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An Unconstitutional Tsunami: Predicting the Review of State Legislation Seeking to Prevent Minors from Receiving Gender Affirming Healthcare

Brian W. Courtney

Introduction

Beginning in January 2020, several state legislatures proposed bills aiming to severely restrict transgender youth from receiving gender affirming healthcare. While all of these bills failed to gain traction, state legislators came back with a vengeance in 2021. A whopping 20 bills were proposed, each taking aim at health care for transgender youth. On March 29, 2021, the Arkansas General Assembly enacted House Bill 1570, the first law that prohibits the prescription of gender affirming treatments to those under 18.[1] On April 5, 2021, Arkansas Governor Asa Hutchinson vetoed the bill, stating the legislation was "well intended, but off course."[2] The following day, the Arkansas General Assembly overrode the veto, thus enacting the first prohibition of the use of gender affirming healthcare for minors in the United States.[3]

Arkansas House Bill 1570 purports to protect the health and safety of vulnerable children,[4] but in reality it prevents the use of gender affirming medical treatments for any person under the age of 18.[5] According to the law, "gender transition procedures," as the General Assembly terms them, refer to any medical or surgical service, or prescribed drugs related to gender transition that seek to alter or remove physical or anatomical characteristics or features that are typical for a person's biological sex, or to instill or create physical or anatomical characteristics that resemble a sex different from the individual's biological sex.[6] Specifically,

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[1] Jo Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC News (Mar. 29, 2021, 6:14 PM), https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412.

[2] Maggie Astor, *Asa Hutchinson, G.O.P. Governor of Arkansas, Vetoes Anti-Transgender Bill*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/asa-hutchinson-veto-transgender-bill.html?searchResultPosition=2.

[3] Samantha Schmidt, *Arkansas Legislators Pass Ban on Transgender Medical Treatments for Youths, Overriding Governor's Veto*, Wash. Post (Apr. 6, 2021), https://www.washingtonpost.com/dc-md-va/2021/04/06/arkansas-transgender-ban-override-veto/.

[4] H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 2(1) (Ark. 2021).

[5] *Id.* at § 3, 20-9-1502(a).

[6] *Id.* at § 3, 20-9-1501(6)(A).

House Bill 1570 prohibits the use of puberty suppressants, cross-sex hormones, genital surgery, or non-genital surgery that are used to assist a person with gender transitioning.[7]

There has been a wide push against transgender youth from the Republican party over the last few years, with numerous state legislatures taking aim at transgender youth participating in sports.[8] Following the 2020 election, many state legislatures have seen an increased number of Republican lawmakers in the makeup of their legislative bodies.[9] The next logical step for these Republican-led legislatures to take in this so-called "culture war"[10] would be to limit transgender youths' access to gender affirming healthcare, as evidenced by the rise of proposed laws seeking to limit such treatments over the last year.

The American Psychiatric Association (APA) defines gender dysphoria as psychological distress that a person faces when the sex they were assigned at birth does not match their gender identity.[11] Those suffering from gender dysphoria often experience discrimination, victimization, and stigmatization by their peers, which is linked to increased anxiety, depression, and other mental health disorders.[12] The APA recommends the use of gender affirming hormone therapy, pubertal suppressants, and/or surgical procedures aimed at bringing one's body in line with their gender identity, to treat those suffering from gender dysphoria.[13]

If a state legislature passes a law that prohibits doctors from treating gender dysphoria in minors, or a law that limits parents' ability to consent to the use of such treatments, that

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[7] *Id*.
[8] Jeremy W. Peters, *Why Transgender Girls Are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. Times (Mar. 29, 2021), https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html.
[9] Ally Mutnick and Sabrina Rodriguez, *'A Decade of Power': Statehouse Wins Position GOP to Dominate Redistricting*, POLITICO (Nov. 4, 2020, 9:09 PM), https://www.politico.com/news/2020/11/04/statehouse-elections-2020-434108.
[10] Peters, *supra* note 8.
[11] American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013).
[12] *Id*. at 458.
[13] American Psychiatry Ass'n, *Treatments of Gender Dysphoria*, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited May 1, 2021).

legislation would be in violation of the United States Constitution. Over the last hundred years, the United States Supreme Court has routinely held that parents have a fundamental right to raise their children, which includes, but is not limited to, dictating the religion a child practices,[14] a child's education,[15] and most importantly for this essay, a child's medical treatments.[16] Absent a showing of neglect or abuse, a parent retains a substantial, if not the dominant, role in medical decision-making on behalf of the child.[17] By preventing consenting parents from allowing their children to receive gender affirming healthcare, a state legislature will overstep into an area constitutionally reserved for parents.

This essay aims to anticipate the outcome of a constitutional challenge to the four statutory schemes used by various states in 2020 and 2021. Section I will detail the issues that transgender youth face, and will introduce the reader to types of treatments available to those suffering from gender dysphoria. Section II will identify the four statutory schemes that states proposed in 2020 and 2021. Section III will trace the history of parents' fundamental rights and juxtapose them with the state's *parens patriae* powers. Finally, Section IV will assess the four statutory schemes against parental rights, with the conclusion that these state laws are likely to be deemed unconstitutional.[18]

[14] *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944).
[15] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
[16] Parham v J.R., 442 U.S. 584, 603 (1979).
[17] *Id*. at 604.
[18] This essay will not be discussing a physicians' individual constitutional liberties in prescribing treatments. Instead, this essay focuses solely on a *parent's* constitutional rights, and how prohibitions on physicians from prescribing these treatments are merely attempts to subvert parental rights. In addition, this essay does not discuss the event of a parent and child disagreeing over whether the child should utilize gender affirming treatments, nor does this essay discuss a child's individual right, if any, to said treatments.

