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## Trans Bodies, Trans Speech

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## Trans Bodies, Trans Speech

Parker Rose Wingate<sup>†</sup>

*Abstract:* Over the last decade, the acceptability of the very existence of transgender people became a hot-button issue in American politics. A bevy of litigation regarding access to gender-affirming care has ensued. Using medical science to alter one’s appearance is not a new concept, but today legislatures and courts scrutinize such care with renewed vigor, arguing a need to regulate the ways with which citizens may use established medical intervention to change their appearance. This scrutiny manifests itself in bans on various forms of gender-affirming care for transgender people, predominantly transgender youth. In response, this Article examines a nascent theory of the right to gender-affirming care: gender-affirming healthcare as symbolic speech protected by the First Amendment.

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## I. Introduction

This Article argues that the act of gender expression through receiving gender-affirming health care as part of a gender transition is symbolic speech recognized by the First Amendment under a novel theory of symbolic speech doctrine. An examination of the relevant case law interpreting similar questions of symbolic speech protection demonstrates a clear connection between First Amendment speech rights of gender expression, queer identity expression, and self-expression through body modification. Courts across the nation now recognize free speech interests in things like body piercing, gender-expressive clothing, and LGBT-expressive speech. The extension of this logic leads to the conclusion that the Constitution must recognize a First Amendment symbolic speech right in pursuing gender-affirming care<sup>1</sup> to express one's gender identity.

This Article is divided into five parts. Part I summarizes the most recent wave of anti-transgender legislation and what it means for the transgender community. It then discusses the singular case in which a judge has briefly noted the merits of arguing for symbolic speech

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1. Gender-affirming care is healthcare that brings one's bodily presentation closer to that of their gender identity, including hormone treatment, surgery, vocal training, hair removal, and more. "Transgender" (or simply "trans") means having a gender identity that differs from that assigned at birth. "Cisgender" (or simply "cis") means having a gender identity that matches that assigned at birth.

protection for gender-affirming care.<sup>2</sup> Part II illustrates the relevant First Amendment doctrine regarding symbolic speech, discusses the implications of an ongoing circuit split regarding the test for protected symbolic speech, and explains the constitutionality of governmental restrictions on symbolic speech. Part III introduces the relevant case law on gender-expressive speech of transgender (trans) people, LGBT-expressive speech, body modification as speech, and third-party standing for First Amendment speech claims. Part IV sets forth and evaluates the doctrinal argument for protecting gender-affirming healthcare—specifically for trans people—as symbolic speech under the First Amendment, examining the constitutionality of a ban on gender-affirming care. It further discusses the double standard regarding access to gender-affirming and gender-expressive healthcare for cis and trans people. Part V concludes that there is a strong First Amendment interest in gender-affirming healthcare.

#### A. *The Current Wave of Anti-Trans Legislation*

In the 2015 *Obergefell v. Hodges* decision, the Supreme Court affirmed marriage as a right for same-sex couples, marking a monumental legal and cultural victory for the LGBT community.<sup>3</sup> Since *Obergefell*, opponents of LGBT civil rights have shifted focus from sexual orientation to gender identity.<sup>4</sup> They have recently proposed dozens of bills seeking to restrict transgender freedoms, mostly in Republican-dominated states.<sup>5</sup> Multiple states have passed laws restricting youth access to

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2. See *Vuz v. DCSS III, Inc.*, No. 3:20-CV-00246-GPC-AGS, 2020 WL 7240369 (S.D. Cal. Dec. 9, 2020).

3. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

4. See Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 655 (2020) (“By far, the majority of new anti-LGBT legislation and policy is directed at transgender people . . .”).

5. See *id.* at 651 (describing the recent wave of legislation restricting transgender freedoms and explaining that these policies are primarily seen in “red states” and under Republican administrations); *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map> [<https://perma.cc/F3ZK-HR3V>] (May 8, 2023) (showing that thirty states have passed or considered a law or policy banning gender-affirming care for minors, and, as of April 3, 2023, tracking more than 110 bills across the country that would “limit or prevent transgender people from accessing gender-affirming care”). Since the first draft of this Article was written, many additional such bans have been proposed or enacted, and some also curtail gender-affirming care regardless of age. See, e.g., MO. CODE REGS. ANN. tit. 15, § 60-17.010 (2023) (drastically curtailing eligibility for gender-affirming care for transgender people in the state of Missouri, by Emergency Rule); Steve Gorman, *Montana Governor Signs Bill Banning Transgender Medical Care for Youths*, REUTERS (Apr. 29, 2023) <https://www.reuters.com/world/us/montana-governor-signs-bill-banning-transgender-medical-care-youths-2023-04-29/> [<https://perma.cc/664T-7Y92>] (discussing Montana’s recent ban on gender-affirming care for trans youth, as well as the concurrent censure of transgender Representative Zoey Zephyr for speaking against the ban).

