impose a legal distinction between sex and gender identity. Equal protection sex discrimination may struggle to bat away these definitions; the concept of "real differences" allows courts to classify anti-TGNCI legislation as reasonable regulations that equally affect people of all sexes. Due process claims may also be susceptible, as federal appellate courts post *Dobbs* have reverted to framing puberty blockers and hormone replacement therapy as experimental treatments that only pertain to gender nonconformity. The ADA could also be vulnerable; if courts interpret gender dysphoria as a *mental* disorder, it is easy to imagine them falling prey to the conclusion that gender is psychological whereas sex is physiological. Because this moment requires different tools, advocates should consider a doctrinal strategy that attacks the exclusionary viewpoint suppression underlying these laws. Enter the First Amendment.

II. Challenging Anti-TGNCI Legislation Under the First Amendment: A Roadmap

This part discusses three First Amendment theories that can attack the ongoing legal erasure of TGNCI identities while potentially steering clear of the sex-and-gender distinction that weakens the claims discussed *supra* Section I.A. Section A demonstrates that daily gender expression is protected symbolic conduct that reflects the values of the First Amendment. Section B argues that a particular viewpoint often accompanies this symbolic conduct: namely, that sex and gender cannot be artificially separated to prohibit TGNCI people from moving through society on an equal basis in their self-determined genders. Many scientists believe that sex traits combine in non-binary ways and result in a minority of people whose gender does not correspond with their reproductive anatomy observed at birth. When states suppress the power to self-determine gender in a society separated by reproductive anatomy, they not only suppress the above viewpoint; they also favor the idea that sex is unchanging and unrelated to gender. Section C traces the natural consequences of viewpoint discrimination: exclusionary sex definitions coerce TGNCI people

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sports teams consistent with their gender identity just because of who they are"). *But see* Libby Stanford, *A Flood of Public Feedback has Delayed a Title IX Change Covering Trans Athletes—Again*, Educ. Week (Sept. 20, 2023), https://www.edweek.org/policy-politics/a-flood-of-public-feedback-has-delayed-a-title-ix-change-covering-trans-athletes-again/2023/09 [https://perma.cc/LXQ2-DBBL] (explaining how the Biden administration has not implemented this proposed rule, or a second rule that would expand Title IX's coverage to sexual orientation and gender identity, due to a flood of public comments and looming government shutdown issues).

into abandoning their speech and their viewpoint if they want to participate in society. Finally, Section D analyzes the Florida Bathroom Ban as an example, disassembling the Florida legislature's purported interests as pretexts that are not legitimate enough to survive many forms of scrutiny.

A. Gender Expression as Symbolic Conduct

When TGNCI people carry themselves daily in a sex-segregated society, they embody several First Amendment values. This is because the First Amendment provides protection to symbolic conduct and literal speech that allows the individual to define, develop, and express who they are.[223] TGNCI people embody these values when they self-determine their gender and engage in symbolic conduct that communicates that identity to others. Without the power to determine who one is and what they believe, a TGNCI person would, for instance, be unable to choose an identity or access a facility such as a restroom that best fits their gender. This self-determination also conveys alternative ideas about the sex and gender binary that much of society is organized around,[224] thereby inviting the world to exchange ideas about the true nature of human sexuality. Finally, the power of TGNCI expression to affect public opinion is a power that all people must have for a democracy to properly function. Accordingly, the expression of TGNCI identity is speech: it intends to communicate that sex/gender assigned at birth is not the only criteria that determines identity. Moreover, expressive conduct—such as using a restroom that aligns with one's chosen identity—is understood as speech in a society that grants access to space based largely on reproductive anatomy.

i. *Values That Underlie Protected Speech*

The Free Speech Clause of the First Amendment prohibits Congress from "abridging the freedom of speech."[225] This clause also protects symbolic conduct "that is 'intended to be communicative' and, 'in context, would reasonably be understood . . . to be communicative."[226] When one reads the above test, it is difficult to imagine how anything would not be protected symbolic conduct. But undergirding First Amendment jurisprudence are a number of values—such as the marketplace of ideas, democratic legitimation, and autonomy—that courts consider when determining whether symbolic conduct receives constitutional protection. For example, the Supreme Court has found

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[223] David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. Rev. 70, 97–98 (2012).

[224] *See generally*, David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. Gender & L. 51, 51–56 (2011).

[225] U.S. Const. amend. I.

[226] Shurtleff v. City of Boston, 596 U.S. 243, 267 (2022) (Alito, J., concurring) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)).

that parades, flag burning, and the refusal to say the pledge of allegiance implicate these values in some fashion and deserve protection.[227]

Federal district courts have similarly found protected First Amendment symbolic conduct when TGNCI people engage in everyday activities that announce or relate to their gender. Those activities have included dressing to reflect their gender; engaging in commonplace mannerisms that reflect their gender, such as wearing cosmetics or blowing kisses; and using an affirming restroom.[228] This finding is unsurprising given that TGNCI expression reflects three core values that anchor First Amendment doctrine: the marketplace of ideas, democratic legitimation, and autonomy. Because TGNCI identity implicates these critical First Amendment values, gender expression is symbolic conduct. This section first discusses those values before noting how they apply to TGNCI identity.

The first justification for preserving freedom of expression is that the best way to identify truth from falsity and to advance public knowledge and the common good is to allow the free exchange of ideas and information in the "marketplace of ideas."[229] In *Abrams v. United States*, Justice Oliver Wendell Holmes articulated a now-classic formulation of this "truth-discovery" value:

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[227] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (recognizing that the First Amendment "shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red [Community] flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika") (citations omitted).

[228] *See, e.g.*, Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 136 (E.D. Va. 2020) (citing Brooks v. Arthur, 685 F.3d 367, 371 (4th Cir. 2012)) (explaining that a trans woman may not have "explicitly convey[ed] her sexual and gender orientation . . . on a t-shirt," but "her presentation as a female conveyed a similar message of 'public concern' that falls within the protection of the First Amendment"); Brown v. Kroll, 8:17-CV-294, 2017 WL 4535923, at *7–8 (D. Neb. Oct. 10, 2017) (holding that an imprisoned trans woman plausibly engaged in protected speech when she requested a bra); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-02–1531, 2004 WL 2008954, at *9 (D. Ariz. June 3, 2004) (explaining that when a company prevented a trans woman from using the correct restroom, they retaliated against a protected speech on a public matter, because a person's "expression of [their] gender, unlike employee complaints about dress codes, scheduling, or other personnel issues, has its genesis not in the minutiae of workplace in life, but in [their] everyday existence"); *see also* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *5 (Mass. Super. Oct. 11, 2000) (stating that some acts, such as "applying make-up in class" may be "a further expression of gender identity") (state court deploying reasoning consistent with federal courts).

[229] David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 Harv. L & Pol'y Rev. 275, 282–83 (2022) ("Although the Supreme Court has not adopted a unitary theory of the First Amendment, no theory dominates both judicial and public understanding of the First Amendment in the same way as the 'marketplace of ideas.' Typically mentioned in combination with the search for truth, the desire to sustain a marketplace of ideas has been invoked dozens of times by the Supreme Court in cases involving a wide variety of issues ranging from trademark law to government subsidies for the arts. At bottom, the marketplace of ideas theory embodies the proposition that 'the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market,' and that truth should be determined through 'uninhibited, robust, and wide-open' public debate.").

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[230]

Similarly, John Stuart Mill argued that "if the government suppresses communications, it may suppress ideas that are true or partly true. Moreover, even if an idea is wholly false, its challenge to received understanding promotes a reexamination that vitalizes truth."[231]

Many have critiqued the truth-discovery argument,[232] but the notion of a "marketplace of ideas" persists in the Supreme Court's doctrine. Justice John Roberts wrote in *McCullen v. Coakley* that a listener's inability to avoid an "uncomfortable message" shouted on a sidewalk or other forum is a "virtue, not a vice," "[i]n light of the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .'"[233] Justice Neil Gorsuch repeated this language in *303 Creative*,[234] seemingly porting the truth-discovery principle into the Court's compelled speech doctrine discussed *infra* Section II.C.

Other First Amendment scholars have argued for anchoring a principle of freedom of speech in a second doctrinal basis: the democratic process. The basic argument is that First Amendment doctrine should and does seek primarily to "protect the free formation of public opinion that is the sine qua non of democracy."[235] The democratic-process justification most applicable here is "democratic legitimation."[236]

Democratic legitimacy is the notion that for a system of self-government to function, "those who are subject to law should also experience themselves

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[230] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[231] Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119, 130 (1989).

[232] *See, e.g.*, *id*. at 131 ("[T]he truth-discovery justification is subject to a number of possible challenges: that objective truth does not exist; that if truth does exist, human beings cannot identify it, or the conditions under which it is discovered; that if human beings can identify truth sometimes, free discussion does not evidently contribute to their capacity to do so; and that the way free discussion works in practice contravenes the open market of ideas that the truth-discovery justification assumes."); Paul Horwitz, Essay, *The First Amendment's Epistemological Problem*, 87 Wash. L. Rev. 445, 448-51 (2012) (discussing "epistemological questions" the truth-discovery argument does not resolve, such as how to distinguish true from false statements).

[233] 573 U.S. 464, 476 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

[234] 600 U.S. 570, 584-85 (2023) ("By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, '[i]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'") (citations omitted).

[235] Robert Post, Democracy, Expertise, and Academic Freedom 15 (2012).

[236] *Id*. at 33–36 (exploring the simultaneous interconnectivity of and contradiction between democratic legitimation, which "requires that the speech of all persons be treated with toleration and equality," and democratic competency, "the cognitive empowerment of persons within public discourse" which "requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones").

as the authors of law."[237] Put differently, governments must be responsive to the public opinions of those impacted by the law. Because freedom of speech is essential for creating the public opinion that governments must evaluate, "if persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state."[238]

Justice Louis Brandeis summarized the argument for democratic legitimation in his dissent in *Gilbert v. Minnesota*:

> Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.[239]

Democratic legitimation may not be the strongest overall justification for TGNCI gender expression being protected symbolic conduct. For instance, the Sixth Circuit concluded that valid democratic debates on TGNCI identity undergirded the trans youth healthcare bans in Tennessee and Kentucky.[240] To be sure, TGNCI people and their allies literally "speak" against these bills at statehouses nationwide, and, in theory, influence public opinion to which lawmakers must respond. But this position ignores larger anti-democratic forces that weaken the value of public opinions to lawmakers,[241] including

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[237] *Id.* at 17.

[238] *Id.* at 18.

[239] 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

[240] L. W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023) ("The States are indeed engaged in thoughtful debates over this issue, as the recent proliferation of legislative activity across the country shows. By our count, nineteen States have laws similar to those in Tennessee and Kentucky, all of recent vintage.")

[241] *See, e.g.*, Robert Reich, Opinion, *America's Billionaire Class is Funding Anti-Democratic Forces*, The Guardian (May 23, 2022), https://www.theguardian.com/commentisfree/2022/may/23/americas-billionaire-class-is-funding-anti-democratic-forces [https://perma.cc/P9F4-WME9] (describing how members of the billionaire class funded candidates who denied the results of the 2020 presidential election); Symone D. Sanders-Townsend, *Many Americans May Not Realize the Extent of the Danger Threatening Democracy*, MSNBC (Aug. 15, 2023), https://www.msnbc.com/symone/americans-dont-realize-danger-threatening-democracy-rcna99867 [https://perma.cc/7LM3-XV49] (describing the rise of anti-democratic forces in America); Anna Massoglia, *Dark Money Groups Have Poured Billions into Federal Elections Since the Supreme Court's 2010 Citizens United Decision*, Open Secrets (Jan. 24, 2023), https://www.opensecrets.org/news/2023/01/dark-money-groups-have-poured-billions-into-federal-elections-since-the-supreme-courts-2010-citizens-united-decision/ [https://perma.cc/ZT8K-PXLZ] (finding that outside spending to influence federal elections exceeded $9 billion, with more than $2.6 billion of that coming from "unknown sources"); Lydia Namubiru, *Charity Loophole Lets U.S. Donors Give Far-Right Groups $272m in Secret*, Open Democracy (July 5, 2023), https://www.opendemocracy.net/en/5050/donor-advised-funds-daf-us-charity-law-loophole-bankroll-hate/ [https://perma.cc/5S8X-K9L3] (revealing how right-wing groups that promote anti-TGNCI legislation receive funding from anonymous individuals through "donor advised funds," or DAFs); Mary B. McCord & Jacob Glick, *January 6 Report Exposes Ongoing, Converging Threat of Anti-Democracy Schemes and Paramilitary Violence*, Just Sec. (Jan. 6, 2023), https://www.justsecurity.org/84669/

in Tennessee, where legislators punished three lawmakers who peacefully protested with their constituents in response to public concerns about gun safety.[242] To prevent other courts from adopting the Sixth Circuit's position, a safer and more persuasive route may be the final First Amendment value: autonomy.

Autonomy-based justifications for speech protection posit that "speech holds intrinsic value apart from aiding in the discovery of truth or promoting democratic self-governance: We also speak in order to define, develop, and express ourselves as individuals."[243] Some scholars have linked the value of autonomy to the governance values discussed above. Martin Redish theorized that "the constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization.'"[244] He defined this individual self-realization as an "intrinsic" component of self-government—or the ability of "individuals [to] control their own destinies"—and an "instrumental" component of facilitating the "development of the individual's human faculties."[245] Robert Post has also argued that democratic-process justifications require valuing individual self-determination to recognize the indeterminacy of collective identity and public opinion.[246] A democratic-process principle without autonomy, Post writes, could result in the state controlling speech to cement some sort of rigid national identity, thereby foreclosing the individual expressions that, in actuality, contribute to a constant push and pull in our understanding of the collective will.[247]

Justice Neil Gorsuch recently invoked autonomy justifications for speech protection in *303 Creative*[248] to reject an application of Colorado's

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the-january-6th-report-exposes-the-ongoing-converging-threat-of-anti-democracy-schemes-and-paramilitary-violence/ [https://perma.cc/9MHG-CG57] (describing how the congressional investigation into the January 6, 2021 insurrection revealed a "record of the efforts by the former president and his allies to illegally keep him in the White House" as well as the "ongoing threat posed by the far-right extremists who captured the nation's attention that day"); Michael Hirsh, *Inside the Next Republican Revolution*, Politico (Sept. 19, 2023), https://www.politico.com/news/magazine/2023/09/19/project-2025-trump-reagan-00115811 [https://perma.cc/DY8E-LUPM] (describing Project 2025, the right-wing plot to overtake American bureaucracy and roll back civil and political rights for numerous disenfranchised groups).

[242] Travis Loller, Adrian Sainz, & Gary Fields, *Tennessee Becomes New Front in Battle for American Democracy*, Associated Press News (Apr. 8, 2023, 1:12 AM), https://apnews.com/article/tennessee-expulsion-democracy-election-nashville-c1ea281cce30e62cb392fca1df30ad3a [https://perma.cc/6BJK-J7A7] (describing how the expulsion of two Black lawmakers who peacefully participated in a protest for gun safety measures feeds into a larger anti-democratic movement, as evidenced by "[a]t least 177 bills restricting voting or creating systems that can intimidate voters or permit partisan interference were filed or introduced in dozens of states so far [in 2023], according to the Brennan Center").