Section I: Emotional Tempest – Gender Dysphoria & the Struggles of Transgender Youth

Transgender youth face a multitude of difficulties in their daily lives. According to a Center for Disease Control study of 131,901 students in grades 9-12 from various states and urban areas, transgender youth are at a higher risk than cisgender students to suffer from violence victimization, substance abuse, sexual risks, and suicide.[19] The UCLA School of Law Williams Institute published a study analyzing the results of the U.S. Transgender Survey of 2015, where nearly 28,000 adult transgender individuals responded to a questionnaire regarding suicide.[20] This survey found that 81.7% of respondents have seriously considered suicide at some point in their lifetime, with 48.3% of respondents seriously considering suicide within the past year.[21] Younger transgender people were more likely to report both suicidal thoughts and suicide attempts.[22] Additionally, those who wanted and subsequently received gender affirming hormone or surgical treatment had a significantly lower rate of prior-year suicidal ideation than those who wanted treatments but were unable to receive them.[23]

Transgender minors are significantly more likely to contemplate and attempt suicide.[24] One study analyzing the Profiles of Student Life: Attitudes and Behaviors survey, which collected data from 120,617 youth between the ages of 11-19 from June 2012 to May 2015, found that between 30% and 51% of transgender adolescents reported seriously considering

[19] Michelle M., Johns, et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban Areas, 2017*, 68 no.3 Ctr. for Disease Control and Prevention Morbidity and Mortality Weekly Report 67, 71 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf.
[20] Jody L. Herman, et al., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey* 1 (September 2019) (on file with Univ. California, Los Angeles Sch. of Law), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 3.
[24] Russell B. Tooney, et al., *Transgender Adolescent Suicide Behavior*, 142 no.4 PEDIACTRICS, Oct. 2018 at 1, 6 (2018), https://pediatrics.aappublications.org/content/pediatrics/142/4/e20174218.full.pdf.

suicide or attempting suicide at some point in their lives.[25] This study was one of the first that looked at variations among the transgender population, specifically finding that female-to-male transgender youth are the most likely to have attempted suicide at some point in their lives.[26]

The APA recommends that younger transgender adolescents utilize puberty suppressing treatments, while older transgender adolescents and adults receive the hormone of their gender identity, either estrogen or testosterone.[27] The APA also states that adults, and some adolescents, may benefit from various surgical treatments.[28]

Transgender individuals who want and subsequently receive pubertal suppression treatment are much less likely to face suicidal ideation at any point in their lives than those who wanted to receive pubertal suppression treatment but were unable to receive it.[29] Pubertal suppression has gained momentum as a useful tool in reducing gender dysphoria, because preventing or postponing puberty allows transgender adolescents to explore their identity without facing dysphoria from having sex characteristics incompatible with that identity.[30]

Gender affirming medical treatments carry certain risks, but the benefits of these treatments far outweigh those risks. Transgender females (those assigned male at birth) who are on an estrogen regimen have a higher risk of developing a stroke than cisgender people.[31]

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[25] *Id*.
[26] *Id*.
[27] *Treatments of Gender Dysphoria*, *supra* note 13.
[28] *Id*.
[29] Jack L. Turban, et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 no.2 PEDIATRICS, February 2020 at 1, 5 (2020), https://pediatrics.aappublications.org/content/pediatrics/145/2/e20191725.full.pdf.
[30] *Id*. at 2.
[31] Paul J. Connelly, et al., *Gender-Affirming Hormone Therapy, Vascular Health and Cardiovascular Disease in Transgender Adults*, 74 Iss. 6 Hypertension 1266, 1268 (2019), https://www.ahajournals.org/doi/epub/10.1161/HYPERTENSIONAHA.119.13080.

Additionally, gender affirming hormone treatments elevate the blood pressure levels of both transgender males and transgender females.[32]

Gender affirming surgery, as with any surgery, carries innate risks of infection, but a 2018 study of 240 patients who underwent male-to-female gender affirming surgery concluded that it is a relatively safe surgical procedure, particularly in terms of short-term complications.[33] The study noted that, in accordance with prior research, male-to-female gender reaffirming surgery reoperation rates are quite low, at only between 4.8-9.0%.[34] A study of 247 female-to-male gender affirming surgeries conducted between 2001 and 2017 found that more complications arose than in male-to-female gender affirming surgeries.[35] Infection only occurred in 8.5% of cases, while mechanical failure and patient dissatisfaction occurred in 15.4% and 19.4%, respectively.[36] Even though 43.3% of procedures had some form of complication, 88% of the patients who received the treatment responded that they were satisfied with their new prostheses.[37]

Despite these risks, gender affirming treatments, including hormone therapy, pubertal suppression, and surgery, remain effective tools to alleviate the negative effects of gender dysphoria. A 2018 study of 201 transgender adults reported an increased quality of life directly due to surgery that aligned their physical characteristics with their identity.[38] This finding is

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[32] *Id.* at 1269.
[33] Jason A. Levy, et al., *Male-to-Female Gender Reassignment Surgery: An institutional Analysis of Outcomes, Short-term Complications, and Risk Factors for 240 Patients Undergoing Penile-Inversion Vaginoplasty*, 131 Urology 228, 232 (2019), https://www.sciencedirect.com/science/article/pii/S0090429519305345.
[34] *Id.* at 231.
[35] Marco Falcone, et al., *Outcomes of Inflatable Penile Prosthesis Insertion in 247 Patients Completing Female to Male Gender Reassignment Surgery*, 121 BJUI Int. 139, 142 (2018), https://bjui-journals.onlinelibrary.wiley.com/doi/abs/10.1111/bju.14027.
[36] *Id.*
[37] *Id.* at 143.
[38] Tim C. van de Grift, et al., *Surgical Satisfaction, Quality of Life, and Their Association After Gender-Affirming Surgery: A Follow Up Study*, 44 no.2 J. of Sex and Marital Therapy 138, 139 (2018), https://www.tandfonline.com/doi/pdf/10.1080/0092623X.2017.1326190?needAccess=true.

consistent with a review of studies looking at the quality of life of transgender adults after receiving gender affirming hormone treatment.[39] Additionally, there are significant decreases in depression, stigmatization, and anxiety, among transgender adults who received gender affirming hormone therapy.[40] Taken together, academic research clearly indicates that the benefits of gender affirming healthcare significantly outweigh the risks. Prohibiting consenting parents from seeking treatments for their children will result in higher suicide rates, more anxiety, and lower quality of life among transgender youth.