gender-affirming healthcare, falsely claiming transgender healthcare is too new to be sure of its safety or efficacy,<sup>6</sup> when in reality gender-affirming care (both for trans adults and youth) has been in practice for decades.<sup>7</sup> While the specific rights targeted have varied over the years,<sup>8</sup> the overall trend paints a picture of coordinated anti-trans actors using the legal system to make life for transgender people more difficult.<sup>9</sup>

These anti-trans bills have begun to significantly encroach into trans people's ability to access gender-affirming healthcare. Already, there have been laws criminalizing aspects of gender-affirming healthcare use, with Texas Governor Greg Abbott going so far as to issue an executive order to child protection officials in Texas to investigate and possibly prosecute parents for helping their children seek gender-affirming care, even from licensed clinicians.<sup>10</sup> Several states are considering bills that would ban gender-affirming care for transgender people up to twenty-six years old.<sup>11</sup>

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6. See *Map: Attacks on Gender Affirming Care by State*, *supra* note 5 (showing seventeen states have passed a law or policy banning gender-affirming care for minors, though court injunctions in three of these states have ensured continued access to gender affirming care).

7. Though perhaps new to the public eye, gender-affirming care dates at least as far back as the founding of the Institute for Sexual Science by Dr. Magnus Hirschfeld in Berlin, circa 1920, when early forms of hormone replacement therapy (HRT) and gender-affirming surgeries were successfully administered to treat gender dysphoria. See Molly Nunn, *Transgender Healthcare Is Medically Necessary*, 47 MITCHELL HAMLINE L. REV. 605, 612–14 (2021) (discussing the history of the Institute for Sexual Science). In the United States, trans patients have been prescribed gender-affirming care such as HRT since at least 1949. See Joanne Meyerowitz, *Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States, 1930-1955*, 4 J. LESBIAN & GAY STUD. 159, 171 (1998) (discussing the case of Miss Lynn Barry, a transgender medical patient). The American Medical Association (AMA) considers gender-affirming care “medically-necessary, evidenced-based care” and opposes restrictions on access to it. *AMA Reinforces Opposition to Restrictions on Transgender Medical Care*, AM. MED. ASS'N (June 15, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-reinforces-opposition-restrictions-transgender-medical-care> [<https://perma.cc/GT3P-8M49>] (quoting AMA board member Michael Suk, MD).

8. For an in-depth discussion of the recent trend toward restricting the rights of transgender youth, see *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors: Chapter One*, 134 HARV. L. REV. 2163 (2021).

9. See Knauer, *supra* note 4, at 619; see also Erin Reed, *2600 Leaked Anti-Trans Lobbyist Emails Show Fundamentalism, Not Evidence, Is How First Anti-Trans Bills Were Drafted*, ERIN IN THE MORNING (Mar. 10, 2023), <https://www.erininthemorning.com/p/2600-leaked-anti-trans-lobbyist-emails> [<https://perma.cc/7BRC-PE4A>] (“While anti-trans experts have tried to argue that the bills that target the transgender community are being written using ‘science’ and ‘evidence,’ the disturbing message behind the scenes is clear: the attacks on transgender rights are crafted with religious motivation and political calculations that have no ties to evidence whatsoever.”).

10. *ACLU, Lambda Legal Sue to Block Texas from Investigating Parents Who Support Their Transgender Kids*, ACLU (Mar. 1, 2022), <https://www.aclu.org/press-releases/aclu-lambda-legal-sue-block-texas-investigating-parents-who-support-their-transgender> [<https://perma.cc/D7AJ-KSSQ>].

11. See, e.g., *Map: Attacks on Gender Affirming Care by State*, *supra* note 5 (stating that

To date, civil rights litigators have had success defending gender-affirming healthcare with theories grounded in Substantive Due Process, the Equal Protection Clause, and the Eighth Amendment.<sup>12</sup> With gender-affirming healthcare vital to transgender health and happiness, including its vital role in preventing suicidality,<sup>13</sup> however, a discussion of why a good-faith reading of the First Amendment and its case law protects gender-affirming care is warranted, as it only makes sense to bring all potential ammunition to the battlefield. Such a discussion must begin with a brief history of the first case to ever mention the idea of such an argument.