[243] Han, *supra* note 223, at 97–98.

[244] Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982).

[245] *Id.* at 602–03.

[246] Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. Colo. L. Rev. 1109, 1120–22 (1993).

[247] *Id*.

[248] 600 U.S. 570, 603 (2023).

anti-discrimination law that could have required a wedding website designer to produce sites celebrating same-sex couples.

> In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. . . . But . . . the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. . . . The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.[249]

Citing *303 Creative* in support of this Article's thesis may seem counterintuitive given the case's negative impact on queer communities. But the autonomy to express one's thoughts goes both ways: Christians are free to believe that queer people should not marry, just as TGNCI people are free to believe that sex and gender are not binary or immutable.

ii. *How Gender Expression Implicates These Values*

Scholars, such as queer researcher Jeffrey Kosbie, have argued that gender expression implicates the truth, democracy, and autonomy-based values discussed above.[250] It consequently falls within the domain of protected symbolic conduct under the First Amendment.

First, expressions of TGNCI identity—such as through an individual's choice of clothing, pronouns, identification documents, and sex-separated bathroom use—furthers the pursuit of social **"truth"** about the nature of sex and gender. For truth-discovery advocates, the basic fear is that government restrictions on speech could suppress ideas that help society learn the truth of things (whether "truth" is exogenous and deterministic, or indeterminate and socially constructed).[251] Prohibitions on TGNCI expression prevent society from seeing that sex and gender are fluid, and from exploring new ways to order itself based on these ideas.

Consider how a TGNCI individual communicates the social truth about the non-binary nature of sex and gender in the context of a restroom. This location captures the conflict between the state gender orthodoxy and the desire to communicate that legal sex includes gender identity. When a TGNCI individual uses an affirming restroom despite this orthodoxy, bystanders

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[249] *Id*. at 602–03.

[250] *See* Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 Wm. & Mary J. Women & L. Rev. 187, 196–97 (2013); *cf.* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 Temp. Pol. & Civ. Rts. L. Rev. 465, 475–78 (2009) (discussing gender expression as performative and the idea that sex is binary as an "ideology").

[251] Greenawalt, *supra* note 231, at 130–31.

understand their message because their speech challenges societal—and now legal—separation of restrooms according to certain sex traits. Others in the restroom need not understand the complexities of sex and gender, but they can comprehend that a TGNCI person communicates they also belong in that space because of their gender identity. This pursuit of truth can generate new public understandings of the nature of sex and gender.

Second, notions of sex and gender shape and are shaped by the **political process**. Suppressing gender expression also prevents a discrete segment of the population from undergoing a range of potentially important communication. This silencing and erasure may deter members of targeted or aligned groups from participating in public expressions of gender identity that might be penalized, thus undermining a conception of U.S. democracy as multicultural and pluralistic, and threatening the stability of a democratic system of government.[252]

Some courts have declared that limiting certain types of *private* gender beliefs does not necessarily prohibit all other "pure" *speech* about gender. The United States District Court for the Northern District of Oklahoma, for example, reasoned in *Fowler v. Stitt* that TGNCI people can still express themselves as gender non-conforming in public and discuss matters related to gender binaries even if in private the state prohibits them from changing their sex marker on their birth certificate.[253]

This approach, however, fails to properly account for the basic principle underlying democratic legitimation arguments for preserving freedom of speech to advance democracy: that all matters relevant to the political discourse at hand must be protected to ensure all ideas and information can be aired. If one accepts that governments construct sex and gender, and that

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[252] Justin Gest & Tyler Reny, What Promotes Pluralism in America's Diversifying Democracy? 13 (June 2023), https://newpluralists.org/wp-content/uploads/2023/05/GestReny_LitReview.pdf [https://perma.cc/4HSY-2Z7S] ("The superdiversity of the United States makes pluralism especially challenging, but it may also make it more possible. Americans originate from hundreds of countries, hundreds of religions, and hundreds of ethnicities, and they speak hundreds of languages. Once in the United States, Americans—regardless of the duration of their family's history in this country—become further shuffled into different economic classes, different levels of educational attainment, different geographical contexts, different gender identities and sexual orientations, and different political ideologies. Pluralism mediates the differences between these many, intersecting groups.").

[253] No. 22-CV-115, 2023 WL 4010694, at *6 (N.D. Okla. June 8, 2023), *appeal docketed*, No. 23-5080 (10th Cir. July 7, 2023) (rejecting the argument that one's gender marker on their birth certificate is protected "expressive conduct" because "[t]he Free Speech Clause's protection 'extend[s] . . . only to conduct that is inherently expressive.' For example, when Plaintiffs present themselves to society in conformance with their gender identities, their conduct is expressive. The expressive component of their transgender identity is not created by the sex designation listed on their birth certificates, but by the various actions they take to present themselves as a man or woman, e.g., dressing in gender-specific clothing, or changing their legal name. In no way does Defendants' Policy restrict Plaintiffs' ability to express themselves in this manner or otherwise prevent them from bringing their bodies and their gender expression into alignment with their subjective gender identities") (citations omitted).

expressions of gender identity serve to create new collective understandings of sex and gender ideology, then expressions of TGNCI identity necessarily occur in the realm of "public discourse" that courts have recognized as the "core" of First Amendment coverage.[254] Viewpoint discrimination may also be a way around this impasse, as discussed *infra* part II.B of this Article.

Finally, expressions of gender identity are core to individual self-perceptions and serve to further individual **autonomy and self-realization**. Drawing on Martin Redish's theory of individual self-realization, the freedom to express one's gender identity furthers both the "intrinsic" value of enabling individual control over one's own destinies (and identities), and the "instrumental" value of furthering the development of human faculties.[255]

B. TGNCI Viewpoint Discrimination

This Article has so far demonstrated why TGNCI gender expression is protected symbolic conduct under the First Amendment. This subsection now seeks to show how a particular viewpoint often underlies that speech. When states suppress that viewpoint through anti-TGNCI legislation they engage in unconstitutional viewpoint discrimination and harm the free flow of ideas. Courts must protect against this discrimination and strike down state-mandated definitions of biological sex and gender to restore viewpoint neutrality. To demonstrate why, this subsection first discusses the doctrine of viewpoint discrimination and how it applies to anti-TGNCI legislation. This subsection then explains the TGNCI viewpoint that states are erasing with this legislation. Finally, this subsection demonstrates how the Florida Bathroom Ban is an example of this viewpoint erasure.

i. *Viewpoint Discrimination Doctrine*

Viewpoint discrimination is impermissible under the First Amendment, with the Court often referring to it as censorship.[256] When the government uplifts certain messages over others and suppresses viewpoints with which it may not agree, it chills free speech and the meaningful exchange of diverse

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[254] Kosbie, *supra* note 250, at 196 n.78.

[255] Redish, *supra* note 244, at 602–03.

[256] Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Con. L. Q. 99, 100 (1996) (explaining that the Supreme Court condemns "government action that casts a 'pall of orthodoxy' or 'aim[s] at the suppression of dangerous ideas,'" because the goal is to prohibit "viewpoint discrimination" and pursue "viewpoint neutrality" in order to fully realize the values underlying the First Amendment, including "the right to think, believe, and speak freely"); *see, e.g.*, Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 61–62 (1983) (Brennan, J., dissenting) ("[O]nce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not," as "[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'").

ideas in society.[257] Government censorship of some viewpoints over others is antithetical to the values championed by the First Amendment: "the right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas necessary to a properly functioning democracy."[258]

The government cannot cherry pick the views it agrees with and only permit those views to be expressed in government-designated public forums.[259] Nor can it prohibit other viewpoints from being shared in these forums, as this would "monopolize the 'marketplace of ideas'"[260] and chill private speech.[261] The government may not compel people to vote a certain way or believe in a certain ideology.[262] Similarly, the government may not suppress speech based on viewpoint.[263]

Viewpoint discrimination jurisprudence often mentions government-designated forums, which are largely beyond the scope of this Article. However, viewpoint discrimination is not dependent on a traditional physical

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[257] Matal v. Tam, 582 U.S. 218, 250 (2017) (Kennedy, J., concurring) ("The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.").

[258] Heins, *supra* note 256, at 100.

[259] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 827, 845–46 (1995) (striking down a university policy that refused to cover printing costs for Christian publications because the state discriminated against religious perspectives in a "forum" that it opened up for speech).

[260] *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (striking down a municipal ordinance that exempted labor picketing from a general picketing prohibition at a school because governments cannot choose "which issues are worth discussing or debating" if society is to remain a marketplace of ideas where people can freely discuss their perspectives).

[261] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (striking down a New York statute that would have forced a serial killer to place the proceeds from his book sales into an escrow account for crime victims). Although private speech about crime is controversial, the Court noted that such a broadly written statute would "encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring vineyard." *Id*. at 121.

[262] Shurtleff v. City of Boston, 596 U.S. 243, 269 (2022) (Alito, J., concurring) ("So government speech in the literal sense is not exempt from First Amendment attack if it uses a means that restricts private expression in a way that 'abridges' the freedom of speech, as is the case with compelled speech. Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. Naked censorship of a speaker based on viewpoint, for example, might well constitute 'expression' in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.").

[263] *Id*.

forum.[264] Consider *Rosenberger v. Rector and Visitors of the University of Virginia*, a 1995 case in which a university refused to subsidize a religious student newspaper with a student-activity fund because of its perspective.[265] There, the Supreme Court likened the student activity fund to a kind of public forum, explaining that a forum can exist "more in a metaphysical than in a spatial or geographic sense."[266] *Rosenberger*, and other cases that take a broad view of government forums,[267] suggest that the primary concern of viewpoint discrimination is when the state suppresses speech on an issue because of its viewpoint while permitting other speech on the same issue to proceed.[268]

Viewpoint discrimination presents such a serious violation of the belief that government should remain viewpoint neutral that courts subject it to either strict scrutiny or treat it as a per se violation.[269] When a court strikes down a law for viewpoint discrimination, it does not replace one viewpoint with another: it restores the viewpoint *neutrality* that should underlie our constitutional regime. Indeed, the relevant right is to *be free from* viewpoint discrimination as much as possible.[270]

Viewpoint discrimination doctrine applies to numerous kinds of anti-TGNCI legislation because states use them to uplift a message that healthcare, restrooms, and sports should be organized exclusively around immutable birth sex. But this message erases the TGNCI viewpoint that gender identity is a sufficient means to access sex-separated institutions. Consequently, non-TGNCI people would be able to express their gender in restrooms, sports, and identity documents while transgender and gender nonconforming people

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[264] *See* Bloom, *supra* note 34, at 33 ("[M]ost cases of viewpoint discrimination involve regulations that prohibit a particular perspective . . . . The Court has treated these [regulations] as if they effectively discriminated on the basis of a particular viewpoint.").

[265] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 827 (1995).

[266] *Id.* at 830.

[267] *See* Matal v. Tam, 582 U.S. 218, 243–44 (2017) (suggesting that a limited government forum existed when the U.S. Patent and Trademark Office, a federal agency, created a clause that allowed some trademarks to be considered too disparaging to be published); *see also* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46–47 (1983) (school mail system received forum analysis); Cornelius v. NAACP Legal Def. & Ed. Fund, 473 U.S. 788, 801 (forum analysis for charitable contribution program).

[268] Bloom, *supra* note 34, at 34 (noting that viewpoint discrimination is often present when a regulation is applied "unequally to all seemingly related speech. The cases in which labor picketing was exempted from statutes prohibiting picketing near a school or residence exemplify this. On their face, these would seem to be clear cases of content or subject-matter discrimination rather than viewpoint discrimination. Even as such, they will be subjected to demanding review and will usually be invalidated. Often, however, such regulation might be perceived as concealed viewpoint-based discrimination, thereby presenting the same problems. For instance, with respect to the exceptions for labor picketing, it is likely that regulators probably believed that most of the time labor picketing would exhibit a pro-labor rather than a pro-employer viewpoint. If so, what appears to be a subject matter distinction may well be a disguised viewpoint-based distinction as well").

[269] *Id.* at 27–36.

[270] *Perry Educ. Ass'n*, 460 U.S. at 57 (Brennan, J., dissenting) ("The First Amendment's prohibition *against* government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court.") (emphasis added).

would not. Anti-TGNCI legislation accomplishes this erasure by casting gender (identity) as a psychological phenomenon that nobody can use to access spaces, sports, and healthcare that must instead be administered according to immutable birth sex.[271] In effect, anti-TGNCI legislation suggests all gender is cisgender: unless an exception applies, nobody can diverge from their sex assigned at birth or the gender assignment that accompanies it, despite scientific and social evidence to the contrary.[272] This is a serious constitutional infringement. TGNCI perspectives of sex and gender are not just academic exercises or preferences. They translate into numerous forms of expressive speech and belief *that everyone relies upon to engage in society*. When governments only delete TGNCI perspective from their laws, they not only delete *TGNCI identity itself*, but they signal a preference for TGNCI-exclusionary ideas.

Such widespread orthodoxy will force some TGNCI people to abandon their ideology to comply with the law[273] and will render them an unequal class amid a public debate on their lives.[274] This is an abhorrent result in terms of the viewpoint discrimination doctrine. Because this censorship disturbs championed First Amendment values—such as the right to think, believe, and freely exchange ideas—it is arguably per se invalid or subject to strict scrutiny and cannot stand.[275]

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[271] *See supra* note 38.

[272] *See supra* notes 20, 21.

[273] FLA. STAT. § 553.865 (subjecting people to trespass charges if they refuse to leave a restroom of the opposite sex when asked to do so).

[274] Parents Defending Educ. v. Olentangy Loc. Sch. Dist., No. 2:23-CV-01595, 2023 WL 4848509, at *16 (S.D. Ohio July 28, 2023) (emphasizing that a regulation must apply "equally to individuals on either side of a given debate" to avoid viewpoint discrimination). To see an example of how a government regulation promotes viewpoint neutrality, consider the reasoning of the district court in *Parents Defending Educ.*:

> The Sixth Circuit has repeatedly upheld public school bans on racially discriminatory expression, rejecting arguments that such bans constituted viewpoint-based restrictions. The crux is whether the ban applies equally to individuals on either side of a given debate. The Policies [in this case] do so. They prohibit all derogatory speech that targets individuals on the basis of gender identity (or race, age, religion, etc.); they apply with equal force to students who identify as transgender as to those who identify as cisgender, to those who seek to denigrate students on account of their transgender identity and to those who seek to harass students who believe that gender at birth is immutable (. . . [because] misgendering is problematic for cisgender and transgender individuals). The Policies allow for an individual who believes 'that sex is binary and that someone's internal perceptions about themselves cannot change biology' to express that viewpoint; they allow for an individual who disagrees to express the opposing viewpoint as well. The only prohibitions are against discriminatory and harassing speech based on gender identity, including the use of gender pronouns contrary to a cisgender or transgender individual's preferences. *Id.* (citations omitted).