Section II: Rising Tides – Increased Anti-Transgender Legislation

Various states have attempted to enact laws prohibiting transgender minors from receiving gender affirming healthcare since the early months of 2020. As of May 1, 2021, only Arkansas has successfully voted its anti-transgender bill into law.[41] There have been four statutory schemes proposed by states, with some states utilizing a combination of schemes. The most common scheme seeks to prohibit doctors from prescribing gender affirming medical treatments, which includes pubertal suppression, hormone therapy, and surgeries, and subjecting any doctor who prescribes such treatment to professional misconduct, subject to review by state licensing boards.[42] A professional misconduct review by a licensing board may result in the revocation of the physician's license to practice within the state.[43] The second most common

[39] Jaclyn M. White Hughto and Sari L. Reisner, *A Systemic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals*, 1.1 Transgender Health 21, 30 (2016), https://www.liebertpub.com/doi/pdf/10.1089/trgh.2015.0008.
[40] *Id*. at 29.
[41] Schmidt, *supra* note 3.
[42] *E.g*., H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 2(1) (Ark. 2021); H.B. 401, Gen. Assemb., Reg. Sess. § 1 31-20A-3 (1)-(4) (Ga. 2021) (Introduced Bill 02/10/2021); H.B. 113, 67th Leg., Reg. Sess. § 4 (1)-(2) (Mont. 2021) (Introduced Bill 01/05/2021). H.B. 113 "died in process" on 04/29/2021, http://billtrack50.com/BillDetail/1258740.
[43] *E.g.* MONT. CODE ANN. § 37-3-202; MONT. CODE ANN § 37-3-323 (LexisNexis 2019). Montana requires its Board of Medical Examiners to maintain reasonable and continuing supervision and surveillance over licensees to ensure licensees maintain standards of conduct, and allows the Board to investigate when it learns of professional misconduct. Such investigation may result in suspension of the physician's license.

scheme involves criminalizing the prescription of these treatments, with punishments ranging from misdemeanors to felonies resulting in multiple years in prison.[44] The third scheme involves defining the administering or consenting to the administering of gender affirming healthcare for minors as abuse or neglect, which may result in temporary or permanent loss of legal and or physical custody of the child.[45] The final scheme to prevent transgender minors from receiving gender affirming healthcare was proposed by West Virginia, which sought a blanket prohibition on parents from substituting their consent for the consent of their child in receiving such treatments.[46]

In April 2021, the Arkansas General Assembly enacted House Bill 1570, overriding Arkansas Governor Hutchinson's veto.[47] This Act uses the most common statutory scheme, which subjects any medical professional who provides or refers a minor to receive gender affirming treatments, including pubertal suppressants, hormone therapy, and surgery, to professional misconduct.[48] The Act states various legislative findings by the General Assembly, including that gender dysphoria only affects between 0.005% to 0.014% of biological males, and 0.002% to 0.003% of biological females.[49] The Act recites that the General Assembly is "gravely concerned" that the medical community is "allowing individuals…to be subjects of…irreversible, permanently sterilizing genital surgery, despite the lack of studies showing the

[44] *See e.g.*, H.B. 935, 2021 H.R., Reg. Sess. (Fla. 2021) (Introduced Bill 02/11/21). This bill died in Professions and Public Health Subcommittee on 04/30/2021, http://billtrack50.com/BillDetail/1313925; S.B. 10, 2021 Leg., Reg. Sess. (Ala. 2021) (Introduced Bill 02/02/2021). S.B. 10 was indefinitely postponed on 05/06/2021, http://billtrack50.com/BillDetail/1247206; H. 4047, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (Introduced Bill 03/09/2021).
[45] *See e.g.*, S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021) (Introduced Bill 03/11/2021); H.B. 33, 2021 H.R., Reg. Sess. (Mo. 2021) (Introduced Bill 01/06/2021); H.B. 68, 2021 H.R., Reg. Sess. (N.H. 2021) (Introduced Bill 01/04/2021).
[46] H.B. 4609, 2020 Leg., Reg. Sess. (W.Va. 2020) (Introduced Bill 01/30/2020). This bill died in House Judiciary on 03/07/2020, http://billtrack50.com/BillDetail/1189157.
[47] Schmidt, *supra* note 3.
[48] H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 3, 20-9-1504(a) (Ark. 2021).
[49] *Id*. § 2 (2)(B).

benefit of such extreme intervention outweigh the risks."[50] The Act is enforceable against any medical professional who allows a minor to receive such treatment through professional misconduct charges issued by the state licensing board,[51] as well as through tort claims that parents and children may bring against a medical professional who prescribes or causes to be prescribed one of the prohibited treatments.[52]

In February 2021, the Florida House of Representatives proposed House Bill 935 which aims to make it a crime for any health care practitioner who prescribes, or causes to be prescribed, a gender affirming treatment for a minor for the purpose of affirming the minor's perception of their gender.[53] Similar to the majority of other bills, House Bill 935 also carves out exceptions for minors with a "medically verifiable genetic disorder of sex development."[54] House Bill 935 also proposes to prohibit transgender girls from participating on their school's women's sports teams,[55] further indicating the state legislature's outright attack on transgender youth.

In March 2021, the Texas State Senate introduced Senate Bill 1646, which seeks to amend the state's abuse and abandonment statutes.[56] The bill proposes to define criminal child abuse as administering, supplying, and consenting to the use of pubertal suppressing or hormonal treatments to children for the purposes of gender reassignment,[57] as well as performing or consenting to the performance of surgery or any other procedure for a child for the purpose of

[50] *Id*. § 2 (14).
[51] *Id*. § 3, 20-9-1504 (a).
[52] *Id*. § 3, 20-9-1504 (b).
[53] H.B. 935, 2021 H.R., Reg. Sess. § 1 (3) (Fla. 2021).
[54] *Id*. § 1 (4). Such conditions include a child born with both ovarian and testicular tissue, as well as a child born with having 46 XX chromosomes with virilization, or with 46 XY chromosomes with under-virilization.
[55] *Id*. § 3 (17)(a)(2).
[56] S.B. 1646, 87th Leg., Reg. Sess., § 1, § 2 (Tex. 2021).
[57] *Id*. § 1 (N)(i).