### B. *The Vuz Case*

The prospect of First Amendment symbolic speech protection for gender-affirming care has yet to be studied at length, and no academic or legal sources have yet discussed the implications of symbolic speech doctrine for bans on such care. Notably, however, one court in California approved of the framing of gender transition as an aggregate of behaviors, clothing choices, and gender-affirming surgery, and that this gender expression conduct could constitute symbolic speech protected under the First Amendment.<sup>14</sup>

In *Vuz v. DCS III, Inc.*, a trans woman sued the local jail for allegedly burdening her protected gender expression and retaliating against her First Amendment right to express her gender identity through gender transition.<sup>15</sup> The plaintiff claimed that she “conveys the message of her

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as of May 8, 2023, these states include Oklahoma, Texas, and South Carolina).

12. See *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022) (enjoining a ban on gender-affirming care for youth due to violations of Equal Protection and Substantive Due Process rights); see also *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (holding that a prison official’s denial of gender-affirming surgery to a transgender prisoner was a violation of the Eighth Amendment).

13. See, e.g., Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David Inwards-Breland & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN e220978 (2022) (finding that after receiving gender-affirming care, trans and nonbinary youth had 60% lower odds of depression and 73% lower odds of suicidality); Amy E. Green, Jonah P. DeChants, Myeshia N. Price & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643 (2022) (reporting significant improvement in the mental health of trans youth with the provision of requested gender-affirming healthcare); Hillary B. Nyugen, Alexis M. Chavez, Emily Lipner, Liisa Hantsoo, Sara L. Kornfield, Robert D. Davies & C. Neill Epperson, *Gender-Affirming Hormone Use in Transgender Individuals: Impact on Behavioral Health and Cognition*, 20 CURRENT PSYCHIATRY REPS. 1 (2018) (finding significantly improved mental health in trans youth and trans adults following treatment with gender-affirming care in the form of hormones).

14. See *Vuz v. DCSS III, Inc.*, No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at \*5–6 (S.D. Cal. Dec. 9, 2020).

15. *Id.*

feminine gender identity, contrary to any masculine gender identity that may be forced upon her, by wearing women's apparel, styling herself in a feminine manner, *undergoing cosmetic surgeries to feminize her appearance*, and maintaining feminine mannerisms."<sup>16</sup>

Noting a parallel with precedent based on appearance-based expression,<sup>17</sup> the court found that the "Plaintiff has pled sufficient facts to support her claim that this conduct is intended to convey a particular message—her feminine gender identity—and that that conduct is likely understood as conveying that message."<sup>18</sup> Unfortunately, the strength of this claim, particularly the gender-affirming surgery portion of her gender expression, was not further evaluated because the court dismissed the claim on other grounds.<sup>19</sup>

The *Vuz* case demonstrates the viability of a symbolic speech claim for gender-affirming care, but its early dismissal means a more robust discussion of the merits of such a claim is still warranted. The *Vuz* opinion never discussed the strength of plaintiff's gender-affirming cosmetic surgery claim, and the case did not involve a ban on such gender-affirming care. This Article sets out to prove that the judge in *Vuz* was correct to accept feminizing cosmetic surgery as part of a claim for protected symbolic speech. This Article will further argue that such a claim would withstand scrutiny even outside a framing of gender transition as an aggregate of gender expression conduct.

## II. Symbolic Speech Doctrine

### A. *The Spence-Hurley Test*

The first step for a plaintiff seeking constitutional protection from governmental action is to establish that a fundamental right is involved.<sup>20</sup> If a fundamental right is not at issue, the reviewing court will apply the highly deferential rational basis test,<sup>21</sup> and the plaintiff is far more likely

16. *Id.* (emphasis added).

17. *See id.* at \*5 (citing *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 704 (N.D. Miss. 2010)) ("The reasoning of the district court in *McMillen v. Itawamba County School District* supports, rather than undermines, Plaintiff's argument. There, the district court found that the plaintiff intended to communicate her view 'that women should not be constrained to wear clothing that has traditionally been deemed "female" attire[.]").

18. *Id.*

19. *Id.* at \*6 (finding plaintiff failed to plausibly allege that defendants' actions burdened her expression of gender identity, as she would have been transferred to the men's jail regardless of her gender expression).

20. *See, e.g., Romer*, 517 U.S. 620 (1996); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that privacy is a fundamental right, and discussing other fundamental rights that are not explicitly enumerated in the Constitution).