[275] Bloom, *supra* note 34, at 20 ("In recent years, another hard and fast rule appears to have developed. It is that the government may never prohibit speech simply on account of its viewpoint. It remains unclear whether this is a per se prohibition or whether such viewpoint-focused regulation must overcome the all but insurmountable burden of serious strict scrutiny.").

ii. *TGNCI Viewpoints Being Erased*

The TGNCI viewpoint that states are erasing is that sex traits combine in nonbinary ways to create more than two binary genders. States like Alabama erase this view when they suggest that sex cannot be changed from the moment of conception or that it results in only males or females based on reproductive capacity.[276] These states also erase TGNCI viewpoints when they refuse to include gender identity in legal definitions of sex,[277] or recognize that gender and gender identity can deviate from a binary model of sex and gender. Although these pieces of legislation do their best not to mention trans people, viewpoint discrimination doctrine does not require the *explicit* erasure of a viewpoint.[278] Instead, a statute can *implicitly* suppress a viewpoint through its operation.[279] Another telltale sign of viewpoint discrimination is when a statute subjects "seemingly related" viewpoints to different treatment, particularly in the midst of a public debate.[280] As discussed *infra* Section II.B.iii, the Florida Bathroom Ban exempts from punishment intersex people who have received genital reassignment surgery or treatment from a doctor. But to acknowledge intersex people, Florida must acknowledge that sex traits combine in non-binary ways to create genders and identities that may differ from the societal norm. Trans people rely on the same viewpoint. However, Florida treats trans people different from intersex people, revealing that its true goal is to install a viewpoint that champions a rigid sex/gender binary.

A quick review of primary and secondary sex traits helps show how trans and intersex people often rely on the same viewpoint. Sex traits include chromosomes, internal and external genitalia, hormones that shape the brain and other parts of the body, and secondary sex characteristics like hair and breasts that do not emerge in different ways until puberty.[281] While these traits typically align as a fetus develops, and then later as a human matures, these traits

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[276] *See, e.g.*, ALA. CODE § 26-26-2(1); FLA. STAT. § 553.865(3)(l).

[277] M. Dru Levasseur, *Gender Identity Defines Sex*: *Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 982 (2015) (arguing that gender identity is biological and helps determine sex and that "[w]hen 'gender identity' is separated from 'biological sex,' it is the equivalent of stripping a transgender person of legal, medical, and social identity" and moreover, "[s]egregating so-called 'real' or tangible sex characteristics using coded language, such as 'physical,' 'anatomical,' 'biological,' or 'genetic,'—from so-called 'imaginary' or intangible or psychological characteristics like 'gender identity' or 'self-identity,' reflects a fundamental misunderstanding of sex. The etiology of sex reveals that it is a multi-faceted determination").

[278] Bloom, *supra* note 34, at 33 ("The opponents of viewpoint-discrimination analysis in a particular case will often argue that the absence of any attempt to ban a particular viewpoint in the course of a specific debate indicates that there has been no viewpoint discrimination. However, the Court has not construed the principle so narrowly. Rather, most cases of viewpoint discrimination involve regulations that prohibit a particular perspective, subject matter, or speaker. The Court has treated these as if they effectively discriminated on the basis of a particular viewpoint.").

[279] *See id.*

[280] *Id.* at 34.

[281] TATE, *supra* note 19, at 8–9, 13.

do not always combine in a binary way.[282] Moreover, these traits can change throughout one's life.[283]

For instance, most people are presumed to have XX (female) or XY (male) chromosomes;[284] people with XX chromosomes typically develop a vulva and uterus and secondary sex characteristics like breasts and wider hips while people with XY chromosomes typically develop a testes and penis and secondary sex characteristics like facial hair.[285] However, an estimated 1 in 500 men are born with an extra X chromosome, resulting in XXY chromosomes, and can grow broader hips and enlarged breasts typically seen in women while still having a penis and testes.[286] Similarly, women are sometimes born with a Y chromosome, resulting in XY chromosomes, and develop testes during puberty even though the rest of their body looks "female."[287] People in either situation may not identify with the gender that flows from their sex assignment when these changes unfold throughout their life.[288]

Anti-TGNCI laws account for intersex identity by exempting intersex variations that result in nonbinary combinations of chromosomes, hormones, and other body parts.[289] But, these laws erase trans identity even though (a trans) gender identity also arguably results from a nonbinary combination of "genes, sex hormones, and developing brain tissues."[290] As researchers Ai-Min Bao and Dick F. Swaab explain:

> [A]lthough sex hormones are very important for gender identity and sexual orientation, sexual differentiation of the brain is not caused by hormones alone. Genes, too, play a key role in it . . . . The two critical periods in human development when testosterone levels are known to be higher in boys than in girls are mid-pregnancy and the first three months after birth. These fetal and neonatal peaks of testosterone, together with functional changes in steroid receptors, are thought to program to a major degree the development of structures and circuits in a boy's brain for the rest of his life. As sexual differentiation of

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[282] *Id.* at 9–12

[283] *Id.* at 13.

[284] *Id.* at 9.

[285] *Id.* at 9, 13.

[286] *See supra* note 28.

[287] *See* Nat'l Health Serv., *Symptoms: Androgen Insensitivity Syndrome*, https://www.nhs.uk/conditions/androgen-insensitivity-syndrome/symptoms/ [https://perma.cc/LLU4-NK9T].

[288] *See supra* note 23.

[289] *See, e.g.*, Fla. Stat. §553.865(15)(a)–(b) (explaining that section does not apply to anyone "who is or has been under treatment" for "external biological sex characteristics that are unresolvably ambiguous" or for "[a] disorder of sexual development in which [a doctor] has determined through genetic or biochemical testing that the patient does not have a normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action for a male or female, as applicable").

[290] Ai-Min Bao & Dick F. Swaab, *Sexual Differentiation of the Human Brain: Relation to Gender Identity, Sexual Orientation and Neuro-psychiatric Disorders*, 32 Frontiers in Neurology 214, 215 (2011).

> the genitals takes place much earlier in development (i.e. in the first 2 months of pregnancy) than sexual differentiation of the brain (the second half of pregnancy), these two processes may be influenced independently. In rare cases, this may result in transsexuality, i.e. people with male sex organs who nevertheless have a female identity, or vice versa. It also means that in the event of an ambiguous sex organ at birth, the degree of masculinization of the genitals may not always reflect the degree of masculinization of the brain.[291]

This example suggests that gender divergence in TGNCI people—trans people in particular—arises from physical traits that many states say are part of sex. Consider the above proposal that gender identity may result from a flood of hormones that masculinizes or feminizes the fetal brain to varying degrees after the genitals develop. Numerous sex traits interact in this scenario. The cells building the brain contain chromosomes, or structures that carry genetic information such as DNA.[292] These 23 pairs of chromosomes contain "many genes, with each having a different function."[293] Some of these genes not only "code" for hormones, but are "regulated" by hormones, "in particular, steroid hormones (such as cortisol, estradiol, progesterone, and testosterone)," which bind to "intracellular receptors" that can "directly regulate" whether a gene will express a particular trait.[294]

Other research suggests that specific genes may be responsible for interacting with "female" hormones that feminize the brain. Consider a 2019 study that examined hormone-signaling genes in 380 trans women and 344 cisgender men.[295] The study found twelve hormone-signaling genes overrepresented in these trans women compared to these cisgender men.[296] This finding led researchers to suggest that these twelve genes may be responsible for

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[291] *Id.*

[292] Amy Murnan, *Gene v. Chromosome: What is the Difference?*, Med. News Today (Jan. 13, 2023), https://www.medicalnewstoday.com/articles/gene-vs-chromosome [https://perma.cc/RY34-DQTB] ("Nearly every cell in the [human] body contains a nucleus. Inside each nucleus are chromosomes, which consist of DNA, the genetic material that instructs cells how to divide and grow. Chromosomes have a cross or butterfly-like shape, with four arms—most human cells contain 23 pairs of them. One set comes from each of a person's biological parents.").

[293] *Id.* ("For example, some instruct cells on how to make certain proteins. Overall, the function of chromosomes and genes is to tell cells how to replicate, informing how the body grows and develops."); *see also* Elise Mullis, David van Heel, Fran Balkwill, & Kam Islam, *Genes Made Easy*, Genes & Health, https://www.genesandhealth.org/genes-your-health/genes-made-easy [https://perma.cc/NL82-N43E] ("Hidden inside almost every cell in your body is a chemical called DNA. A gene is a short section of DNA. DNA is made up of millions of small chemicals called bases. The chemicals come in four types A, C, T and G. A gene is a section of DNA made up of a sequence of As, Cs, Ts and Gs.").

[294] K. Paige Harden & Kelly L. Klump, *Introduction to the Special Issue on Gene-Hormone Interplay*, 45 Behav. Genetics 263, 263 (2015), https://link.springer.com/article/10.1007/s10519-015-9717-7 [https://perma.cc/44BH-GRCR].

[295] Madeleine Foreman et al., *Genetic Link Between Gender Dysphoria and Sex Hormone Signaling*, 104 J. Clinical Endocrinology & Metabolism, 390, 390–91 (2019).

[296] *Id.*

interacting with more "female" hormones that feminize the brain and lead to a female identity in trans women. Bolstering this finding is other research that has found that trans peoples' brain morphology, brain activation, and brain performance on certain tasks more closely resembles their desired gender beginning at a young age.[297] In short, the process that arguably establishes gender identity is a naturally occurring one that involves the same sex traits highlighted in anti-TGNCI legislation.

Thus, when states curtail TGNCI civil rights by framing gender as binary and psychological, they suppress three ideas that underlie TGNCI viewpoints. First, sex traits interact in non-binary ways and result in people with "male" and "female" traits. A person can have a feminized brain due to certain genes and hormone interactions but otherwise have XY male chromosomes and have a penis. Or, a person with Swyer Syndrome can have XY male chromosomes, look female and have a vulva, but be unable to produce sex hormones or undergo puberty without hormone therapy. Second, gender and gender identity are not binary or purely psychological; they can be—and arguably are—shaped by similar biological agents that shape a person's reproductive anatomy. Finally, sex traits are not frozen at birth. They change throughout one's life, naturally and in response to individual desires. Testosterone and estrogen decrease in cisgender men and cisgender women, respectively, as they age,[298] and cisgender people seek some of the same care as TGNCI people to affirm their genders,[299] or to rid themselves of certain characteristics.[300]

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[297] Eur. Soc'y of Endocrinology, *Transgender brains are more like their desired gender from an early age*, Sci. Daily (May 24, 2018), https://www.sciencedaily.com/releases/2018/05/180524112351.htm [https://perma.cc/DTD2-7C8K]; *see also* Hillary B. Nguyen, et al., *What Has Sex Got to Do with It? The Role of Hormones in the Transgender Brain*, 44 Neuropsychopharmacology Revs. 22, 25 (2019) (explaining that "most cross-sectional neuroimaging research" suggests that transgender people have "brain morphology and activation patterns at rest and during cognitive performance" that are "more congruent with gender identity than natal sex" before being treated with hormone replacement therapy).

[298] Frank D. Brodkey, *Aging Changes in Hormone Production*, Medline Plus, (July 21, 2022), https://medlineplus.gov/ency/article/004000.htm [https://perma.cc/W732-9F4X] ("Many of the organs that produce hormones are controlled by other hormones. Aging also changes this process. For example, an endocrine tissue may produce less of its hormone than it did at a younger age, or it may produce the same amount at a slower rate.").

[299] Vic Parsons, Opinion, *Cis People Get Gender-Affirming Care over the Counter. Why Can't Trans Folks Have the Same?*, Pink News, (Nov. 19, 2021), https://www.thepinknews.com/2021/11/19/gender-affirming-healthcare-cis-people-trans/ [https://perma.cc/4QTC-9XVX] ("Boob jobs? Gender-affirming surgery. Hormone replacement therapy for menopausal cis women? Gender-affirming healthcare. Hair transplants for balding men? Gender-affirming treatment. Viagra? Gender-affirming healthcare, definitely.")

[300] Justin T. Brown, *When I Started Growing Breasts as a Teenage Boy, I Got Gender-Affirming Care Without Stigma*, NBC News (Oct. 30, 2022), https://www.nbcnews.com/think/opinion/gender-affirming-care-isnt-just-for-trans-people-rcna54651 [https://perma.cc/7SXC-VEUC] (explaining that it is not controversial when "cisgender people alter their eyes, noses, lips, faces, hairlines, facial hair, body hair, height and even the nether regions to more closely align with our culture's ideals of 'the perfect man' or 'the perfect woman'" and that moreover, cisgender people "frequently change or 'enhance' [their] bodies hormonally, too. Kids have been dosed with human growth hormone since the '60s to make them taller, and men looking to achieve a cartoonish level of 'manliness' get testosterone

This wave of anti-TGNCI bills not only suppresses these three views in broad, invalid ways; it also replaces them with a countervailing belief that gender and sex are binary and unchangeable in a way that suggests nothing short of animus for TGNCI identity and viewpoint.

iii. *How the Florida Bathroom Ban is an Example of Viewpoint Erasure*

The Florida Bathroom Ban is a good example of how this legal distinction between sex and gender suppresses TGNCI viewpoints. The law aims to separate restrooms in buildings owned or leased by the government according to sex, [301] which is either male or female based on certain birth features.[302] These genders are determined by a person's reproductive anatomy, hormones, and chromosomes *at birth*.[303] People who produce sperm are deemed male.[304] People who produce eggs are deemed female.[305] Males must use the men's room and females must use the women's room.[306] People who work at one of the covered institutions and who use the "wrong" restroom can be asked to leave and can be punished if they refuse to do so.[307]

Many TGNCI identities are absent from this legal construction. There are no "trans" gender identities. Instead, people are a "male" or "female" gender depending on whether they produce sperm or eggs. However, human identity is more complicated than that, because sex and gender are more complicated. What the state is effectively doing is telling people what their gender will always be depending on their reproductive capacity.

Recall, though, that certain intersex variations result in people who lack reproductive capacity and who have hormones and chromosomes that differ from their external gender assignment. How would that person fare under the Florida Bathroom Ban if they do not produce eggs or sperm and therefore do not fall into the definition of "male" or female?" The statute does not attempt

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pumped into their veins. Hormone replacement therapy is commonplace for cis-women and men looking to maintain or enhance their vitality in ways that align with their gender identities and gender ideals").

[301] FLA. STAT. § 553.865(2), (4)–(5).

[302] *Id*. at § 553.865(3)(f), (h).

[303] *Id*. at § 553.865(3)(l) (stating that sex means "the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth").

[304] *Id*. at § 553.865(3)(h).

[305] *Id*. at § 553.865(3)(f).

[306] *Id*. at § 553.865(4)(a)–(b) ("A covered entity that maintains [a multi-stall restroom] must . . . have . . . a restroom designated for exclusive use by females and a restroom designated for exclusive use by males; or . . . a unisex restroom.").

[307] *See, e.g.*, *id.* at § 553.865(7)(a) (commanding correctional institutions to establish disciplinary regulations for employees who enter opposite-sex restrooms and refuse to leave when asked); *id.* at § 553.865(9)(a) (applying to public educational institutions); *id.* at § 553.865(10)(a) (applying to juvenile prisons); *id.* at § 553.865(11)(a) (applying to government entities with jurisdiction over public buildings); *id.* at § 553.865(12)(a)–(f) (requiring these entities to submit proof of compliance by April 1, 2024).

to expand the definition of sex or gender to recognize them. Instead, it *exempts* from criminal trespass any person born with ambiguous genitalia or a verifiable "disorder of sexual development" who has received medical therapy or genital-reassignment surgery.[308] But why exempt intersex people instead of take a more inclusive view of sex and gender? What does that exemption do?