gender reassignment, as abuse.[58] The bill also seeks to amend the state's abandonment statute to include a presumption that a child is placed in imminent danger of death, bodily injury, or physical or mental impairment if a person administers, supplies, consents to, or assists in the administering of pubertal suppressants or hormone treatments, surgery or other medical treatments to the child for the purpose of gender reassignment.[59]

Finally, in January 2020, the West Virginia state legislature sought to prohibit minors and their parents from consenting to gender affirming treatments.[60] The proposed bill limited the use of gender affirming surgeries and gender affirming hormone treatments only to consenting adults,[61] refused to allow a person under 18 years of age to consent to such treatment, and refused to allow parents to substitute their consent for their child's.[62]

Each of these statutory schemes aims to severely restrict transgender youth from receiving treatment they need, as well as restrict parents' rights to choose medical treatments for their children. Despite stated goals of protecting the health and well-being of minors, these statutes would likely have the opposite effect if enacted into law. Transgender youth face many difficulties, and their overall health would be improved with access to gender affirming healthcare.[63] Reduced suicide rates, increased quality of life, and the reduction of the ill effects of gender dysphoria will result if transgender youth gain access to gender affirming treatments. Additionally, these bills would abridge one of the most sacred fundamental liberties: the right of parents to be free from state interference in the care, custody, and control of their children.

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[58] *Id*. § 1 (N)(ii).
[59] *Id*. § 2 (a)(C)(4)-(5).
[60] H.B. 4609, 2020 Leg., Reg. Sess. (W.Va. 2020).
[61] *Id*. § 16-11A-1.
[62] *Id*. § 16-11A-2.
[63] *See e.g.*, Turban, *supra* note 29; Herman, *supra* note 20, at 3.

Section III: Caught in the Crosswind – Parental Rights vs. *Parens Patriae*

Over the last hundred years, the Supreme Court has consistently held that parents have a fundamental liberty interest in raising their children in whatever manner they deem appropriate.[64] A parent is presumed to act in their child's best interests, and a parent's decisions should not be overturned absent abuse or neglect.[65] The Supreme Court has identified a parent's fundamental liberty to raise their child as being the oldest liberty enumerated by the Court.[66]

There have been numerous attempts by states to restrict a parent's ability to make decisions about the upbringing of their children. Early cases typically involved education, such as in *Meyer v. Nebraska*, the seminal case discussing this fundamental liberty.[67] *Meyer* concerned a law prohibiting the teaching of foreign languages to students below the eighth grade.[68] The Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects citizens from deprivation of liberties, which include the right to marry, establish a home, and bring up children.[69] The Court, having not yet developed the strict scrutiny analysis, used a standard similar to rational basis review in deciding this case.[70] Using such analysis, the Court concluded that the statute as applied was arbitrary and without reasonable relation to any state interest.[71] Using a similar analysis, the Court held shortly thereafter that the state may not impose mandatory attendance laws to force children to attend public schools instead of private institutions.[72]

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[64] Troxel v. Granville, 530 U.S. 57, 66 (2000).
[65] Parham v. J.R., 442 U.S. 584, 604 (1979).
[66] *Troxel*, 530 U.S. at 65.
[67] Meyer v. Nebraska, 262 U.S. 390, 396 (1923).
[68] *Id*. at 397.
[69] *Id*. at 399.
[70] *Id*. at 402.
[71] *Id*.
[72] Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

More recently, the Supreme Court has reaffirmed its holding that parents have a fundamental liberty interest in bringing up children.[73] The Court held that statutes allowing any third party to petition the court for visitation unconstitutionally abridged parents' fundamental liberty interest.[74] Justice O'Connor emphasized in the action before the Court, no party asserted, nor did any court find, that the mother was an unfit parent.[75] This was significant, the Court held, because so long as a parent is "fit," or adequately cares for the child, there will normally be no reason for the state to insert itself into this family dynamic and make decisions on behalf of the parent.[76] Significantly, the Court held that the Due Process Clause prohibits a state from infringing on this fundamental liberty simply because a state actor, a state court judge in the case of *Troxel*, believes a better decision could be made on behalf of the child.[77] Special weight must be accorded to a parent's own determinations regarding the upbringing of their child.[78]

The Supreme Court has also recognized and reaffirmed this fundamental liberty interest in the context of medical decisions, holding that parents have a right and a duty to recognize symptoms of illness and seek, as well as follow, medical advice.[79] Parents have the life experience and maturity that children lack, and due to the natural bond to their children, are presumed to act in their best interests in making medical decisions.[80] State courts have also held that the wishes of a parent is a heavily weighted factor to consider even when mature minors attempt to receive, or opt out of, life-saving treatment.[81]

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[73] Troxel v. Granville, 530 U.S. 57, 66 (2000).
[74] *Id*. at 68.
[75] *Id*.
[76] *Id*.
[77] *Id*. at 72-73.
[78] *Id*. at 70.
[79] Parham v. J.*R*., 442 U.S. 584, 602 (1979).
[80] *Id*.
[81] In re E.G., 549 N.E.2d 322, 328 (Ill. 1989).

Although heavily protected by the Due Process Clause of the Fourteenth Amendment, a parent's rights are not absolute. The state, acting through its *parens patriae* powers, may intervene on a child's behalf if the child's health or well-being is seriously jeopardized by a parent's fault or omission.[82]

There are numerous cases where courts have held the state's responsibility as *parens patriae* outweighed parents' fundamental right to the care, custody, and control of their children. One of the earliest *parens patriae* cases was *Prince v. Massachusetts*, which pitted a guardian's religious and parental rights against the state's prohibition on child labor.[83] In *Prince*, the child's guardian gave the child religious pamphlets and instructed her to distribute them to the public.[84] The child's guardian in *Prince* argued that the statute prohibiting such child labor violated her First Amendment right to free exercise of religion, as well as her Fourteenth Amendment parental rights, as the guardian of the child.[85] The Supreme Court held that the state's *parens patriae* powers have a far reach, and a state may restrict the parent's control by requiring school attendance and prohibiting child labor, among other restrictions.[86] The Court specifically noted the evils that child labor fosters, citing the many harms children face in the workforce.[87] Ultimately, the Court held the state's interest in protecting the child from the harms of child labor far outweighed both of the guardian's claimed liberty interests, thus the statute at issue was constitutional.[88]

[82] In re Hofbauer, 47 N.Y.2d 648, 655 (N.Y. 1979).
[83] Prince v. Massachusetts, 321 U.S. 158, 160 (1944).
[84] *Id*.
[85] *Id*. at 164.
[86] *Id*. at 166.
[87] *Id*. at 168.
[88] *Id*.