21. *See, e.g., Romer*, 517 U.S. at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a

to be denied constitutional protection.<sup>22</sup> This Article proposes that a fundamental right at issue in a ban or limitation on gender-affirming care is the freedom of speech guaranteed by the First Amendment.<sup>23</sup>

Symbolic speech—non-verbal conduct conveying an intended message—is generally protected by the First Amendment’s free speech clause.<sup>24</sup> This protection, however, is subject to the possibility of the government’s valid interest in restricting the underlying conduct.<sup>25</sup> Essentially, the government may not restrict symbolic speech itself, but it may restrict underlying conduct if done for purposes unrelated to suppressing speech.<sup>26</sup>

When determining if a given pattern of conduct is entitled to protection as symbolic speech, a court will apply the *Spence* test (sometimes called the *Spence-Hurley* test). This test was created by the Supreme Court in *Spence v. Washington*.<sup>27</sup> In *Spence*, a college student was convicted of violating a criminal statute that forbade the alteration of the American flag.<sup>28</sup> The student appealed his conviction to the Supreme Court, arguing his alteration of the flag was protected symbolic speech.<sup>29</sup>

Reversing the conviction, the Court ruled that symbolic speech is protected by the First Amendment’s free speech clause when “[an] intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who [view] it.”<sup>30</sup> Thus, symbolic speech is protected pursuant to a two-part test: a plaintiff must show (1) an intent to convey a particularized message and (2) a great likelihood those receiving the message will understand it given the circumstances.

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rational relation to some legitimate end.”); *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) (“[Where a] policy does not implicate any fundamental right, we review it under the rational basis standard.”).

22. See, e.g., Aaron Belzer, *Putting the “Review” Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 340 (2014) (describing the current rational basis standard as “an extraordinarily deferential standard by any measure”).

23. See U.S. CONST. amend. I; *Schneider v. State of New Jersey*, 308 U.S. 147, 150 (1939) (“This court has characterized the freedom of speech . . . as [a] fundamental personal right[.]”).

24. See BARBARA J. VAN ARSDALE ET AL., 16A AM. JUR. 2D CONSTITUTIONAL LAW § 528 (2023). But see *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

25. RALPH C. CHANDLER, RICHARD A. ENSLEN & PETER G. RENSTROM, CONSTITUTIONAL LAW DESKBOOK § 8:112 SYMBOLIC SPEECH (2022).

26. See *infra* Section II.B.

27. See *Spence v. Washington*, 418 U.S. 405 (1974).

28. *Id.* at 405.

29. *Id.* The student had affixed a large peace symbol made out of tape on the flag. *Id.*

30. *Id.* at 410–11.



The *Spence* test was modified by the Supreme Court's subsequent decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.<sup>31</sup> In *Hurley*, a private parade organizer challenged a ruling which required the organizer to allow a group of LGBT Irish marchers to join the organizer's St. Patrick's Day Parade.<sup>32</sup> The organizer argued the forced inclusion of the LGBT marchers was unconstitutionally compelled speech, and the Court agreed.<sup>33</sup> The Court's ruling modified the application of the *Spence* test—relaxing the particularized-message aspect—allowing for protection where symbolic speech expresses more vague, hard-to-articulate messages. The Court asserted that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock.”<sup>34</sup> Therefore, the Supreme Court held that a private speaker's action does not lose First Amendment protection just because it contains “multifarious voices” or fails to have an isolated, “exact message as the exclusive subject matter of the speech.”<sup>35</sup>

While the Court's relaxation of the message requirement may make for a more speech-protective symbolic speech doctrine in general, the *Hurley* holding has created a circuit split due to the difficulty lower courts have had in applying *Hurley* to the *Spence* factors.<sup>36</sup> While the circuit split regarding the exact interpretation of the *Hurley* decision's effect on *Spence* is significantly more complex,<sup>37</sup> this Article is primarily focused on the Second and Eleventh Circuits' interpretations (the latter of which is also joined by the Sixth and Ninth Circuits).<sup>38</sup>

The Second Circuit has essentially left the *Spence* test unchanged.<sup>39</sup> This interpretation of the *Spence-Hurley* test is the most difficult version for plaintiffs to satisfy, and it has been criticized for being neither faithful to the text of the *Hurley* decision nor helpful for free speech policy

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31. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

32. *Id.* at 557.

33. *Id.* at 581.

34. *Id.* at 569 (internal citations omitted). Jackson Pollock is a painter known for abstract expressionism. See, e.g., Francis Valentine O'Connor, *Jackson Pollock*, ENCYC. BRITANNICA (Apr. 30, 2023), <https://www.britannica.com/biography/Jackson-Pollock> [https://perma.cc/7MPC-WLB].

35. *Hurley*, 515 U.S. at 569–70.

36. See Sandy Tomasik, *Can You Understand This Message? An Examination of Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston's Impact on Spence v. Washington*, 89 ST. JOHN'S L. REV. 265, 271–76 (2015).

37. See *id.* (detailing how the Sixth and Ninth Circuits, the Eleventh Circuit, the Third Circuit, and the Second Circuit have all interpreted *Hurley's* application to *Spence*).

38. See *id.* at 276–81 (arguing that the Sixth, Ninth, and Eleventh Circuits have similarly interpreted *Hurley's* liberalization of the first *Spence* factor).