The intersex exemption reveals how the state of Florida is elevating non-TGNCI viewpoints of sex and gender while erasing, stigmatizing, and potentially harming TGNCI people. First, the state acknowledges that some sex traits do not align in binary ways; after all, some intersex people are born with ambiguous genitalia that doctors historically sculpted into "male" or "female" anatomy without a child's permission.[309] Other times intersex people have "male" XY chromosomes even though they have "female" sex characteristics like breasts and a vulva. Second, the state acknowledges that humans *can* manipulate certain aspects of their sex to *approximate* a particular gender. Otherwise, why else would intersex people who more closely resemble "men" or "women" through surgery be exempted?

However, what the state is also doing is encouraging intersex bodies to reflect the sex/gender binary. This exemption would not only permit nonconsensual surgeries on babies and children with intersex variations.[310] It would also allow the Florida Bathroom Ban to apply to people with intersex variations who forgo genital reassignment surgery or treatment. Not all people with intersex variations require or want this care,[311] meaning there are people whose bodies and identities voluntarily defy the sex/gender binary. The statute would presumably direct this group of intersex people to the restroom that correlates with their assigned sex at birth—regardless of their current identity

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[308] *Id.* at § 553.865(15)(a)–(b) (explaining that section does not apply to anyone "who is or has been under treatment" for "external biological sex characteristics that are unresolvably ambiguous" or for "a disorder of sexual development in which [a doctor] has determined through genetic or biochemical testing that the patient does not have a normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action for a male or female, as applicable").

[309] *See* GILL-PETERSON, *supra* note 20, at 68–80.

[310] Kiara Alfonseca & Mark Kekatos, *Amid Transgender Care Bans, Exceptions Made for Surgery on Intersex Children*, ABC NEWS (July 18, 2023), https://abcnews.go.com/Health/intersex-surgeries-ignite-controversy-bans-gender-affirming-care/story?id=100452871 [https://perma.cc/R5ZS-AVUZ] ("Though conservative legislators across the country have introduced or passed bans that limit access to gender-affirming medical care for transgender youth, the bills have explicitly allowed an exception for surgery on intersex minors. This means surgeries can be performed on babies or young children, but only if they have a medically verifiable condition that doesn't fit into the typical definitions of 'male' or 'female.'").

[311] CLEVELAND CLINIC, *Intersex*, https://my.clevelandclinic.org/health/articles/16324-intersex [https://perma.cc/N237-8VGY] (while some intersex people may seek gender-affirming options, "being intersex doesn't mean you need any special treatment"); Jayne Leonard, *What Does it Mean to Be Intersex*, MEDICAL NEWS TODAY (Mar. 22, 2021), https://www.medicalnewstoday.com/articles/intersex#sexuality [https://perma.cc/9HCR-TANZ] ("[T]here is a growing movement that aims to change how medical professionals, parents, and others view intersex people. As it is not a disease, many believe that intersex does not require treatment.").

or body. Conversely, it does not matter the amount of gender-affirming care a trans or gender-nonconforming person with no intersex variations has received. The Florida Bathroom Ban directs them to the restroom of their assigned sex at birth even if their body largely reflects the sex/gender binary. In both scenarios, the common denominator is the freedom to determine one's identity outside of the sex/gender binary. This exemption suggests, then, that the goal of the Florida Bathroom Ban *is to treat gender expression speech/viewpoint differently if it involves identifying outside of the sex/gender binary*.

To be clear, this Article is not suggesting that TGNCI people must undergo surgery or specific hormone treatment for their gender identity or body to be valid. It is pointing out how intersex exemptions reveal the true objective of the Florida Bathroom Ban (and likely other pieces of anti-TGNCI legislation). Intersex identity and trans identity both arguably involve non-binary physical interactions among hormones and chromosomes.[312] Both identities involve hormone therapies, surgeries, and sometimes, leaving the body be, regardless of whether it fits a binary gender ideal.[313] The former identity, however, is regarded as physiological and exempted under certain circumstances while the latter is considered psychological and erased. Although Florida is willing to admit that sex traits combine in non-binary ways *and* that one can change aspects of their sex over time to achieve a more-binary "male" or "female" gender, it refuses to apply this belief to trans people, gender identity, or bodies that refuse binary categorization. (And it takes advantage of intersex people by subjecting them to non-consensual surgeries to create a trans-exclusionary vision of sex and gender.) However, when the state imposes that belief through legislation and shuts down countervailing beliefs increasingly supported by science and lived experience, it crosses the line into viewpoint discrimination.

iv. *TGNCI Viewpoint Discrimination as Applied by Courts*

Some federal courts have recognized that viewpoint discrimination underlies anti-TGNCI legislation restricting access to healthcare and restrooms. These decisions suggest that it is possible to convince courts that lawmakers are erasing TGNCI viewpoints amid a debate about TGNCI inclusion. However, these positive decisions have focused less on how the non-binary nature of sex and gender is a viewpoint being suppressed. Instead, they have focused on the ways in which states targeted the ability of TGNCI allies to support their TGNCI patients or patrons through literal speech restrictions. Therefore, it remains to be seen whether courts are ready to understand how TGNCI identities and viewpoints of sex and gender disrupt the "real differences" thinking that permeates much of society.

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[312] *See supra* notes 281–91.
[313] *See supra* notes 190, 218, 300.

Beginning with the victories, the United States Eastern District Court of Arkansas in *Brandt v. Rutledge* temporarily enjoined a state ban on gender-affirming care for TGNCI youth on multiple grounds, including First Amendment viewpoint discrimination.[314] Of concern to the court was the law's effort to ban all doctors licensed in the state from "[speaking] to patients about these treatments."[315] The law, however, *only* restricted healthcare professionals "from making referrals for 'gender transition procedures.'"[316] The court accordingly found regulation viewpoint-based. After all, the ban was only directed at one form of speech: trans identities.

The United States Middle District Court of Tennessee similarly rejected a law in 2021 that attempted to force businesses to promote the state's idea of sex and gender. *Bongo Products v. Lawrence*[317] concerned a law that forced businesses with TGNCI-inclusive bathroom policies to post signs outside their restrooms that said "this facility . . . . [allows] the use of restrooms by either biological sex, regardless of the designation on the restroom."[318] Businesses that refused to comply faced penalties.[319]

But the court enjoined the law on multiple grounds, including First Amendment viewpoint discrimination.[320] The court, writing through Judge Aleta Trauger, found that the meaning of sex constitutes a controversial matter of public concern about which several people have differing views.[321] However, the law placed its thumb on the scale in favor of one viewpoint over another: in this case, immutable birth sex based on reproductive genitalia.[322] Because the state could not offer a compelling reason for favoring this viewpoint over a TGNCI-inclusive viewpoint, the regulation had to fall.[323]

Another case out of the same district, however, demonstrates the difficulty of asking courts to recognize that a TGNCI-exclusionary paradigm

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[314] No. 4:21-CV-00450, 2023 WL 4073727, at *37–38 (E.D. Ark. June 20, 2023).

[315] *Id*. at *37.

[316] *Id*.

[317] 603 F. Supp. 3d 584 (M.D. Tenn. 2022).

[318] H.B. 1182, 111th Leg., at 1–2 (Tenn. 2021).

[319] *See* Tenn. Code Ann. § 68-120-108(a); *see also Bongo Prods.*, 603 F. Supp. 3d at 592–93 (explaining how the bill amends the building code to subject businesses to a Class B misdemeanor if they fail to erect a required sign and then refuse to comply within 30 days of being notified of non-compliance).

[320] *Bongo Prods.*, 603 F. Supp. 3d at 609–11.

[321] *Id.* at 608 ("[T]here is a well-established recent history of controversy, not merely around gender identity generally, but specifically surrounding the issue of how gender identity relates to public restrooms. Indeed, the 'message that gender identity protections create peril in bathrooms' is so commonplace that it even has a colloquial name: the 'bathroom argument.'"); *see also* Marie-Amélie George, *Framing Trans Rights*, 114 Nw. U. L. Rev. 555, 581 (2019).

[322] *Bongo Prods*., 603 F. Supp. 3d at 609 (explaining "the evidence overwhelmingly mandates a conclusion that people do, in fact, genuinely and sharply disagree about the topic addressed and characterized, in a non-neutral fashion, by the signs required by the Act. The Act, therefore, requires the plaintiffs to endorse a position they do not wish to endorse and falls within the boundaries of laws subject to strict scrutiny.").

[323] *Id*. at 610.

of sex and gender is not a valid governmental objective. In *Gore v. Lee*,[324] the Middle District of Tennessee dismissed a challenge to Tennessee's vital records law, which prohibits amending the listed sex on an individual's birth certificate "as a result of sex change surgery."[325] Plaintiffs brought equal protection, due process, and First Amendment challenges and argued that gender identity helps define a person's sex.[326] Because the law assumed that sex is frozen at the time of birth and excluded gender identity as a valid way to define one's sex, the plaintiffs argued that the law compelled them to embrace the state's ideological position about sex any time they had to show their birth certificate.[327]

Ironically, the court acknowledged that Tennessee's proffered definition of "sex" did send a message:

> Tennessee birth certificates and the Birth Certificate Policy reflect the views that persons can be divided into two categories based on external genitalia at the time of birth, that it is worth making and retaining a record of the category into which each person falls, that it is appropriate to refer to this categorization as a categorization based on sex (as surely people have consistently done worldwide since the dawn of civilization), and that it is appropriate to refer to the two categories as male and female (as, again, surely people have consistently done worldwide since the dawn of civilization).[328]

The court, however, missed that such a viewpoint excludes the recording of TGNCI bodies that defy these binary categorizations. The court seemed content with this exclusion because "there is no conflict between being male in terms of sex (based on birth appearance) and being female in gender identity, or vice versa."[329] In other words, the court said *gender* (and, specifically, gender identity) had no bearing on the State's admittedly ideological message about a person's *birth-assigned sex*. Without a conflict of ideas, plaintiffs failed, among other reasons, to show how the state could compel them to accept a reality with which they disagreed.

However, this analysis misses how *there is* a conflict of ideas. The plaintiffs believed that a birth certificate sex marker could and should be changed to align with a person's gender identity developed later in life.[330] Indeed, the plaintiffs argued that gender identity should be the main determinant of legal sex.[331] The court, however, saw no conflict between gender identity and sex assigned at birth because a birth certificate "does not purport to say in any way

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[324] Gore v. Lee, No. 3:19-CV-0328, 2023 WL 4141665, at *3–4, *37 (M.D. Tenn. June 22, 2023), *appeal docketed*, No. 23-5669 (6th Cir.).
[325] Tenn. Code Ann. § 68-3-203(d).
[326] *Gore*, 2023 WL 4141665, at *4–5.
[327] *Id.* at *31.
[328] *Id*. at *33.
[329] *Id*. at *31–32.
[330] *Id.* at *11.
[331] *Id.* at *12.

what a person's 'sex' is at any point *after* birth."[332] Unlike gender identity, the court said, "'sex' at the time of birth is in reality a statement only about external genitalia."[333] What this analysis misses is that sex assigned at birth *is also an accurate legal statement of gender identity in most (cisgender) people*.[334] Therefore, cisgender people would have no need to change the legal sex on their birth certificates after birth, because their assigned birth sex aligns with their gender identity. The same is not true for TGNCI people, meaning there is a conflict between assigned sex and gender identity that TGNCI people cannot fix because of a policy that denies trans identities in particular the right to be legally recorded alongside non-TGNCI identities.

This is where the explicit use of a viewpoint discrimination argument may force government actors to confront assumptions underlying the sex/gender binary that contribute to TGNCI erasure. Cases like *Gore* and *Stitt* attempt to validate these sex/gender constructions because there is either no public speech or because the regulation is limited to a specific context. But, as discussed *supra* Section II.A.i, this approach fails to account for the basic principle underlying both competence and legitimacy-based arguments for preserving freedom of speech to advance democracy: that all matters relevant to the political discourse at hand—even private ones—must be protected to ensure all ideas and information can be aired. Indeed, this is the same principle that animates viewpoint neutrality and viewpoint discrimination.[335]

C. Compelled Speech Doctrine

When the government suppresses one viewpoint and imposes another, people are forced to become the bearers of state messaging. But the First Amendment presumptively forbids compelling people to choose between complying with the law and engaging in sincere expression. Indeed, the Supreme Court insisted in *303 Creative* that forcing a person to choose one

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[332] *Id.* at *21 (emphasis added).

[333] *Id.*

[334] USA Facts, *What Percentage of the US Population is Transgender?* (Aug. 3, 2023), https://usafacts.org/articles/what-percentage-of-the-us-population-is-transgender/ [https://perma.cc/7P72-82P2] ("Most of the US adult population (97.5%) self-identifies as cisgender.") .

[335] Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1280 (11th Cir. 2004) (finding impermissible viewpoint discrimination would exist, even if a student's refusal to say the pledge of allegiance was not constitutionally protected speech, if the student's punishment was based on his teacher's personal offense or disagreement with his conduct because "government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place"); *see also* Uptown Pawn & Jewelry, Inc. v. City of Hollywood, 337 F.3d 1275, 1277 (11th Cir. 2003) ("[R]estrictions on nonpublic forums need only be reasonable and not viewpoint discriminatory."); Adler v. Duval Cnty. Sch. Bd., 206 F.3d 1070, 1081 (11th Cir. 2000) ("The Supreme Court has consistently held that in nonpublic fora the government may not engage in viewpoint discrimination.").

or the other "'is enough,' more than enough, to represent an impermissible abridgement" of the First Amendment.[336]

This doctrine is rooted in *West Virginia State Board of Education v. Barnette*, a 1943 case in which a school attempted to punish Jehovah's Witness students who refused to salute the American flag due to their beliefs.[337] Finding that people have a right to "differ as to things that touch the heart of the existing order," the Court held that the constitution protects people against government coercion that conflicts with their sincere beliefs.[338] Perhaps most famously, the Court pronounced: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[339]

In other words, the government cannot use laws to coerce people into becoming vessels for "expressions of value, opinion, or endorsement, [or] statements of fact the speaker would rather avoid."[340] Ordinary people have a right to engage in "unsophisticated expression," absent government compulsion, that others might find "misguided, or even hurtful."[341] This doctrine has startling reach. It has halted the use of an anti-discrimination law when parade members wanted to exclude gay, lesbian, and bisexual people from joining their route and diluting their message.[342] It has prevented a school from punishing a student for refusing to say the pledge of allegiance.[343] And it has halted criminal charges against a man who covered up a state-mandated license plate motto that conflicted with his religious beliefs.[344]

The relevant conflict for this Article is between legislative findings about sex and gender that exclude gender identity from legal definitions of sex and the TGNCI beliefs that suggest gender-divergent individuals are free to enter sex-segregated spaces that best reflect their gender. These provisions are present in numerous forms of anti-TGNCI legislation.[345] Therefore, to participate in society, TGNCI people must risk punishment for their identities, move somewhere else, or abandon their sincerely held beliefs about their identity.

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[336] 303 Creative LLC v. Elenis, 600 U.S. 570, 589 (2023) (forcing a person to choose between punishment and speech "'is enough,' more than enough, to represent an impermissible abridgement" of the First Amendment) (quoting Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995)); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (stating that people have a right to "differ as to things that touch the heart of the existing order").