Many cases subsequent to *Prince* involving the application of *parens patriae* concern parents' withholding of consent for life-saving medical treatments for seriously ill children.[89] The Supreme Court of Delaware developed a useful test in determining whether a child was abused or neglected after his parents withheld medical treatment due to their religion.[90] At the outset, the court held that a state may only intervene when there is clear and convincing evidence that intervening in the parent-child relationship is necessary to ensure the safety or health of the child, or to protect the public at large.[91] The court undertook a test in which the parent's sacred interest in rearing their child,[92] is balanced with the state's interest in protecting its "youngest and most helpless citizens,"[93] and the best interests of the child.[94] The court ultimately held that the best interests of the child were served by remaining in the custody of his parents, and because of the circumstances of the child's disease, namely that it was terminal, the parents were within their rights to reject medical treatment for their child.[95]

The Supreme Judicial Court of Massachusetts decided a case involving the parents of a three-year-old leukemia patient who wanted to supplement chemotherapy with the daily ingestion of laetrile.[96] The court heard testimony from numerous experts who testified that laetrile, which contained large doses of vitamins A and C, as well as enzyme enemas and folic acid, was unlikely to mitigate the effects of the chemotherapy, and might even cause cyanide poisoning.[97] The court held that the state could prohibit the parents from treating their child with

[89] *See* Newmark v. Williams. 588 A.2d 1108, 1109 (Del. 1991); Custody of a Minor, 393 N.E.2d 836, 837 (Mass. 1979); State v. Perricone, 181 A.2d 751, 753 (N.J. 1962).
[90] *Newmark*, 588 A.2d at 1110.
[91] *Id*.
[92] *Id*. at 1115.
[93] *Id*. at 1116.
[94] *Id*. at 1117.
[95] *Id*. at 1120.
[96] Custody of a Minor, 393 N.E.2d 836, 837 (Mass. 1979).
[97] *Id*. at 841.

laetrile, on the grounds that the child's well-being was sufficiently threatened.[98] The Supreme Judicial Court of Massachusetts held that the state can only intervene when it is sufficiently provoked to do so because the parents' medical decisions are unsafe for the child.[99] The court made clear that a drug or treatment will be considered unsafe if the potential for causing death or physical injury is not outweighed by the treatment's therapeutic benefit.[100]

The Supreme Court of New Jersey decided a case involving Jehovah's Witnesses adherents who refused to consent to their infant receiving blood transfusions, in accordance with their religion.[101] The court held that courts are to be guided by the prevailing medical opinion, and because the minor's parents did not present any medical evidence demonstrating significant risk from blood transfusions, the court was bound to require the procedure in order to protect the child's well-being.[102]

Just as a parent's fundamental liberties are not absolute, the state's *parens patriae* powers are subject to limitations. An early Washington Supreme Court case held, absent a showing of a parent's unfitness, the state will never be justified in utilizing *parens patriae* powers to intervene over parental objection.[103] Courts have since expanded a state's ability to intervene, now allowing a state to intervene to ensure a child's health or well-being is not seriously jeopardized by a parent's fault or omission.[104] The Court of Appeals of New York requires parents to exercise a minimum degree of care for children whose physical condition has been impaired or is

[98] *Id.* at 843.
[99] *Id.* at 846.
[100] *Id.*
[101] State v. Perricone, 181 A.2d 751, 753 (N.J. 1962).
[102] *Id.* at 760.
[103] In re Hudson, 120 P.2d 765, 782 (Wash. 1942).
[104] In re Hofbauer, 47 N.Y.2d 648, 654 (N.Y. 1979).

in imminent danger of being impaired.[105] The court noted, however, that great deference is to be shown to a parent's choice in the method of medical treatment to be used.[106]

Although not an overwhelming amount, there has been some caselaw involving parental oversight of transgender minors, though these cases are mainly in situations involving the modification of custody agreements.[107] An Ohio state appellate court addressed a custody dispute among parents with a minor who showed signs of gender dysphoria.[108] The mother, who supported the minor's attempts to transition, never confirmed her at-home diagnosis of gender-identity disorder with a medical professional.[109] Instead, she only relied on her own conclusion that the child suffered from the disorder based on internet research and information from a support group.[110] Holding that information surrounding the minor's gender-related issues was a change in circumstances that allowed the trial court to alter the custody order, the court affirmed the lower court's decision to name the father the parent of primary residential custody.[111] In rejecting the mother's argument that the court was abridging her fundamental liberty to raise her child, the court held that it had the authority to do so because the parties had initiated divorce proceedings, so the court had already been involved in decisions regarding the child.[112] Other state appellate courts have cited lack of medical diagnosis as an important factor in modifying prior custody arrangements.[113] Additionally, the Alaskan Supreme Court affirmed a modification of custody in part due to the mother's "failure to deal with" her child's transgender issues.[114] The

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[105] *Id*.
[106] *Id*. at 655.
[107] *See* Smith v. Smith, 2007-Ohio-1394, 4, 2007 WL 901599 (Ohio Ct. App. 2007); Williams v. Frymire, 377 S.W.3d 579, 590-591 (Ky. Ct. App. 2012); Kristen L. v. Benjamin W., 2014 Alas. LEXIS 111, 7 (Alaska 2014).
[108] *Smith*, 2007 WL 901599 at 1.
[109] *Id*. at 5.
[110] *Id*.
[111] *Id*. at 34.
[112] *Id*. at 27-28.
[113] Williams v. Frymire, 377 S.W.3d 579, 590-91 (Ky. Ct. App. 2012).
[114] Kristen L. v. Benjamin W., 2014 Alas. LEXIS 111, *7 (Alaska 2014).

mother in that case refused to accept her child's desire to appear as female, and utilized physical violence in an effort to force her child to conform to norms of the child's biological sex.[115]