39. See *id.* at 275–76, 286–88 (discussing the Second Circuit's interpretation of *Hurley*).

outcomes.<sup>40</sup> This stricter standard for achieving protection as symbolic speech is useful for analyzing the strength of this Article’s argument, as it poses the highest burden on the plaintiff for establishing such a claim.

In contrast, the Eleventh Circuit has relaxed the first factor of the *Spence* test.<sup>41</sup> “In the Eleventh Circuit, the new test would be whether a reasonable person would understand *some sort of message*, not whether an observer would necessarily infer a specific message.”<sup>42</sup> Broadly, this interpretation avoids the sort of problem alluded to in *Hurley*’s mention of abstract Jackson Pollock paintings: the original *Spence* test arguably failed to protect “speech where the audience does not understand the exact same message the actor intends to convey.”<sup>43</sup>

This Article will analyze these two key approaches for identifying protected symbolic speech: one stricter, and one more liberalized. In the Second Circuit version, the speaker must have an intent to convey a particularized message which the audience is likely to understand. In the Eleventh Circuit version, the speaker must intend to convey a particularized message and the audience must understand that some message was expressed. This Article argues that gender-affirming care satisfies the stricter Second Circuit version of *Spence*—eliminating the need to argue for a more lenient standard like the Eleventh Circuit interpretation. Nonetheless, the Eleventh Circuit’s emphasis on protection, even where a speaker’s exact message is not necessarily understood, would be especially helpful for cases involving gender-affirming care that clash with the traditional male-female binary, which may be particularly relevant for cases involving non-binary plaintiffs.

#### B. Regulation of Protected Symbolic Speech — The O’Brien Test

Once a court determines some regulated conduct is protected as symbolic speech, it must then determine whether the regulation burdening this symbolic conduct is nonetheless constitutional.<sup>44</sup> A court first must determine whether the regulation is an incidental regulation of symbolic conduct or content-based discrimination, as this determines the level of scrutiny to which the governmental action will be subjected: intermediate or strict scrutiny.<sup>45</sup> Essentially, “[a]s a threshold matter, a

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40. *See id.*

41. *Id.* at 273–74, 276–81.

42. *Id.* at 277 (emphasis added).

43. *Id.* at 278.

44. *See, e.g.,* *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (noting that the “[t]he First Amendment does not protect the ‘apparently limitless variety of conduct [that] can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’”).

45. *See* Hannah H. Porter, *Tattooist v. Tattoo: Separating the Service from the Constitutionally Protected Message*, 2012 B.Y.U. L. REV. 1071, 1078–79 (2012). Note that the

regulation of symbolic conduct must not aim directly at the regulated conduct's expressive elements but rather may impose only an incidental limitation on the First Amendment. Otherwise, the regulation is content-based discrimination subject to strict scrutiny."<sup>46</sup> A regulation is more likely to be found as an incidental limitation where it is "not seeking to limit the message but rather the way that the message is conveyed," and the "governmental interest is unrelated to the suppression of free expression."<sup>47</sup> In such cases, the regulation would be scrutinized under a form of intermediate scrutiny, the *O'Brien* test.

In *United States v. O'Brien*, *O'Brien* claimed that the act of burning his draft registration certificate was protected symbolic speech, as his conduct communicated that he was against the Vietnam War and the draft.<sup>48</sup> The Supreme Court accepted for the sake of argument that *O'Brien's* conduct was expressive, but it determined that restrictions on symbolic conduct that are not content-based may still be constitutional if they survive a form of intermediate scrutiny.<sup>49</sup> In this case, the Court determined the government's regulation was not content-based, so intermediate scrutiny applied.<sup>50</sup> Under the *O'Brien* test, an incidental governmental burden on symbolic speech is valid only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>51</sup> In *O'Brien* itself, the

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determination of which level of scrutiny to apply to a constitutional challenge based on "pure speech" is distinct; symbolic conduct is not "pure speech," as "it necessarily combines both speech and nonspeech elements." *Id.* at 1078.

46. *Id.* at 1078-79 (footnote omitted); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 25-28 (2010) (applying strict scrutiny to a statute that purportedly regulated only plaintiffs' conduct; "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message").

47. *Porter*, *supra* note 45, at 1079; see, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570-71 (1991) (finding that a prohibition on nudity as applied to erotic dance performances was not related to the suppression of free expression; the state's regulation prevented public nudity in all places, and dancers could still perform and convey an "erotic message" while wearing some amount of clothing).

48. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

49. See *id.* at 376-77.

50. *Id.* at 381-82 (finding that the government did not regulate *O'Brien's* conduct "because the communication allegedly integral to the conduct is itself thought to be harmful[;]" rather, it was the conduct of destroying the draft registration certificate that *itself* was harmful and targeted by the regulation, not any message that conduct might convey).

51. *Id.* at 377; see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (2010) (citing *O'Brien*, 391 U.S. at 377) ("[A] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

Court found that the statute criminalizing O'Brien's expressive conduct satisfied this standard.<sup>52</sup>

It seems likely, but far from certain, that a court would determine a ban on gender-affirming care to be an incidental limitation on symbolic conduct as opposed to content-based discrimination and apply the *O'Brien* test. It would be easy enough for legislators to write a statute, even one passed with discriminatory purpose, as an incidental regulation, and courts are often unwilling to look into the intent of facially neutral legislation where a valid interest arguably exists.<sup>53</sup> This problem is particularly acute in the case of gender-affirming care bans because health care is a practice with obvious basis for state regulation,<sup>54</sup> and gender-affirming care is, of course, a form of health care.<sup>55</sup> State legislators could craft statutes that make the provision of gender-affirming care effectively banned by way of onerous regulation, rather than by a simple blanket prohibition,<sup>56</sup> making legal analysis of the intent and burden of these statutes particularly complex. Thus, the mere existence of a valid, important interest in state regulation of medicine could likely be enough to argue incidental limitation in the case of statutes pertaining to gender-affirming care, leading to the application of

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52. See *O'Brien*, 391 U.S. at 382 (finding that the government had a substantial interest in "assuring the continuing availability" of draft certificates, the statute was the narrowest means of protecting this interest, and the statute "condemns only the independent noncommunicative impact of conduct within its reach").

53. See, e.g., *Barnes*, 501 U.S. at 582–83 (1991) (Souter, J., concurring) ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.").

54. See generally Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 202–22 (1999) (describing the United States' historical regulation of the practice of medicine through the states' policed power to enact laws pertaining to public safety and health).

55. Cf. Transgender Legal Def. & Ed. Fund, *Medical Organization Statements*, TLDEF'S TRANS HEALTH PROJECT: WORKING FOR TRANSGENDER EQUAL RTS, <https://transhealthproject.org/resources/medical-organization-statements/> [<https://perma.cc/D2M8-86S4>] (providing links to statements from numerous medical organizations that recognize the medical necessity of gender-affirming care and endorsing such treatments).

56. Cf. Nicole Huberfeld, *Returning Regulation to the States, and Predictable Harms to Health*, SCOTUSBLOG: SYMP. (June 30, 2022), <https://www.scotusblog.com/2022/06/returning-regulation-to-the-states-and-predictable-harms-to-health/> [<https://perma.cc/L3QM-HJ9>] (discussing state laws relating to abortion care and how some states are drastically limiting access to such care through "onerous and unnecessary regulations"); *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023), <https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs#.ftnref6> [<https://perma.cc/ZWL9-Y5XU>] (noting that states which have imposed heavy restrictions on abortion care have made this care "often totally inaccessible").

intermediate scrutiny. As this Article will illuminate, however, a ban on gender-affirming care should not pass the *O'Brien* test.

### III. Previously Protected Speech

While no court has fully evaluated the right to pursue and receive gender-affirming care under a symbolic speech theory,<sup>57</sup> courts across the country have ruled on related issues of gender and LGBT identity expression, physicians' free speech rights to provide or refer patients for gender-affirming care, and body modification.<sup>58</sup> These cases together can serve as a guide for assessing the present question.

#### A. Gender and LGBT Identity Expression

Courts have on several occasions indicated that the gender expression of transgender people—largely in terms of choice of dress—can be protected under the First Amendment's free speech clause. One of the most notable cases, *Doe ex rel. Doe v. Yunits*, involved a transgender student in a Massachusetts public school.<sup>59</sup> When the student (referred to as Doe) transitioned from male to female during her seventh grade school year, she began to dress in feminine clothes and wear makeup during school hours.<sup>60</sup> The school forbade her behavior, often sending her home to change, citing the dress code's prohibition on disruptive clothing.<sup>61</sup> The student's treating therapist determined that it was

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57. Again, the *Vuz* court dismissed the plaintiff's case on other grounds before properly evaluating the merits of such an argument. See *Vuz v. DCSS III, Inc.*, No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at \*6 (S.D. Cal. Dec. 9, 2020). Additionally, one journal article has mentioned the possibility of symbolic speech protection for gender-affirming surgery, but this possibility appeared only in a brief footnote. See Charles Thomas Little, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUT. & INFO. L. 315, 333 n.118 (2006) ("Arguably, [gender-affirming surgery] is a form of symbolic expression, as it manifests one's emotions and thoughts pertaining to gender.").