[337] *Barnette*, 319 U.S. at 626–30.

[338] *Id*. at 642.

[339] *Id*.

[340] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995).

[341] *Id*. at 573–74.

[342] *Id*. at 572–73.

[343] *Barnette*, 319 U.S. at 642.

[344] Wooley v. Maynard, 430 U.S. 705, 715 (1977).

[345] *See supra* note 25.

This conflict violates the First Amendment because it attempts to compel speech and belief.[346]

Consider the Florida Bathroom Ban. Though it may not result in arrest every time a TGNCI person uses a public restroom, it criminalizes the act of using an affirming restroom as a TGNCI person.[347] It consequently puts a choice before every TGNCI person. They can either honor their viewpoint and identity but risk arrest in the correct bathroom,[348] or they can invalidate their core beliefs and risk their personal safety in the opposite-gendered restroom.[349]

If they pursue the former without being charged, they still relinquish a constitutional right. This is because people have an *affirmative* right "to avoid becoming the [state's] courier."[350] One does not possess that right if they are forced to break the law to honor their core beliefs. If individuals pursue the latter and follow the law—as Tsukuru Fors did in Florida[351]—they invalidate their core beliefs about who they are and become the courier of state gender orthodoxy. Either way, the state compromises the constitutional rights of a TGNCI individual. The only question is what *kind* of harm the TGNCI person is willing to endure.

Some might argue that unisex restrooms provide a viable alternative to this dilemma, and that unisex restrooms result in no government coercion. However, the Supreme Court has found that if restrictions to a government forum are viewpoint discriminatory, "the ability of a group to exist outside the forum would not cure the constitutional shortcoming."[352] The Florida Bathroom Ban and many other forms of anti-TGNCI legislation are viewpoint discriminatory, as demonstrated *supra* Section II.B.iii. Having a unisex restroom available, then, would not fix the viewpoint discrimination.

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[346] *See, e.g.*, Nat'l Ctr. For Transgender Equal., Early Insights: A Report of the 2022 US Transgender Survey 23 (Feb. 2024), https://ustranssurvey.org/ [https://perma.cc/5F55-SZED] (reporting that nearly half of the roughly 92,000 survey respondents "had thought about moving to another state because their state government considered or passed laws that target transgender people for unequal treatment (such as banning access to bathrooms, health care, or sports), and 5% of respondents had actually moved out of state because of such state action"); Bram Sable-Smith, Daniel Chang, Jazmin Orozco-Rodriguez & Sandy West, *Why Some People are Choosing to Move to States That Protect Gender-Affirming Healthcare,* CNN (June 23, 2023), https://www.cnn.com/2023/06/23/health/families-moving-for-transgender-health-care/index.html [https://perma.cc/CN7Z-P44L].

[347] *See* Fla. Stat. § 553.865(11)(b) ("A person who willfully enters, for a purpose other than those listed in subsection (6), a restroom or changing facility designated for the opposite sex at a public building and refuses to depart when asked to do so by an employee of the governmental entity for the public building that is within the governmental entity's jurisdiction commits the offense of trespass as provided in s. 810.08.").

[348] Declaration of Christynne Lili Wrene Wood in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶¶ 22–23.

[349] Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 1, at ¶¶ 22–24, 29.

[350] *Wooley*, 430 U.S. at 717.

[351] Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 1, at ¶ 29.

[352] Hastings Christian Fellowship v. Martinez, 561 U.S. 661, 690 (2010).

Unisex restrooms are also not a suitable alternative for other reasons. Unisex restrooms can convey an inequality between TGNCI and non-TGNCI people of any gender. Anaïs Kochan, one of the plaintiffs from *Women in Struggle v. Bain*, said the forced use of a unisex restroom made her feel humiliated and othered.[353] Tsukuru Fors and Lindsey Spero described how intolerance for TGNCI people makes the men's *and* women's facilities unsafe for them.[354]

Moreover, unisex restrooms are not necessarily safe or available for TGNCI individuals. They can isolate TGNCI individuals from people of similar gender identities and make it easier for strangers to target them.[355] A unisex restroom also does not cure the problem of compelled speech; the right is to *avoid* being the state's courier. If a TGNCI individual follows the law and uses a unisex restroom, they have conveyed the state's message that gender identity is an invalid basis for accessing a sex-segregated space. Non-TGNCI people do not experience this coercion. If they do not want to share a space with a TGNCI person and use a unisex restroom instead, they are acting on their own beliefs. In contrast to TGNCI people, they have not modified their behavior because *the government* has not legislated against their identity or *told them they cannot* use a restroom that accords with their gender identity.

D. (Pretextual) State Interests

So far, this Article has analyzed how the expressive conduct of TGNCI individuals is protected under the First Amendment, how distinct viewpoints about sex and gender underlie that expression, how states are suppressing that speech and viewpoint, and how states are compelling TGNCI people to embrace anti-TGNCI ideas if they want to participate in society like their non-TGNCI peers. These state actions result in three claims under the First Amendment: suppression of symbolic conduct, viewpoint discrimination,

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[353] Declaration of Anaïs Kochan in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 17.

[354] Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 1, at ¶ 23–24, 26; Declaration of Lindsey Spero in Support of Plaintiffs' Emergency Motion for Temporary Restraining Order, *supra* note 5, at ¶ 12.

[355] Declaration of Melinda Butterfield in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 24 ("If a public establishment has a men's, women's, and unisex bathroom, and I am forced to use the unisex bathroom, I feel this is also a violation of my rights because the State is forcing me to deny my identity as a woman. Any requirement to use unisex restrooms still targets transgender people, because anyone looking to target transgender people may be looking at who is going in and out of the unisex restrooms. Foregoing the use of a restroom altogether, or being compelled to use the unisex restroom, is dehumanizing and effectively makes transgender and gender non-conforming people second-class citizens. It is much like how people in the Jim Crow South felt when they were forced to use separate water fountains, washrooms, and changing rooms.").

and compelled speech. What are the state interests that allegedly justify these violations?

This section analyzes the purported state interests behind the Florida Bathroom Ban and discusses the arguments the *Women in Struggle* plaintiffs used to demonstrate how those interests are pretexts for discrimination against TGNCI people. For context, *Women in Struggle* featured an as-applied constitutional challenge to the Florida Bathroom Ban on behalf of six TGNCI individuals and one feminist organization traveling to a trans-rights march in Orlando, Florida.[356] The plaintiffs, many of whom helped organize the march, feared they would not be able to use affirming restrooms without being arrested or harassed, and they worried about the impact the law would have on their ability to exercise their rights to speech.[357] This section does not address the interests underlying other anti-TGNCI legislation, such as sports bans and healthcare bans. However, other scholarship addresses the nuanced arguments required to counteract the purported interests in these areas of anti-TGNCI legislation.[358]

The Florida Bathroom Ban declares its purpose is "to maintain public safety, decency, decorum, and privacy."[359] How would a court analyze these interests? Interest balancing seems absent in compelled speech cases,[360] and the Supreme Court has never definitively clarified whether viewpoint

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[356] Ctr. for Const. Rts., *Women in Struggle, et al., v. Bain, et al.,* https://ccrjustice.org/home/what-we-do/our-cases/women-struggle-et-al-v-bain-et-al [https://perma.cc/YK9N-ZE6Y].

[357] *Id.*

[358] *See, e.g.*, Nancy Leong, *Against Women's Sports*, 95 Wash. U. L. Rev. 1251 (2018) (explaining how sex-segregation in sports is often oversimplified); *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2163, 2175–85 (2021) (explaining numerous flaws in the logic for gender-affirming care bans and some constitutional arguments that can be used to challenge them); Kait Sanchez, *The Bad Science Behind Trans Healthcare Bans,* The Verge (Jul. 30, 2021), https://www.theverge.com/22590708/trans-youth-gender-affirming-healthcare-bans-science [https://perma.cc/9FXF-8PCF] (debunking four flawed studies showing that eighty percent of youth who experience gender dysphoria will identify as cisgender adults and that although lawmakers tend to rely on these "desistance" statistics to pass trans youth healthcare bans, including in Arkansas, "[a]ll of the studies included children who had not actually expressed gender dysphoria and had instead been deemed gender-nonconforming by their parents. Labeling those children as desistant drastically inflates the percentage. [Moreover], [i]n three of the studies, participants who didn't follow up with the researchers in adolescence or adulthood were assumed to be desistant, again inaccurately raising the desistance percentage"); *see also* Julia Temple Newhook, et al., *Teach Your Parents and Providers Well: Call for Refocus on the Health of Trans and Gender-Diverse Children*, 64 Canadian Fam. Physician 332, 332–33 (2018) (documenting further problems with anti-trans healthcare studies); Klapsa, *supra* note 89 (explaining why it is inaccurate to say that European countries have prohibited trans youth healthcare).

[359] Fla. Stat. § 553.865(2).

[360] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 589 (2023) ("Under our precedents, [compelling someone to speak against their beliefs] 'is enough,' more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely." (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574 (1995)).

discriminatory laws are per se invalid or require strict scrutiny analysis.[361] For symbolic conduct claims, courts use a form of intermediate scrutiny that asks whether a law is narrowly drawn to "further[] an important or substantial government interest" and is "unrelated to the suppression of free speech."[362]

Because of the uncertainty regarding the level of scrutiny, a court evaluating a First Amendment challenge to the Florida Bathroom Ban may weigh the state's interests to determine the constitutionality of the legislation. But, even under the lowest form of scrutiny, known as *O'Brien* analysis,[363] Florida cannot demonstrate that the Florida Bathroom is unrelated to speech or viewpoint. This is because the law does not actually advance any of the stated interests, many of which are arbitrary or pretexts to discriminate against TGNCI people. The following sections demonstrate why.

i. *Public Safety*

A court will typically deem appropriate the use of a state's police powers when it is in furtherance of public safety. [364] However, by citing "public safety,"[365] the Florida Bathroom Ban contains a common dog whistle: TGNCI people—and trans women in particular—are predators.[366] When public safety of children or women is cited in a case involving trans people, medication, public facilities, or drag, courts are willing to analyze the evidentiary record for proof of this concern, with even conservative jurists hinting that trans people are no more dangerous than anyone else.[367]

Women in Struggle plaintiffs argued that TGNCI-exclusionary restroom policies are more dangerous than letting people choose a facility that best matches their gender identity. Plaintiff Lindsey Spero explained how the

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[361] Bloom, *supra* note 34, at 27, 36.

[362] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[363] *Id*.

[364] *See, e.g.*, Olympus Spa v. Armstrong, No. 22-CV-00340, 2023 WL 3818536, at *14 (W.D. Wash. June 5, 2023) (finding that a state's public accommodations law is justified as "an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state").

[365] Fla. Stat. § 553.865(2).

[366] Katelyn Burns, *The Rise of Anti-Trans 'Radical' Feminists, Explained*, Vox (Sep. 5, 2019), https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical [https://perma.cc/H8L2-J69D].

[367] Bongo Prods. v. Lawrence, 603 F. Supp. 3d 584, 593-94 (M.D. Tenn. 2022) (examining legislative history and noting lawmakers could not provide evidence of a "problem" of sexual predation in bathrooms); D.H. *ex rel.* A.H. v. Williamson Cnty. Bd. of Educ., 638 F.Supp.3d 821, 833 (M.D. Tenn. 2022) (finding no evidence that "transgender students were involved in any" of the "over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, [or] 218 instances of inappropriate sexual conduct" in Metro Nashville public schools between 2012 and 2016); *see also* Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety*, NBC News (Sept. 19, 2018), https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106 [https://perma.cc/99FZ-YY6U].

Florida Bathroom Ban would force them to use a public bathroom labeled for women even though "[they] identify as non-binary and present as masculine and have noticeable facial hair."[368] Plaintiff Tsukuru Fors similarly worried that women would call security on him if they heard his voice or saw his masculine appearance in a woman's bathroom.[369] As Spero shared, for those who present or identify as masculine, being forced to use the women's restroom comes with "the risk of targeted violence, hostility, or mental and emotional harassment," all of which are "life-threatening risks" that a person should not have to balance when performing a basic human function.[370]

These are not abstract concerns: news stories document the harassment and violence that TGNCI people experience in public restrooms, particularly non-affirming ones for transmasculine people and affirming ones for transfeminine people.[371] Public safety is not served when the state directs a transgender man, who may have a very masculine appearance along with state identification bearing a male gender marker, to use the women's restrooms alongside cisgender women, or compelling the exact opposite with transgender women.[372]

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[368] Declaration of Lindsey Spero in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 5, at ¶ 12.

[369] Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 1, at ¶ 24.

[370] Declaration of Lindsey Spero in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 5, at ¶ 12.

[371] *See, e.g.*, James Factora, *This Trans Man Was Just Trying to Pee. He was Assaulted and Arrested*, THEM (July 13, 2022), https://www.them.us/story/trans-man-noah-ruiz-was-just-trying-to-pee-he-was-assaulted-and-arrested [https://perma.cc/8EJ8-M6MT]; Amanda Watts & Scottie Andrew, *A Man Beat a Transgender Woman for Using the Correct Bathroom – the Women's. Now He's Guilty of a Hate Crime*, CNN (Feb. 1, 2020), https://www.cnn.com/2020/01/31/us/man-guilty-hate-crime-beat-trans-woman-restroom-trnd/index.html [https://perma.cc/CK8G-JWFS].

[372] *See* Excerpts from the Florida House of Representatives House Session April 19, 2023 at 10, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. filed Sept. 29, 2023), ECF No. 02-12 (Ex. 10) (gathering representative comments in opposition to the Florida Bathroom Ban, including Rep. Anna Eskamani, who stated "There is no evidence that allowing transgender people to use public facilities that align with their gender identity creates a safety risk. There is no evidence of that. In fact, in deep contrast, what there is evidence of is that those who identify as transgender are more likely to experience hate crimes. They are more likely to be assaulted"); Excerpts from the Florida House of Representatives Session May 3, 2023, *supra* note 13, at 17 (gathering representative comments in opposition to the Florida Bathroom Ban, including Representative Kelly Skidmore, who stated "My sister's boyfriend is a trans man. He is a full-blown man. And you want him to walk in to the girl's room? You want him to walk in to the girl's room? Do you understand? And then you want someone to go in there and tell him that he's in the wrong bathroom. But it's the bathroom you're sending him to. You have no idea what you're doing here because you can't think past your hatred. And you can't think past your discrimination. A man that has feminine features, a woman who has masculine features—they're going to be accosted in the bathroom. You're in the wrong bathroom. You have to leave. You are suggesting that when my sister and her boyfriend are somewhere, they should walk into that bathroom together. That's what you want him to do. That's what you want them to do. And you want an employee to go in there and tell this trans man you're in the wrong bathroom because you look like a man").

ii. *Decency and Decorum*

"Decency" and "decorum" are pretextual interests because they join other terms like "annoying" or "indecent" that are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning."[373] Courts have struck down statutes that criminalize "annoying" or "indecent" conduct under the void-for-vagueness doctrine.[374] The Florida Bathroom Ban does not make the words "decency" or "decorum" the basis of one's criminal culpability, per se. However, the law criminalizes TGNCI use of an affirming restroom in the interest of decency. But decency to *who*? Non-TGNCI people? The government?