Section IV: Waves Crashing Down – Analyzing the Statutory Schemes

Each of the proposed schemes, if enacted, would violate parents' fundamental liberty interest guaranteed by the Constitution. As the Supreme Court held, special weight must be afforded to a fit parent's decision regarding the care, custody, and control of their child,[116] including the parent's determinations regarding the child's healthcare.[117] The state's *parens patriae* power allows it to intervene in the parent-child relationship, including a parent's ability to make medical decisions on behalf of the child, only when there is clear and convincing evidence that intervention is necessary to prevent significant harm to the child.[118] None of the states that proposed restrictions on gender affirming healthcare have met the incredibly high burden to constitutionally prohibit such treatment.[119]

a) Restrictions and Criminal Penalties Imposed on Physicians

Arkansas House Bill 1570, the only bill which has successfully been enacted into law, violates the constitutional rights of parents. Despite the General Assembly's attempt to prevent doctors from prescribing these treatments, the necessary result of the law is that parents are prohibited from obtaining gender affirming medical care for their transgender children.

A statutory scheme that subjects medical professionals to professional misconduct or criminal penalties likely violates parents' fundamental liberties. By precluding medical professionals from administering this treatment, states vicariously limit the way in which parents

[115] *Id*. at *2-3.
[116] Troxel v. Granville, 530 U.S. 57, 66 (2000).
[117] Parham v. J.R., 442 U.S. 584, 602 (1979).
[118] Newmark v. Williams, 588 A.2d 1108, 1110 (Del. 1990).
[119] *Id*.

can control the upbringing of their children. In *Meyer*, the case which first ruled that parents have a liberty interest in raising their children, the statute at issue precluded teachers in public schools from teaching foreign languages to any student below the eighth grade.[120] The Supreme Court held that this statute vicariously violated parents' Due Process right to control the education of their children, even though the statute forbade the use of foreign languages by teachers in public schools.[121] The Court reasoned that parents' fundamental liberties in the upbringing of their children apply to what is taught in public schools.[122]

Alternatively, a court may view these two schemes through a lens similar to that which the Supreme Court has utilized in the abortion context. The Supreme Court has held that a statute that places an undue burden on women seeking an abortion is invalid.[123] In the abortion context, an undue burden is present when the statute's purpose or effect is to place a substantial obstacle in the path of a woman seeking to abort a fetus before it attains viability.[124] The Supreme Court affirmed this analytic framework in 2016.[125] In *Whole Woman's Health v. Hellerstedt*, the statute at issue required, among other things, physicians to have active admitting privileges in a hospital located less than 30 miles from the site of where the abortion was being performed.[126] Although the state regulated physicians, the Court held that this statute placed an undue burden on the Constitutional rights of women because the restrictions on physicians ultimately led to the closing of nearly half of Texas's abortion clinics, resulting in fewer qualified doctors, longer wait times, and increased crowding.[127] The majority conceded that longer driving times alone are not

[120] Meyer v. Nebraska, 262 U.S. 390, 397 (1923).
[121] *Id*. at 398.
[122] *Id*. at 401.
[123] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).
[124] *Id*.
[125] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016).
[126] *Id*. at 2310.
[127] *Id*. at 2313.

sufficient, although they are relevant to the inquiry as to whether the statute placed an undue burden on a woman seeking an abortion.[128] The Court also held that the law's stringent facility requirements similarly constituted an undue burden on women seeking an abortion.[129]

The undue burden analysis also determines the constitutionality of restrictions on a parent's rights to decide what form of healthcare to give their child, including gender affirming medical treatments. The Due Process Clause of the Fourteenth Amendment guarantees a woman the choice of whether to have an abortion, subject to limitations.[130] Similarly, the Due Process Clause of the Fourteenth Amendment guarantees parents the right to make medical decisions on behalf of their children, also subject to limitations.[131] Because these two fundamental liberty interests stem from the same constitutional foundation, the logical conclusion would be to utilize a similar standard. Under this standard, which a court may adopt from *Planned Parenthood v. Casey* or its progeny,[132] a statute would unduly burden parents when it has the purpose or effect of presenting a substantial obstacle to a parent seeking to treat their transgender child with gender affirming healthcare, including pubertal suppressants, hormone therapy, or surgeries.

The goal of Arkansas House Bill 1570, as well as many other proposed bills which seek to subject physicians to professional misconduct or criminal charges for administering gender affirming treatments, is to prevent parents from choosing those treatments for their transgender children.[133] By prohibiting physicians from prescribing these treatments, these statutes would force parents who wish to treat their transgender children with gender affirming healthcare to seek treatment in neighboring states without such a statute. This is a substantial obstacle that

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[128] *Id*. at 2318.
[129] *Id*.
[130] Roe v. Wade, 410 U.S. 113, 153 (1973).
[131] Parham v J.R., 442 U.S. 584, 603 (1979).
[132] *See e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992); *Whole Women's Health* at 2313.
[133] *See e.g.*, H.B. 1570, 93rd Gen. Assemb., Reg. Sess. § 2(1) (Ark. 2021); H.B. 401, Gen. Assemb., Reg. Sess. § 1 31-20A-3 (1)-(4) (Ga. 2021); H.B. 113, 67th Leg., Reg. Sess. § 4 (1)-(2) (Mont. 2021).

stands between parents and the medical treatments they believe are best suited for their transgender children. If a court chooses to apply the undue burden standard that the Supreme Court has utilized in the abortion context, that court will likely determine the statute is unconstitutional.

b) Charging Parents with Abuse or Neglect for Treating with Affirming Healthcare

A few of the proposed laws utilize a scheme seeking to charge any parent who allows their child to receive gender affirming healthcare with abuse or neglect.[134] Texas Senate Bill 1646, for instance, seeks to amend its family code to define such conduct as abuse and abandonment.[135] This statutory scheme unduly invades a parent's fundamental right to raise a child without a compelling government interest.