58. This Article does not delve into the litigation revolving around the Trump-era military ban on trans enlistees. While this controversy garnered much attention, it is of little use to this analysis. The Biden Administration unilaterally withdrew the policy before the courts came to a conclusion on the merits of the issue, so legal analysis on this issue was never resolved. See Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021). For a detailed analysis of the litigation, see Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 426–32 (2021).

59. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000). Cases where the speech in question concerns a minor in a public school setting should be viewed as particularly strong precedent where the plaintiff succeeds, as the government is given great deference in regulating speech in the public classroom, especially with younger students. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

60. *Yunits*, 2000 WL 33162199, at \*1.

61. *Id.*

“medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff’s mental health,” yet during her eighth grade school year, the principal required the student to come to his office every day to approve her appearance, sometimes sending her home to change.<sup>62</sup> Due to this treatment, the student missed so much school that she needed to repeat the eighth grade; the school told the student that she would not be allowed to enroll if “she wore any girls’ clothing or accessories.”<sup>63</sup>

The student subsequently filed a complaint with multiple claims, including that the school had violated her “right to free expression” as guaranteed by the First Amendment.<sup>64</sup> The court held that Doe’s conduct was indeed likely symbolic speech and granted a preliminary injunction.<sup>65</sup> Her conduct sent a particularized message of gender expression; her gender expression through clothing and accessories was “not merely a personal preference but a necessary symbol of her very identity.”<sup>66</sup> Further, as evidenced by the school’s hostility in response to Doe’s gender expression, her message was recognized and understood by its audience.<sup>67</sup>

While *Yunits* was an unpublished state court decision, the Second Circuit soon discussed *Yunits* in a published decision regarding a cis woman’s claim of First Amendment protection for gender-expressive conduct.<sup>68</sup> In *Zalewska v. County of Sullivan*, though the Second Circuit ultimately ruled that a cis woman who wanted to wear skirts to work did not engage in symbolic speech, the court simultaneously all but decreed that the student’s conduct in *Yunits* would pass the Second Circuit’s narrowly construed version of the *Spence-Hurley* test:

Of course, there may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection. A state court in Massachusetts, for example, found in [*Yunits*], that [Doe’s] decision to wear traditionally female clothes to school as an expression of female gender identity was protected speech . . . [Doe’s] dress was an expression of [her] clinically verified gender identity. This message was readily understood by others in [her] high school context, because it was such a break from the norm. It sent a clear and particular message about the plaintiff’s gender

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62. *Id.*

63. *Id.* at 2.

64. *Id.*

65. *Id.* at \*8 (enjoining the school “from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined”); see also Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 34–35 (2009) (summarizing the court’s analysis in *Yunits*).

66. *Yunits*, 2000 WL 33162199, at \*3.

67. *Id.*

68. See *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314 (2d Cir. 2003).

identity. By contrast, a [cis] woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs.<sup>69</sup>

In other words, while a transgender woman choosing to wear traditionally feminine clothing sends a particularized message about her gender identity that can be readily understood, a cisgender woman choosing to wear skirts to convey her “cultural values” is not particularized and cannot be readily understood.

Additionally, a Federal District Court in Virginia has held that a transgender employee’s conduct in presenting as female<sup>70</sup> plausibly constituted protected speech.<sup>71</sup> In *Monegain v. Department of Motor Vehicles*, the court affirmatively discussed *Yunits* and *Zalewska*—considering them “persuasive case law”—when determining whether a transgender employee’s decision to present as female was intended to communicate a message about her gender identity and gender expression.<sup>72</sup> The *Monegain* court determined that the plaintiff’s gender expression through her appearance indeed was “intended to communicate a message of public concern about her gender identity and gender expression.”<sup>73</sup> Her decision to present herself as female at work “sent a clear and particular message about [Monegain’s] gender identity,” and her coworkers responded—often negatively—to this message.<sup>74</sup>

The *Monegain* court also relied on *Kastl v. Maricopa County Community College District* in reaching its decision.<sup>75</sup> In this unpublished but influential opinion, the District Court for the District of Arizona held that a transgender female employee who was fired for refusing to use the men’s restroom at a public community college stated a free speech claim under the First Amendment.<sup>76</sup> The defendant college in this case did not dispute that the employee’s gender expression constituted speech, but rather argued that her speech did not address a matter of public concern

69. *Id.* at 320.

70. The plaintiff stated that presenting as female for her constituted “wearing clothing, makeup, body styling and hair styling typically associated with a feminine gender expression.” *Monegain v. Dep’t of Motor Vehicles*, 491 F. Supp. 3d 117, 129 (E.D. Va. 2020).