TGNCI people's use of an affirming restroom may be indecent or indecorous to "some people" and not to "others."[375] But there is no way to reliably measure this annoyance because non-TGNCI people may not notice when they share a facility with TGNCI people.[376] For example, plaintiff Melinda Butterfield explained how she used the women's restroom during a layover at the Miami Airport around the time the Florida Bathroom Ban passed without anybody noticing. This experience left a "deep psychological impression on [her] because of the anti-trans climate in Florida,"[377] but it demonstrated that TGNCI identity is not always noticeable enough to disturb whatever "decorum" or "decency" exists in the restroom.

So, what are decency or decorum really measuring? If the terms cannot be narrowed without admitting that the goal is discriminating against TGNCI people, they cannot serve as a measure of this regulation's success. Therefore, decency and decorum cannot be substantial or compelling government interests that justify the Florida Bathroom Ban and similar pieces of legislation.

iii. *Privacy*

The final stated interest is privacy. Privacy does not appear to be constitutional in nature when the state cites it as an interest. However, TGNCI

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[373] U.S. v. Williams, 553 U.S. 285, 306 (2008); *see also* Coates v. Cincinnati, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others."); United States v. Elliot, No. 2:17-CR-33-RWS, 2018 WL 11478272, at *1–3 (N.D. Ga. Aug. 8, 2018) (finding that someone arrested for public nudity at a campsite would lack notice that their conduct fell under the contested statute, which criminalized "[a]ny act or conduct . . . [from] boisterous, rowdy, disorderly [individuals who] otherwise disturb the peace on project lands or waters," because the terms provided no narrowing construction of what would be illegal).

[374] *Williams*, 553 U.S. at 285; *Elliot*, 2018 WL 11478272, at *2–3.

[375] *Coates*, 402 U.S. at 614.

[376] Declaration of Melinda Butterfield in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶¶ 9–10 (explaining that even though other cisgender women may not have noticed a trans woman client's use of the women's restroom, it still caused fear of being verbally assaulted or stopped from using the restroom in an affirming facility).

[377] *Id.* at ¶ 10.

opponents may cite privacy rights under the First or Fourteenth Amendments in (1) affirmative challenges to trans-inclusive policies or (2) as a justification for an anti-TGNCI law being challenged as unconstitutional.[378] Accordingly, this subsection analyzes some of the arguments *Women in Struggle* plaintiffs used to counter any alleged privacy right in biological-sex spaces.

First Amendment

First Amendment jurisprudence protects privacy in the form of freedom of association. The two forms of freedom of association include the "freedom of intimate association" and the "freedom of expressive association."[379] Of those two freedoms:

> The former involves the right to enter into and maintain certain intimate human relationships [such as marriage, rearing a child, and cohabitating with a nuclear family member]— relationships which must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. The freedom of intimate association receives protection as a fundamental element of personal liberty. On the other hand, the freedom of expressive association refers to the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. It is viewed as an indispensable means of preserving other individual liberties.[380]

The freedom to intimate association neatly applies in the context of TGNCI people accessing an affirming restroom or facility. *Olympus Spa v. Armstrong*, a federal district court case out of Seattle, is instructive. There, a day spa banned trans women with a biological "female-only policy" and, when sued by the state's anti-discrimination agency, cited the privacy rights of cisgender women to associate without having to view "uncomfortable" genitalia of some trans women.[381] Although the court was sympathetic to privacy concerns, it rejected this argument, noting how precedent instructs that

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[378] *See, e.g.,* Parents for Privacy v. Barr, 949 F.3d 1210, 1217 (2020) (involving a privacy challenge to a school district's trans-inclusive restroom and changing facility policy); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 804–05 (11th Cir. 2022) (citing privacy as an important state interest that justified a "biological sex" restroom policy).

[379] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

[380] Olympus Spa v. Armstrong, No. 22-CV-00340, 2023 WL 3818536, at *17 (W.D. Wash. June 5, 2023) (quoting *Jaycees*, 468 U.S. at 617–18).

[381] *Id.* at *3.

intimate association typically applies to marriage, child rearing, and cohabitation with nuclear family members.[382]

"Aside from this nudity, though, there is simply nothing private about the relationship between Olympus Spa, its employees, and the random strangers who walk in the door seeking a massage," the court declared.[383] "Nor is there anything selective about the association at issue beyond Olympus Spa's 'biological women' policy."[384] A restroom is similar. There are certainly moments of intimacy and camaraderie among people of similar genders or experiences in a restroom. But this experience is typically not lasting in the way that a marriage, a parent-child relationship, or cohabitation with a nuclear family is. For the most part, the people who pass through the doors of a restroom are strangers who spend little time in the facility. Any privacy concerns cited on behalf of "biological women," then, are not well supported under the First Amendment right to intimate association.

Some might argue, in contrast, that the freedom of *expressive association* gives non-TGNCI people the right to exclude unwanted TGNCI people from their spaces. One of the more infamous examples of this freedom is *Boy Scouts of America v. Dale*, a 2000 case where the Supreme Court held that the Boy Scouts could expel a gay scoutmaster because his presence affected the organization's ability to assert that "homosexual conduct [was] inconsistent with the values embodied in the Scout Oath and Law."[385] For several reasons, this doctrine does not apply to non-TGNCI individuals who believe that TGNCI people affect their ability to express their beliefs about gender, as presence is not the same thing as membership.

"Forced membership" is only unconstitutional if "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[386] But how can TGNCI people have a significant impact when their presence is not always detectable in the restroom? Even if TGNCI people are noticeable, their presence is not synonymous with membership. Within each gender there are numerous identities and intersections that result in different experiences, beliefs, and alliances. A trans woman may not want to identify with certain kinds of womanhood just because she uses the restroom alongside other women.

Non-TGNCI individuals in restrooms are not an organization like the Boy Scouts, and no law is stopping them from exercising free expression. Individuals can (and do) comment in opposition to TGNCI people who use affirming restrooms and changing spaces.[387] They should not, however, be

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[382] *Id.* at *17.
[383] *Id*. at *18.
[384] *Id*.
[385] Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000).
[386] *Id*. at 648 (citing N.Y. State Club Ass'n. v. City of New York, 487 U.S. 1, 13 (1988)).
[387] *See, e.g.*, Alexander Shur, *'It's Creepy,': Sen. Ron Johnson Weighs in on Transgender Issues*, Wis. State J. (Mar. 23, 2022), https://madison.com/news/local/govt-and-politics/its-creepy-sen-ron-johnson-weighs-in-on-transgender-issues/article_640dcacd-1f37-525f-8632-e6140597c011.html#tracking-source=home-top-story

able to seek the arrest of a TGNCI person simply because a TGNCI person has different views than them. Therefore, non-TGNCI individuals have no First Amendment expression right to exclude TGNCI people from the bathrooms they use.

Fourteenth Amendment

The Fourteenth Amendment also protects privacy when a person has a reasonable expectation of privacy in their body or their personal information.[388] One federal appellate court has justified a TGNCI-exclusionary restroom policy by citing to the school board's important interest in protecting the Fourteenth Amendment privacy of students.[389] The state could ensure that interest, the court said, through the separation of spaces by "biological sex."[390] However, "biological sex" is often used synonymously with sex assigned at birth,[391] which is based on a newborn's external genitalia and the assumption that other sex traits such as chromosomes and hormones are in alignment.[392] This conflation, however, ignores how sex traits and gender change over time in non-TGNCI and TGNCI people.[393] Therefore, the state does not actually

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[https://perma.cc/U6BG-NR5U]; Sami Quadri, *Trans Women Can Be Excluded From Single-Sex Changing Rooms and Toilets, Watchdog Rules*, The Standard (Apr. 4, 2022), https://www.standard.co.uk/news/uk/trans-women-toilets-changing-rooms-rules-b992398.html [https://perma.cc/M5AY-X5ML] (explaining how "[o]rganisers of a group counselling session for female victims of sexual assault could exclude trans women if they judge that those attending 'are likely to be traumatised by the presence of a person who is biologically male'").

[388] *See, e.g.*, Hancock v. Rensselaer Cnty., 882 F.3d 58, 65 (2d. Cir. 2018); Vazquez v. Kern Cnty., 949 F.3d 1153, 1160 (9th Cir. 2020).

[389] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Ctny., 57 F.4th 791, 804, 817 (11th Cir. 2022).

[390] *See id*. at 803–04.

[391] *See* Clarke, *supra* note 27, at 1824 ("Many federal court decisions fail to critically consider the differences between sex assigned at birth and 'biological sex' or even conflate the two concepts.").

[392] *See id.* at 1847 n. 144 (collecting numerous anti-trans state laws that define biological sex as features observed, or assumed to be binary, at birth); *see, e.g.*, Ark. Code Ann. §§ 16-130-103 (2022) (defining "sex" as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth"); Fla. Stat. Ann. § 1006.205 (2022) (providing that "a statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex at birth if the statement was filed at or near the time of the student's birth"); Idaho Code § 33-6203 (2021) (setting up a verification process for determining a student's "biological sex" based on "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels").

[393] *See, e.g.*, *supra* note 23, at 289–90; *see also* Nat'l Health Serv., *Overview: Hysterectomy*, https://www.nhs.uk/conditions/hysterectomy/ [https://perma.cc/5M5Q-6A8S] ("A hysterectomy is a surgical procedure to remove the womb (uterus)," and removes the ability "to get pregnant."); Mayo Clinic, *Vasectomy* (Feb. 9, 2023), https://www.mayoclinic.org/tests-procedures/vasectomy/about/pac-20384580 [https://perma.cc/D89Q-WAL3] (explaining how a vasectomy "cuts [off] the supply of sperm to [one's] semen" by "cutting and sealing the tubes that carry sperm").

accomplish its interest in spaces separated by biological sex when it excludes people because of their gender identity.

The Eleventh Circuit tried to create such an affirmative privacy right in December 2022 in *Adams* when it rejected a transgender student's equal protection claim challenging his high school policy that prohibited him from using the boy's room.[394] In upholding the policy, which separated restrooms by biological sex, the Eleventh Circuit wrote that "protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective."[395] The court believed "it is no surprise, then, that the privacy afforded by sex-separated bathrooms has been widely recognized throughout American history and jurisprudence."[396] The Eleventh Circuit also suggested this privacy interest applies the moment one steps into the restroom.[397] To the court, what one does in the restroom is irrelevant; the privacy right prevents TGNCI individuals from even entering an affirming restroom.

To reach this conclusion, the Eleventh Circuit cited five cases for the proposition that privacy includes protection from involuntary exposure of one's genitals to the opposite sex.[398] But none of these cases involved the impact of TGNCI people on privacy interests. The cases instead involved law enforcement officials involuntarily subjecting people to video surveillance in changing rooms or prison guards and deputies subjecting people in custody to cross-gender body cavity searches.[399] As such, the cases were inapposite.

The Ninth Circuit Court of Appeals, two years prior to *Adams*, demonstrated why privacy cases involving law enforcement are inapplicable to TGNCI people in restrooms. In *Parents for Privacy v. Barr*, the court upheld the dismissal of a parent's privacy challenge to a school policy that allowed TGNCI students to use affirming facilities.[400] These parents also relied on cases that "'involve[d] egregious state-compelled intrusions into one's

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[394] *See Kasper*, 57 F.4th at 801.

[395] *Id* at 804.

[396] *Id*. at 805.

[397] *See id*. at 806 (explaining that the privacy interests are "sex-specific privacy interests" that "hinge on using the bathroom away from the opposite sex and shielding one's body from the opposite sex, not using the bathroom in privacy" and therefore they "attach once the doorways to those bathrooms swing open").

[398] *Id*. at 805 (citing Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993); Harris v. Miller, 818 F.3d 49, 59 (2d Cir. 2016); Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 494–95 (6th Cir. 2008); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994); Byrd v. Maricopa Cnty. Sheriff's Dep't, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc)).

[399] *See Fortner*, 983 F.2d at 1030 (holding that imprisoned people have a privacy right against opposite-sex corrections officers involuntarily strip-searching sensitive areas); *Harris*, 818 F.3d at 54 (involving a female imprisoned person who legs were "forcibly opened" so that a male officer could "visually inspect her genitalia"); *Brannum*, 516 F.3d at 491–92 (involving a school administrator's decision to install video cameras in the changing rooms of middle schoolers and viewing and retaining the footage); *Canedy*, 16 F.3d at 184 (involving an imprisoned man who complained about two female prison guards strip-searching him); *Byrd*, 629 F.3d at 1137 (involving strip searches of imprisoned people by opposite sex guards).

[400] Parents for Priv. v. Barr, 949 F.3d 1210, 1217–18 (2020).

personal privacy,' such as 'government officials'—often law enforcement or correctional officers—'viewing or touching the naked bodies of persons of the opposite sex against their will.'"[401] But those cases involved literal *nonconsensual* state action "by government officers or the public disclosure of photos or video footage."[402] The same concerns, the Ninth Circuit reasoned, are simply not present just because a TGNCI person uses a facility that accords with their gender identity.[403]

The Ninth Circuit's holding differs slightly because there the plaintiff parents brought a constitutional privacy claim whereas in *Adams* the school raised privacy as a substantial government interest. However, *Parents for Privacy* suggests that privacy interests can be overcome when balanced against other interests, such as providing non-discriminatory gender-inclusive spaces. For example, the Ninth Circuit subjected the school's TGNCI-affirming policy to strict scrutiny because privacy is a fundamental right. But in doing so, it emphasized that the school engaged in a compelling governmental interest (creating inclusion for all) in the least restrictive way possible. Specifically, the court found that the school provided "alternative [facilities] and privacy protections [for] those who [did] not want to share facilities with a transgender student."[404] Even though having to use these alternative facilities "appear[ed] . . . less convenient," the Ninth Circuit noted that their own precedents had held that the "inconvenience and slight discomfort that results from attempting to accommodate both interests are not enough to establish a privacy violation."[405] All to say, litigants challenging anti-TGNCI bathroom policies may be able to point to any alternatives provided to non-TGNCI people to diminish a state's privacy interest.

In addition to the Ninth Circuit's reasoning, litigants can follow the lead of the *Women in Struggle* plaintiffs and emphasize that bathroom bans would not accomplish a separation of spaces based on external genitalia, hormones, and potentially chromosomes.[406]

An alleged privacy right to "biological sex" facilities operates on the assumption that TGNCI people retain their birth genitalia or have cognizably "male" or "female" genitalia. Both assumptions are incorrect. Two of the *Women in Struggle* plaintiffs were transgender women who had received

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[401] *Id*. at 1222 (quoting Parents for Priv. v. Barr, 326 F. Supp. 3d 1075, 1099 (D. Or. 2018)).

[402] *Id.* at 1225.

[403] *Id.* at 1224 (explaining that in-circuit cases did not allege "a more general right to be free from alleged privacy intrusions by other non-government persons, or a privacy right to avoid any risk of being exposed briefly to opposite-sex nudity by sharing locker facilities with transgender students in public schools" and that these cases could be distinguished on the facts because the plaintiff parents did not allege, like the government officials in these cases, that "transgender students [were] taking nude photographs . . . or purposefully taking overt steps to invade . . . privacy for no legitimate reason").

[404] *Id*. at 1225.

[405] *Id*.