The state's *parens patriae* power justifies the enactment of abuse and neglect statutes, and the state's intrusion into the family realm.[136] Abuse and neglect statutes often target conduct of a parent which impairs, or may imminently impair, the physical, mental, or emotional condition of a child.[137] This impairment must result from the parent's failure to exercise a minimum degree of care in supervising the child by unreasonably inflicting or allowing to be inflicted harm or substantial risk of harm.[138] Courts have held that "minimum degree of care" refers to conduct that is grossly or wantonly negligent, but is not necessarily intentional.[139] A guardian fails to exercise a minimum degree of care when he or she knows of dangers inherent in

[134] *See e.g.*, S.B. 1646, 87th Leg., Reg. Sess. (Tx. 2021); H.B. 33, 2021 H.R., Reg. Sess. (Mo. 2021); H.B. 68, 2021 H.R., Reg. Sess. (N.H. 2021).
[135] S.B. 1646, 87th Leg., Reg. Sess. (Tex. 2021).
[136] State v. Perricone, 181 A.2d 751, 758 (N.J. 1962).
[137] *E.g.*, N.J. STAT. ANN. § 9:6-8.21(c)(4)(b) (2021).
[138] *Id*.
[139] G.S. v. Dept. of Human Servs., Div. of Youth and Family Servs., 723 A.2d 612, 620 (N.J. 1999).

a situation and fails to adequately supervise the child or recklessly creates a risk of serious injury to the child.[140]

By attempting to charge a parent who allows their child to receive gender affirming healthcare with abuse, the Texas state legislature goes beyond its *parens patriae* powers. The current law defines abuse as thirteen acts or omissions by a person. They range from mental or emotional injury to a child resulting in observable mental and material impairment to the child's growth, development, or psychological functioning;[141] physical injury or substantial harm to the child, or genuine threat of substantial harm from physical injury to the child;[142] and causing or permitting a child to be photographed if the person knew or should have known that the resulting photograph of the child is obscene or pornographic.[143] Each of these definitions clearly seeks to prevent substantial harm inflicted on the child, and are thus a constitutionally sufficient compelling state interest which would allow the state to interfere in the family.

Texas Senate Bill 1646, on the other hand, aims to define the treatment of minors suffering from gender dysphoria with gender affirming healthcare as abuse.[144] Specifically, the bill aims to penalize anyone who administers, supplies, or consents to the administering or supplying of gender affirming healthcare to minors.[145] Senate Bill 1646 does not list any legislative findings, although the intent behind the enacting of the statute is easily deducible. No other provision in Texas' current or proposed definition of abuse facially prohibits a type of medical treatment or healthcare.[146]

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[140] *Id*. at 622.
[141] TEX. FAM. CODE ANN. § 261.001(1)(A) (West 2019).
[142] *Id*. § (1)(C).
[143] *Id*. § (1)(H).
[144] S.B. 1646, 87th Leg., Reg. Sess., § 1 (Tex. 2021).
[145] *Id*. § 1 (N)(i)-(ii).
[146] *Id*.

In the context of a parent's medical decisions on behalf of their child, abuse and neglect statutes are typically utilized when the parent's decisions neglect to provide the child with proper care or protection.[147] One case, involving Jehovah's Witnesses and their sincerely held beliefs, held that parents abused and neglected their child by refusing to consent to lifesaving blood transfusions.[148] The court noted that the facts of the case were much more dire than the facts of *Prince*, discussed above, as the child in question was facing a life-threatening but treatable illness instead of child labor.[149]

The Supreme Court has held absent a showing of neglect or abuse, a parent has a substantial, if not the dominant, role in deciding the treatment of their child.[150] Parents who wish to see their transgender children given the best healthcare must be afforded that opportunity. It is within their rights to seek this treatment out for their children, and the state lacks a compelling interest to override the parental decision, which in the medical context requires the need to intervene in order to protect the child's health and safety.[151] While there are risks to certain gender affirming treatments, states have a heavy burden to demonstrate the need for intervention in the parent and child relationship.[152] In considering the constitutionality of statutes similar to Texas Senate Bill 1646, a court would likely deem those statutes unconstitutional for the intervention in the relationship without clear and convincing evidence that intervention is necessary to protect the health and safety of the child.[153]

[147] State v. Perricone, 181 A.2d 751, 759 (N.J. 1962).
[148] *Id*. at 760.
[149] *Id*. at 757.
[150] Parham v J.R., 442 U.S. 584, 603 (1979).
[151] Newmark v. Williams, 588 A.2d 1108, 1116 (Del. 1990).
[152] *Id*. at 1110.
[153] *Id*.

c) Prohibiting Children and Parents from Consenting to Gender Affirming Healthcare

In 2020, West Virginia sought to prevent people under the age of 18 from consenting to gender affirming medical treatment of any kind, and prohibit parents from substituting their consent for the consent of their child.[154] This statutory scheme directly violates the mandate of the Supreme Court: wide latitude is to be given to the decisions of fit parents, as the law presumes these parents act in the best interests of their children.[155] The state may intervene in parents' decisions only when the child's physical and emotional well-being is jeopardized.[156]

A state might argue that it is justified in prohibiting transgender youth and their parents from consenting to treatment in the same way that some states have prohibited the use of sexual orientation change efforts (SOCE) on minors. SOCE, commonly known as conversion therapy, is comprised of a variety of methods with the shared goal of changing one's sexual orientation from homosexual to heterosexual.[157] Early tactics for SOCE included forced nausea, vomiting, or paralysis, electric shocks, and having the patient intentionally hurt themselves by slapping a band on their wrist when aroused by homosexual images.[158] More recent methods of SOCE include assertiveness training and social reinforcement to decrease homosexual behaviors.[159]

The federal appellate courts are split on whether states are empowered to enact bans on SOCE, and the Supreme Court has yet to grant certiorari to a case on this issue.[160] The Ninth Circuit Court of Appeals held that parents' fundamental rights to rear their children do not extend to choosing medical treatments that a state has reasonably determined to be harmful or

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[154] H.B. 4609, 2020 Leg., Reg. Sess. (W.Va. 2020).
[155] Troxel v. Granville, 530 U.S. 57, 68-69 (2000). Statutes discussed in Section IV(b), *supra*, appear to re-define parental fitness so that parents who seek this medical treatment are *per se* unfit. As explained therein, the definition of unfitness must reflect a high level of harm to a child. These treatments do not pose such harm. Section I, *supra*.
[156] Parham v J.R., 442 U.S. 584, 603 (1979).
[157] Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir.) *cert. denied*, 573 U.S. 945 (2014).
[158] *Id*.
[159] *Id*.
[160] Pickup v. Brown, 740 F.3d 1208 (9th Cir.) *cert. denied*, 573 U.S. 945 (2014).

ineffective.[161] In *Pickup v. Brown*, parents who wished to send their children to counseling which utilized SOCE filed suit for a preliminary injunction against California's ban on the use of SOCE on children.[162] In holding the statute prohibiting the use of SOCE on minors was constitutional, the court reasoned that parents do not have a constitutional right to submit their children to treatments that a state has reasonably found harmful.[163] Additionally, the Third Circuit agreed with the Ninth Circuit's reasoning in *Pickup*, namely that parents do not have a liberty interest in demanding the state to allow treatments that have been reasonably deemed harmful to children.[164]

Alternatively, the Eleventh Circuit held a district court erred in not issuing a preliminary injunction against ordinances prohibiting the use of SOCE on minors.[165] The court held that the ordinances violated the First Amendment rights of the *therapists* who engage in counseling using SOCE methods, not the rights of parents.[166] The court did not reach a conclusion as to whether parents had a fundamental liberty interest in seeking SOCE "treatment" for their children.[167] In dissent, Judge Martin highlighted the significant harms that SOCE may cause, including exacerbating distress that individuals feel, as well as increasing depression and suicidal thoughts.[168]

Ultimately, the inquiry as to whether a state is within its power to prohibit parents from submitting their children to a certain type a treatment, is whether the state was reasonable in concluding the treatment posed a harm to the minor.[169] West Virginia's proposed statute does not

[161] *Pickup*, 740 F.3d at 1236.
[162] *Id*. at 1225.
[163] *Id*. at 1236.
[164] Doe v. Governor, 783 F.3d 150, 156 (3rd Cir. 2015).
[165] Otto v. City of Boca Raton, 981 F.3d 854, 871 (11th Cir. 2020).
[166] *Id*.
[167] *Id*. at 860.
[168] *Otto*, 981 F.3d at 875 (Martin, J., dissenting).
[169] Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014).

list any legislative findings as to why the legislature felt it was necessary to propose such a prohibition.[170] Numerous empirical studies have demonstrated that the benefits of gender affirming healthcare, in the form of pubertal suppressants, hormone therapy, and surgery, all outweigh the risks associated with gender dysphoria in minors.[171] Therefore, unlike a ban on SOCE, a ban on healthcare for transgender youth cannot be justified by a state claim that such treatments pose an unreasonable harm to children.

Conclusion

The onslaught of legislation aimed at restricting transgender youth from receiving gender affirming healthcare violates parents' constitutional rights. For various reasons, each of the statutory schemes enacted or proposed by state legislatures is impermissible. By prohibiting doctors from prescribing gender affirming healthcare to minors, states unduly burden parents by requiring them to travel out of state for their child to receive such treatment.[172] Without clear and convincing evidence of harm to a child, the state has no grounds to intervene in the parent-child relationship through an abuse or neglect statute.[173] Similarly, without a reasonable conclusion of harm to the child, states have no grounds to prevent parents from consenting to gender affirming healthcare.[174]

As of the writing of this essay, only Arkansas has passed a law that ultimately prevents parents from seeking gender affirming healthcare for their children, but it is likely the first of many. The United States Supreme Court, in reviewing House Bill 1570, or a bill that follows one of the other three statutory schemes, would likely declare it unconstitutional for abridging

[170] H.B. 4609, 2020 Leg., Reg. Sess. (W.Va. 2020).
[171] *See*, *e.g.* Herman, *supra* note 20; Tooney, *supra* note 24; Hughto and Reisner, *supra* note 39.
[172] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016).
[173] Parham v. J.R., 442 U.S. 584, 604 (1979).
[174] Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014).

parents' fundamental liberties. The doctrine of *parens patriae*, although powerful, is not strong enough to wrest care, custody, and control of a child from a parent when that parent is not deemed unfit,[175] or where there is no determination of abuse or neglect.[176]

The states, which claim that these statutes are meant to protect the well-being and safety of children, overlook important data and research which tends to show that transgender minors significantly benefit from gender affirming healthcare.[177] There is clear evidence that adolescents who received gender affirming treatments saw reduced rates of suicides, as well as a marked increased quality of life.[178] Despite the Illinois state legislature's conclusion otherwise,[179] transgender children exist. This lack of acknowledgement and outright persecution of transgender youth significantly contributes to the issues that they face in their daily lives. Numerous transgender children and their parents have testified at legislative hearings, begging to be seen and heard.[180] These children and their parents have received death threats for having the courage to publicly testify.[181] States should not, and cannot, override a fit parent's decision in treating their child absent a showing of significant harm to that child.[182] Clear and convincing evidence of significant harm to the child is required in order for a state to intervene in in the parent-child relationship.[183] Research has shown that gender affirming hormone therapy does not

[175] Troxel v. Granville, 530 U.S. 57, 68-69 (2000).
[176] *Parham*, 442 U.S. at 604.
[177] *Supra*, note 171.
[178] *See e.g.* Falcone, *supra* note 35, at 144; van de Grift, *supra* note 38, at 147; Turban, *supra* note 29, at 7; Levy, *supra* note 33.
[179] H.B. 3515, 101st Gen. Assemb., §5(31). (Il. 2020) ("Our central contention is that transgender children don't exist").
[180] Daniel Villarreal, *Transgender 4th Grader Kai Shappley Gets Death Threats After Testifying Before Texas Legislature*, Newsweek (Apr. 21, 2021, 7:41 PM), https://www.newsweek.com/transgender-4th-grader-kai-shappley-gets-death-threats-after-testifying-before-texas-legislature-1585571.
[181] *Id*.
[182] Newmark v. Williams 588 A.2d 1108, 1110 (Del. 1991).
[183] *Id*.

pose a serious risk to minors,[184] and any state that prohibits the use of such will abridge a right the Supreme Court has held to be sacred.[185]

[184] *Supra*, note 178.
[185] Troxel v. Granville, 530 U.S. 57, 65 (2000).