[406] Plaintiffs' Emergency Motion for a Temporary Restraining Order and Incorporated Memorandum of Law, *supra* note 17, at 16–17.

gender-confirmation surgery, meaning they both have vaginas.[407] There was no logical reason to make these women urinate in the men's room to ensure the privacy interests of other women with vaginas—as both the two plaintiffs and these women have much of the same anatomy. Moreover, these women have the same circulating hormones as the average woman due to years of hormone replacement therapy.[408] Yet, the Florida Bathroom Ban requires both of these women to use the men's restroom. This is a bizarre outcome if Florida's goal is to shield people from involuntary exposure to different genitalia.

TGNCI bodies made more "binary" from surgery are not the only ones that undermine the state's interest in separating people by birth hormones, chromosomes, or genitalia. When transmasculine people take testosterone, they often experience "bottom growth," meaning their clitorises widen and lengthen into penis-like structures sometimes capable of penetration.[409] Some transmasculine people also undergo phalloplasty, which creates a penis from arm or leg skin, but opt to preserve their vagina—meaning they have the genitalia of a "male" and a "female."[410] Meanwhile, certain intersex people may have outward female gender identities but may have mixed genitalia or XY chromosomes that prevent them from having a period and giving birth.[411] The Florida Bathroom Ban would direct all of these individuals to the women's restroom based on some of their birth features. But, again, these individuals would have different sex features than the non-TGNCI women in these spaces.

All to say, privacy interests based on biological-sex segregation cannot be a real interest because the broadly written Florida Bathroom Ban does not achieve them. Government officials can only achieve these interests if they lean into the legal construction that sex is physiological, immutable, and binary, and that gender (identity) is psychological. However, that distinction

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[407] Declaration of Christynne Lili Wrene Wood in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 8; Declaration of Brianna Kelly in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, at ¶ 11, Women in Struggle v. Bain, et al., No. 6:23-CV-01887 (M.D. Fla. Sept. 29, 2023), ECF No. 02-6 (Ex. 4)

[408] Declaration of Brianna Kelly in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 407, at ¶¶ 10, 12; Declaration of Christynne Lili Wrene Wood in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 8.

[409] FOLX Health, *Testosterone HRT and Bottom Growth* (Feb. 17, 2021), https://www.folxhealth.com/library/testosterone-bottom-growth [https://perma.cc/MKS7-NGYS].

[410] *See, e.g.*, Gabriel Mac, *My Penis, Myself*, N.Y. Magazine (Dec. 20, 2021), https://nymag.com/intelligencer/article/gabriel-mac-essay.html [https://perma.cc/UCZ5-VM9B]; Zinnia Jones, *Trans Men and Transmasculine People on Testosterone can Grow Prostate Tissue*, Gender Analysis (Oct. 31, 2020), https://genderanalysis.net/2020/10/trans-men-and-transmasculine-people-on-testosterone-can-grow-prostate-tissue/[https://perma.cc/FN3J-2W99].

[411] *See, e.g.*, Shana Knizhnik, *I'm Coming Out as Intersex After Years of Keeping it a Secret*, Teen Vogue (Oct. 26, 2020), https://www.teenvogue.com/story/coming-out-as-intersex [https://perma.cc/F2X6-T49R].

boils down to viewpoint discrimination against trans identity and the belief that sex and gender are non-binary.

Other aspects of the Florida Bathroom Ban demonstrate that it is not properly tailored to an important government interest. Particularly troubling is the ban's broad geographic application—the entire state—and its lack of clear enforcement standards.[412] Moreover, because passports, birth certificates, and other state identity documents are not an accepted way to establish one's legal sex for purposes of the statute, the law suggests nothing short of genital checks to enforce the statute.[413] However, *Adams* emphasized several cases in which people have a right to be free from involuntary exposure of their genitals to law enforcement of the opposite gender.[414] Here, the state would essentially force people to involuntarily expose their genitals to law enforcement to protect the right against involuntary exposure of genitals to law enforcement. This outcome is not only illogical; it defies the purpose of privacy in the first place.

Likewise, there are no exceptions to the statute for TGNCI people who legally change their sex on identity documents or for trans people who have had genital-affirming surgery, meaning that the statute (one) forces them to use restrooms where they tacitly do not belong based on their gender presentation, genitalia and/or state identification, and (two) exposes them to harassment, assault, and criminal prosecution under this and other statutes to which no easy defense exists.[415] Thus, the statute creates a novel criminal punishment scheme with a broad yet uncertain application.

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[412] *See, e.g.*, Friends of Georges, Inc. v. Mulroy, No. 2:23-CV-02163, 2023 WL 3790583, at *23, *27–29 (W.D. Tenn. June 2, 2023) (finding that although protecting minors is a compelling interest, a statute is not narrowly tailored to that interest if it has a "novel punitive, and overbroad geographical scope," "lack of affirmative defenses," and more). The confusion also extends to the disciplinary regulations that covered entities have released in accordance with the Florida Bathroom Ban. For instance, the latest disciplinary regulations allow universities to fire TGNCI faculty and staff for using the "wrong restroom" but do not explain how universities are supposed to enforce this law beyond having common knowledge of a person's TGNCI identity. *See* Finch Walker, *Trans University Staff Could be Fired for Using 'Wrong' Restroom Under New Florida Rule*, Fla. Today (Nov. 9, 2023), https://www.floridatoday.com/story/news/2023/11/09/florida-universities-must-now-segregate-bathrooms-by-sex-at-birth/71476636007/ [https://perma.cc/B3X5-SPET] (stating that "[e]mployees at universities within Florida's University System—such as University of Florida, Florida State University or University of Central Florida" can be fired for using a restroom that does not align with their sex assigned at birth, but the Florida Board of Governors has until January 1, 2024 to pass procedures for carrying out the rule).

[413] Tammy Pedroja, *Welcome to Florida, Where You Can Be Subjected to Genital Inspections and DNA Tests to Use a Bathroom*, The Mary Sue (May 22, 2023), https://www.themarysue.com/new-florida-anti-trans-bathroom-law-comes-with-dna-tests-genital-inspections/ [https://perma.cc/83VC-H7DW] ("It doesn't matter how long ago a person transitioned, how 'passing' they are, or whether their ID shows their true gender and legal name—in Florida, they must use the bathroom that corresponds with their 'internal and external genitalia present at birth.'").

[414] Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 806 (11th Cir. 2022).

[415] Tammy Pedroja, *supra* note 413. *See generally* Excerpts from the Florida House of Representatives House Session April 19, 2023, *supra* note 372 (gathering comments in

III. Potential Counterarguments

The recent litigation in *Women in Struggle v. Bain* used the above arguments on behalf of six TGNCI individuals who traveled to Orlando, Florida, in October for the National March to Protect Trans Youth and Speakout for Trans Lives.[416] These plaintiffs, many of whom flew into the city of Orlando, feared for their ability to use restrooms in buildings owned or leased by a subdivision of the state government without being arrested or harassed.[417] Those buildings included the Orlando International Airport, Orlando City Hall, those in the University of Central Florida campus, and the Dr. Phillips Center for the Performing Arts.[418] Because march preparations and the march itself put the plaintiffs in close proximity to these restrooms for multiple hours on end, they asked the Orlando Division of the Middle District of Florida to enjoin numerous state defendants who oversaw these buildings from enforcing the Florida Bathroom Ban against them.[419]

Restroom use in Florida was an anxiety-driven affair for the plaintiffs that highlighted their status as second-class individuals.[420] Some of them used a range of strategies to avoid the law, including limiting their time in public and using the restroom in their hotel rooms.[421] Others declined to use the correct restroom in public without a cisgender ally present.[422] At least one plaintiff did not want to risk harassment or arrest and would use the restroom of their birth assigned sex if necessary.[423] All of them faced the agonizing choice of deciding whether to risk criminalization or whether to cave to the state-imposed idea of their sex and gender.

United States District Court Judge Wendy Berger rejected the plaintiffs' request for a temporary restraining order, citing numerous procedural grounds and a lack of imminent harm.[424] However, before doing so, Judge Berger ordered the eleven defendants to respond to the plaintiffs' request for injunctive relief.[425] These defendants included law enforcement officials charged with enforcing the law, the operating officers of state or quasi-state-owned entities

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opposition to the Florida Bathroom Ban); Excerpts from the Florida House of Representatives Session May 3, 2023, *supra* note 13 (same).

[416] Plaintiffs' Emergency Motion for a Temporary Restraining Order and Incorporated Memorandum of Law, *supra* note 17, at 10–21.

[417] Complaint for Declaratory and Injunctive Relief, *supra* note 4, at ¶¶ 127, 279.

[418] *Id*. at ¶¶ 180–81, 233–35, 247–53, 256–62.

[419] *Id*. at ¶¶ 3–4.

[420] *Id.* at ¶ 381.

[421] These statements are based on plaintiffs' experiences during their week in Orlando, Florida.

[422] *Id*.

[423] Declaration of Tsukuru Fors in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 1, at ¶ 29.

[424] Women in Struggle v. Bain, No. 6:23-CV-01887, 2023 WL 6541031, at *3–6 (M.D. Fla. Oct. 6, 2023) (rejecting emergency relief because of issues with standing and pleading).

[425] Order Directing Defendants to File Responses, Women in Struggle v. Bain, No. 6:23-CV-01887 (M.D. Fla. Sept. 29, 2023), ECF No. 04.

whose restrooms the plaintiffs believed they would have to use, and the property manager and chief administrator for the City of Orlando.[426]

Although responses from these defendants persuaded the court against injunctive relief, they also revealed a number of arguments that litigators should consider when crafting First Amendment challenges against anti-TGNCI legislation, particularly bathroom bans. The defendants' arguments, the court's reasoning, and additional counterarguments follow.[427]

A. Plaintiffs lacked a constitutional right to enter a building and use the restroom of their choice.

Two defendants claimed plaintiffs lacked the constitutional right to enter a preferred building to use the restroom. One defendant—a member of the Board of Trustees for the University of Central Florida ("UCF")—argued that "visitors [to campus] are only permitted inside university buildings for authorized university business.[428] The other defendant—the chief operating officer of the Orlando International Airport—cited two cases, including a 1991 case out of the Eleventh Circuit, *U.S. v. Gilbert*, to argue that restroom use is not protected constitutional behavior.[429] Judge Berger found merit in both arguments, holding that "just because a building is a public building and generally open to the public for some purposes does not mean that it is open to the public for all purposes."[430] Plaintiffs consequently lacked "any right to enter either City Hall or the Dr. Phillips Center . . . without any other business on the premises."[431]

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[426] *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4, at ¶¶ 17–27.

[427] Because many of the counterarguments concern whether the plaintiffs' harm was "imminent" or "actual" enough for the court to order injunctive relief, it might help to review the elements of a temporary restraining order. To obtain a Temporary Restraining Order (TRO) in the Eleventh Circuit, plaintiffs had to show: "(1) substantial likelihood of success on the merits; (2) [that] irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to [plaintiff/petitioner] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). Showing a likelihood of success on the merits of a claim means a plaintiff must also demonstrate that they have standing to bring their claim. Standing requires a plaintiff to show they suffered an injury-in-fact, that defendant caused that injury, and that a court can redress the injury. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). The law defines an "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.*

[428] Defendant Alex Martins' Response in Opposition to Plaintiff's Emergency Motion for Temporary Restraining Order at 1, 3, Women in Struggle v. Bain, No. 6:23-CV-01887 (M.D. Fla. filed Oct. 2, 2023), ECF No. 25.

[429] Defendant Thomas Draper's Response in Opposition to Plaintiff's Emergency Motion for Temporary Restraining Order at 3, 8, Women in Struggle v. Bain, No. 6:23-CV-01887 (M.D. Fla. filed Oct. 2, 2023), ECF No. 27.

[430] Women in Struggle v. Bain, No. 6:23-CV-01887, 2023 WL 6541031, at *4 (M.D. Fla. Oct. 6, 2023).

[431] *Id*.

There is more than meets the eye in this argument. Orlando City Hall *does* permit individuals to access the first and second floors of the building during business hours.[432] Moreover, the case law cited by the Orlando International Airport board member and the court is factually distinguishable. Defendant Thomas Draper cited *Poor and Minority Justice Ass'n, Inc. v. Judd* for the proposition that "restroom use itself is not expressive conduct."[433] However, the Middle District of Florida made this statement in the context of two different constitutional issues: (one) whether people protesting outside of a courthouse could enter the courthouse to use the restroom, and (two) whether the use of the courthouse restroom was an extension of their protected protest speech.[434]

The *Judd* court upheld the policy for three reasons. First, because this policy applied to everybody, it was viewpoint neutral and did not single out any one type of protest speech.[435] Second, the unique security concerns of a courthouse made the policy reasonable. Therefore, the speech rights associated with the protest ended at the courthouse doors with respect to accessing the restroom.[436] Third, a 1991 Eleventh Circuit Court Case, *U.S. v. Gilbert*, found the use of a *courthouse* restroom in a factually different situation to be "concededly unprotected activit[y]."[437]

The situation in Orlando, however, is markedly different. City Hall held itself as open to the public, and, unlike the courthouses in *Judd* or *Gilbert*, had no policy against people entering the building to use the restroom. Using the restroom was one of the many reasons a visitor could type into the welcome kiosk explaining their visit.[438] Moreover, unlike the courthouse protesters, the plaintiffs *were not protesting* when they used an affirmative restroom; they were simply being themselves, an act that happens to also be protected symbolic conduct.[439] Finally, as demonstrated *supra* Section II.B.iii, the Florida

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[432] City of Orlando, *City Hall Facility Overview*, https://www.orlando.gov/Directory/City-Buildings-Centers/City-Hall [https://perma.cc/2H9H-CV2H].

[433] Defendant Thomas Draper's Response, *supra* note 429, at 8 (quoting Poor and Minority Justice Ass'n v. Judd, No. 8:19-CV-T-2889-02, 2020 WL 7128948, at *4 (M.D. Fla. Dec. 4, 2020)).

[434] Poor and Minority Justice Ass'n, Inc. v. Judd, No. 8:19-CV-T-2889-02, 2020 WL 7128948, at *1 (M.D. Fla. Dec. 4, 2020) ("Courthouse restrooms are not open to the public at large, and courthouse interiors are neither forums for protest nor support facilities for protests elsewhere. As such, persons who are not attending the courthouse for court purposes may be excluded from it, however righteous their purposes may be.").

[435] *Id*. at *4.

[436] *Id*.

[437] *Id*. at *4. *But see* United States v. Gilbert, 920 F.2d 878, 880–83 (1991) (describing how a man protested against his former employer by sleeping outside a courthouse and using the inside facilities, including the restroom, as his home. The Court found, and the plaintiff conceded, that "some of his [protest] activity, such as using the building's rest rooms to bathe and launder his clothing and using the newspaper racks to dry his clothes is not expressive.").

[438] The author had to use this kiosk to enter City Hall and use the restroom and observed the restroom option on said kiosk.

[439] *See, e.g.*, Declaration of Melinda Butterfield in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 17 ("I express my transgender

Bathroom Ban constitutes viewpoint discrimination. Therefore, people *are* being singled out for speech and belief that is *separate* from their protest itself.[440]

The University of Central Florida board member's argument raised similar questions about the role that building policies play in these kinds of challenges. Alex Martins said plaintiffs did "not allege any invitation to be on the campus of the University of Central Florida" and would need to rely on Florida Statute §1004.097, otherwise known as the Campus Free Express Act.[441] That act grants visitors access to "generally accessible areas of a campus of a public institution of higher education in which members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas."[442] Martins said this act meant that visitors could engage in protected expressive speech in outdoor areas of campus but could "only [be] permitted inside university buildings for authorized university business."[443]

Martins, however, cited no policy that bars visitors from going inside a building to use a restroom while they are lawfully on campus. Although the university possesses the power to pass reasonable policies governing the conduct of visitors, there are limitations. In the context of prison visits, for example, courts have held that rules may not be discriminatory or "deliberately indifferent" to the critical needs of visitors, including access to restrooms.[444] Otherwise, governments who promulgate these rules might run afoul of substantive due process under the Fourteenth Amendment, which blocks state behavior that shocks the conscience.[445] For example, one Michigan court held that federal prison officials violated this constitutional right of a visitor who

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identity every day. I changed my name and gender marker on my documents; I use the women's public and private restrooms; I dress how I want to dress, which is more female presenting; and I have changed my body to align with how I feel and I express my gender. Suppressing my identity is a violation of my right to express myself.").

[440] *See supra* Section II, A-D.

[441] Defendant Alex Martins' Response, *supra* note 428, at 3.

[442] FLA. STAT. § 1004.097(2)(d).

[443] Defendant Alex Martins' Response, *supra* note 428, at 3.

[444] Glaspy v. Malicoat, 134 F. Supp. 2d 890, 893–96 (W.D. Mich. 2001); *see also* Davis v. Bouck, No. 1:20-CV-412, 2021 WL 1169468, at *4 (W.D. Mich. Mar. 29, 2021) ("The Court agrees with the decision in [*Glaspy*] that, for free citizens, the right to urinate in private, i.e. the right to urinate without soiling one's self in public view, is a fundamental one."); West v. Dall. Police Dep't, No. Civ. A. 3–95CV–1347P, 1997 WL 452727, at *6 (N.D. Tex. July 31, 1997) (finding a Fourteenth Amendment right "to urinate or defecate in reasonable privacy," and noting that "there are few activities that appear to be more at the heart of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment than the right to eliminate harmful wastes from one's body away from the observation of others"); Thompson v. Spurgeon, No. 3:13-CV-0526, 2013 WL 2467755, at *3 (M.D. Tenn. June 7, 2013) ("This Court finds *Glaspy* to be instructive under the circumstances presented here, and likewise finds that the plaintiff's allegations, if proven to be true, could be sufficient to establish that both defendants acted with deliberate indifference to the plaintiff's fundamental right to use the restroom.").

[445] *Glaspy*, 134 F. Supp. 2d at 895.

was not allowed to relieve himself while visiting his incarcerated son.[446] In that case, *Glaspy v. Malicoat*, the prison cited a policy that prevented *imprisoned people* from using restrooms during an institutional count.[447] Because the visiting father needed to use the restroom during the count, the prison argued that policy should also apply to him.[448] However, the judge found that the policy did not apply to visitors, or prevent them from using the restroom, particularly when they communicated an emergency need to relieve themselves.[449]

More research should be done on whether (1) the case law prohibiting access to courthouse restrooms has been extended to other kinds of buildings and (2) universities and other non-courthouse buildings run afoul of substantive due process if they prohibit visitors from using restrooms when they are lawfully present on campus for several hours.[450] More definitive answers to these questions could address the *Women in Struggle* court's procedural conclusion that plaintiffs failed to allege "a legal right to access a public restroom when necessary or to be free from discomfort based on the lack of a facility of their choice."[451]

B. In the case of the airport, unisex restrooms were available. Therefore, plaintiffs could have avoided any harm.

Defendant Draper argued that plaintiffs could have avoided the harm of having to choose between risking their arrest or invalidating their identity by using one of the 29 unisex restrooms located throughout the Orlando International Airport.[452]

As explained *supra* Section C.II, the use of a unisex restroom does not cure the harm that results to TGNCI people from being on the receiving end of viewpoint discrimination and compelled speech. These constitutional harms are present in Florida any time a TGNCI person needs to use a public restroom. However, constitutional challenges seeking injunctive relief require a plaintiff for purposes of standing to show an actual or imminent injury before a court determines that a constitutional violation exists.[453] Therefore, litigants should not just rely on the constitutional violations to demonstrate harm, because a court may never reach the merits of a claim. Instead, as discussed

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[446] *Id*. at 892, 895–96.
[447] *Id*. at 892, 896.
[448] *Id*. at 892, 896.
[449] *Id*. at 896 ("Although Malicoat argues that he was just following procedures . . . there was no policy in place that prevented visitor use of restroom facilities during count.").
[450] *See, e.g.*, United States v. Gilbert, 920 F.2d 878, 880–83 (11th Cir. 1991); Poor and Minority Justice Ass'n, Inc. v. Judd, No. 8:19-CV-T-2889-02, 2020 WL 7128948, at *1 (M.D. Fla. Dec. 4, 2020).
[451] Women in Struggle v. Bain, No. 6:23-CV-01887, 2023 WL 6541031, at *4 (M.D. Fla. Oct. 6, 2023).
[452] Defendant Draper's Response, *supra* note 429, at 4–5.
[453] *See* sources cited *supra* note 427 (explaining the standing requirements one must meet for a court to find they are likely to prevail on the merits).

infra Section III.iii, litigants may also want to emphasize how TGNCI people routinely suffer poor mental health outcomes and physical danger in sex-separated restrooms.

C. An attenuated chain of events made enforcement too improbable to be imminent or actual for purposes of standing.

Defendant Draper also emphasized that arrest under the Florida Bathroom Ban required an unlikely chain of events:

> Plaintiffs' allegations of injury in fact are based on their unsubstantiated fear that (1) they will use a certain restroom, (2) they will be noticed by someone as both transgender and in violation of the Act, (3) that person will then notify an employee of [the airport authority], (4) an employee of [the airport authority] will then decide to confront Plaintiffs and ask them to leave, (5) Plaintiffs will refuse, (6) [the airport authority] will then notify law enforcement, and (7) law enforcement will arrest Plaintiffs and charge them with trespass. There is no support that this chain of events is likely to happen. As a consequence, the "threatened injury"—arrest at the hands of Mr. Draper—is not shown to be "certainly impending" or even that there is a "substantial risk" that this will occur.[454]

This hypothetical chain of events may be a feature unique to the Florida Bathroom Ban, but it also reveals how opponents see "arrest" as the only harm that a TGNCI person can face in a non-affirming restroom. Indeed, the court noted that two trans-masculine plaintiffs—Lindsey Spero and Tsukuru Fors—declined to use the men's restroom. Therefore, they did not allege "any actions that would put them at risk of arrest under the statute."[455]

These framings, however, misunderstand how harm for TGNCI people encompasses more than arrest when viewpoint discrimination prevents them from accessing public spaces without fear. News stories describe the violence and harassment imposed on trans men with deep voices and facial hair who use the women's restrooms.[456] Trans women similarly fear violence in either restroom.[457] Finally, some intersex people might keep their variations quiet in the hope that any outward gender conformity will shield them.[458] All of

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[454] Defendant Draper's Response, *supra* note 429, at 5–6.

[455] *Women in Struggle*, 2023 WL 6541031, at *4.

[456] Rekha Basu, Opinion, *When a Transgender Male Used the Women's Room*, Des Moines Reg. (June 11, 2016), https://www.desmoinesregister.com/story/opinion/columnists/rekha-basu/2016/06/11/basu-when-transgender-male-used-womens-room/85694392/ [https://perma.cc/6SXL-CLKQ]; Factora, *supra* note 371.

[457] Watts & Andrew, *supra* note 371.

[458] Knizhnik, *supra* note 411 ("I'm really good at pretending. I've had almost an entire lifetime of practice. It's easy to pretend when everyone makes assumptions about you and you simply fail to correct them.").

these fears are imminent, legitimate, and produce more mental anguish than opponents may realize. Plaintiff Kochan explained how the "fear and anxiety" of using a restroom "begin from the moment I feel the need to go and continue[s] even after I leave the restroom."[459] When one views harm in this light, arrest may not be imminent; but the poor mental health outcomes that come from hypervigilance and the constant fear of discrimination are.[460]

D. Non-TGNCI people may not understand the meaning behind TGNCI expression. Therefore, TGNCI people do not engage in expressive conduct.

Defendant Draper suggested that plaintiffs could not meet the Supreme Court's test for whether symbolic conduct is protected speech. Specifically, Draper argued there is not a "great likelihood" that strangers in the restroom would understand the plaintiffs' message "as an act of protest."[461] This position is inaccurate for two reasons.

First, the Supreme Court has eased the requirements for when expressive conduct is protected speech. No longer do bystanders have to possess a great likelihood of understanding a particularized message. Instead, expressive conduct need only be "intended to be communicative" and "in context . . . reasonably . . . understood . . . to be communicative."[462] A TGNCI person, then, only needs to intend to communicate that societal understandings of sex should include gender identity. That message does not have to be perfectly understood; instead, it only needs to be understood as "communicative" in context. A TGNCI person's use of an affirming restroom accomplishes this goal, particularly when they are noticeably TGNCI.

Furthermore, as discussed *supra* Section II.A.i, TGNCI people are not engaging in protest (speech) when they use an affirming restroom. They are using the restroom, like individuals of every other gender. They also happen to be expressing that gender identity is a valid means for accessing a legally sex-segregated space. Non-TGNCI people also express an idea in the restroom: that birth assigned sex is a valid basis for identifying with a particular sex-segregated space. The act of using an affirming restroom as a TGNCI person

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[459] Declaration of Anaïs Kochan in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order, *supra* note 8, at ¶ 17.

[460] Mayo Clinic, *Health Concerns for Transgender People* , https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/transgender-health/art-20154721 [https://perma.cc/N4V9-38FX]; Elizabeth Boskey, *Health Disparities in Transgender People of Color*, Very Well Health (last updated Jan. 11, 2024), https://www.verywellhealth.com/trans-health-in-people-of-color-5087608 [https://perma.cc/5D4W-UCNA].

[461] Defendant Draper's Response, *supra* note 429, at 8 ("As to the second prong, there is not a great likelihood that the Plaintiffs' purported message would be understood by those who viewed it. There is no information availed by Plaintiffs' Complaint establishing that anyone subject to Plaintiffs' message at [the airport] would understand it as an act of protest.").

[462] Shurtleff v. City of Boston, 596 U.S. 243, 267 (2022) (Alito, J., concurring) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)).

only becomes a protest when the world is infected with TGNCI animus. But this animus distracts from the essential idea that affirming restroom use is an expression of one's identity. People have the right to define that identity and peacefully express it to others. That protection includes gender, and TGNCI people are no exception.

E. If TGNCI people communicate an idea about their gender when they use an affirming restroom, wouldn't cisgender men be able to use the women's restroom and claim they are engaging in expressive conduct related to their gender?

The above logic draws an immediate counterargument: Could cisgender men access the women's restroom and claim that they are engaging in expressive conduct? Specifically, could cisgender men say they intend to send a message that anyone can access the women's restroom if TGNCI people are permitted to use affirming facilities? And that said message would be reasonably understood in the women's restroom because of how noticeably different a cisgender man is? That would seem to be the extension of a doctrine that recognizes affirming restroom use as protected expressive conduct for all genders. The answer to this question is no, for a doctrinal reason: the cisgender man's expressive conduct would be incitement.

The First Amendment usually prevents punishment for incitement when a "clueless speaker fails to grasp his expression's nature and consequence."[463] Yet, if the speaker's words are "intended" to "produce imminent disorder," the incitement is unprotected.[464] A cisgender man would be intending to incite disorder in this scenario: the point of his speech is to create a mockery out of a TGNCI-inclusive restroom policy by frightening people in the women's restroom and producing disorder. A TGNCI person, in contrast, does not intend to cause incitement. They intend to communicate that gender identity is an acceptable way to identify with a sex-segregated space. Their intent is not to disturb people in the space to make that point. They merely want to relieve themselves and go about their day.

Conclusion

The First Amendment is a strong vehicle because it is grounded in doctrine and the challenges that exist are surmountable. TGNCI expression is protected symbolic conduct and embodies the values that help determine First Amendment protection. The erasure bills also represent a clear attempt

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[463] Counterman v. Colorado, 600 U.S. 66, 76 (2023).

[464] *Id.* (citing Hess v. Indiana, 414 U.S. 105, 109 (1973) (*per curiam*)); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–929 (1982).

to silence the viewpoint undergirding much of TGNCI identity and societal participation. Furthermore, these bills coerce people into abandoning their core beliefs when they levy criminal penalties or other fines and punishment. Much work remains to bring a case against anti-TGNCI bathroom legislation that leads with First Amendment theories, particularly in the realm of political education. However, viewpoint discrimination is a doctrine capable of highlighting the dangerous goal that anti-TGNCI movements are pursuing: a legally imposed definition of sex and gender that makes it possible to erase TGNCI identities in numerous contexts.

More trans erasure bills and anti-queer bills generally are expected during the legislative sessions of 2024.[465] Now may be the time for the advocates to take advantage of the First Amendment to explain the complex link between sex and gender: namely, that sex factors such as chromosomes and hormones combine in non-binary ways and impact whether a person identifies with their birth assigned sex (and gender) throughout their life. Attempts to paint sex as physical and gender as psychological misses how gender and gender identity are arguably shaped by the same biological processes that create reproductive anatomy and other features traditionally considered part of one's sex. These TGNCI-exclusionary framings also provide opportunities for courts to dismiss any harms to TGNCI people under the "real differences" doctrine that belongs to the Equal Protection Clause of the Fourteenth Amendment. Therefore, those passionate about human rights cannot wait for the next statehouse assault to pursue alternative avenues of justice for TGNCI people. The Supreme Court has already received two writs of certiorari on these issues,[466] and TGNCI people cannot be asked to hope, once more, for new results from an old doctrine. Every day of their lives, TGNCI people embody the natural variations of human sexuality that "real differences" ignores. Now is the time for the world to see these differences as a form of beauty, not something that needs to be erased.

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[465] Nico Lang, *What's at Stake for LGBTQ+ Rights in 2024?*, THEM (Jan. 2, 2024), https://www.them.us/story/lgbtq-rights-in-2024-what-is-at-stake [https://perma.cc/3FK3-SESX]; Rick Rojas, *In 2024, Expect New Debates on A.I., Gender, and Guns*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/state-legislatures-2024.html [https://perma.cc/3ZQF-TUS5] ("A recent surge of legislation focused on gender expression and sexual orientation, driven by conservative lawmakers across the country, is also widely expected to continue in 2024.").

[466] *See* Chris Geidner, *Trans Care Bans Reach Supreme Court as Tennessee Families Ask Court to Take Case*, LAW DORK (Nov. 1, 2023), https://www.lawdork.com/p/tenn-trans-care-ban-reaches-supreme-court [https://perma.cc/NQA2-S7DA]; Chris Geidner, *Judge Won't Block Idaho Bathroom Ban; Indiana School Asks SCOTUS to Hear a Similar Case*, LAW DORK (Oct. 13, 2023), https://www.lawdork.com/p/idaho-bathroom-ban-indiana-case-scotus [https://perma.cc/3VRB-T4TB].