71. *See id.* at 134–36. There is a distinct test for the free speech of public employees; “for a First Amendment retaliation claim, ‘whether the speech addressed a matter of public concern, is ‘the threshold question.’” *See id.* at 132–36. However, the court still considered the two-step *Spence-Hurley* analysis, considering whether the employee sent a particularized message and if the message was readily understandable. *See id.* at 135.

72. *Id.* at 134–35.

73. *Id.* at 136 (quoting *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 561–62 (4th Cir. 2011)).

74. *Id.* at 135 (alteration in original) (quoting *Zalewska*, 316 F.3d at 320).

75. *See id.* at 135–36.

76. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, \*9 (D. Ariz. June 3, 2004).

(as is required in a free speech claim made by a public employee).<sup>77</sup> The court agreed that “attire may be understood as an expression of her change in gender identity, as it is clearly understood as such by her employer and the restroom patrons who complained of her use of the women’s restroom.”<sup>78</sup>

Beyond gender expression through choice of dress, federal courts in Idaho and Ohio have also ruled in favor of transgender plaintiffs in cases relating to gender markers on birth certificates. First, in *F.V. v. Barron*, the Federal District Court for the District of Idaho addressed a categorical ban on transgender individuals changing the sex marker on their birth certificate under the Equal Protection and Due Process Clauses, and it considered whether a proposed rule requiring birth certificates of transgender individuals to be marked as “amended” violated the First Amendment.<sup>79</sup> The court ultimately held that the plaintiffs’ success on their Equal Protection claim obviated the need to address the First Amendment claim’s merits, but that “any constitutionally sound rule [regarding birth certificate regulations] must not include the revision history as to sex or name to avoid impermissibly compelling speech.”<sup>80</sup> Second, in *Ray v. McCloud*, the Federal District Court for the Southern District of Ohio held that a ban on changing the sex marker on birth certificates failed even rational basis scrutiny under the Equal Protection Clause.<sup>81</sup> This holding again mooted plaintiffs’ First Amendment claim, unfortunately.<sup>82</sup> While both decisions ostensibly avoided the issue of the First Amendment in their reasoning, combining the reference to avoiding compelled speech in *Barron*, and the fact that the court in *Ray* characterized the challenged Ohio statute as “almost identical” to the statute in *Barron*,<sup>83</sup> the two cases imply a judicial suspicion to compelled speech in regards to gender identity.

Further, case law on the right to speak or express one’s LGBT identity (i.e., one’s sexual orientation or one’s gender identity) is often referred to as “coming out speech” and has been protected by the courts.<sup>84</sup> The willingness to protect such coming out speech seems to be increasing apace with society’s acceptance of the LGBT community in

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77. *Id.* at \*9 n.13.

78. *Id.*

79. See *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Ct. Idaho 2018), *decision clarified sub nom. F.V. v. Jeppesen*, 466 F. Supp. 3d 1110 (D. Ct. Idaho 2020), *decision clarified* 477 F. Supp. 3d 1144 (D. Ct. Idaho 2020).

80. *Id.* at 1135.

81. *Ray v. McCloud*, 507 F. Supp. 3d 925, 939–40 (S.D. Ohio 2020).

82. *Id.* at 940 n.11.

83. *Id.* at 940.

84. Kara Inglehart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause*, 37 GPSOLO MAG. 17, 18 (2020).



general.<sup>85</sup> One of the earliest successful coming out speech arguments was in the 1974 case *Gay Students Organization of the University of New Hampshire v. Bonner*.<sup>86</sup> When the University of New Hampshire disallowed the formation of a gay student group, the Federal District Court for the District of New Hampshire held that “gay students coming together for social events constituted expressive conduct and association protected under the First Amendment.”<sup>87</sup> In a later case, the Federal District Court for the District of Utah ruled a public school district’s policy forbidding a teacher from discussing her same-sex partner was viewpoint discrimination in violation of the First Amendment, as no policy required similarly situated heterosexual teachers refrain from discussing their opposite-sex partners.<sup>88</sup>

### B. Physicians’ Free Speech

Several courts have also considered the free speech rights of physicians to provide or refer patients for gender-affirming care. In *City and County of San Francisco v. Azar*, the Federal District Court for the Northern District of California held that doctors concerned about a federal agency rule’s effect on the healthcare of their LGBT patients had third-party standing to bring a free speech challenge under the First Amendment on their patients’ behalf.<sup>89</sup> The challenged rule would allow those with “religious, moral, or other conscientious objections to refuse to provide abortions and certain other medical services,” including gender-affirming surgery.<sup>90</sup> In finding the physicians had standing, the court reasoned “most of the medical procedures at issue here such as abortions, *gender-affirming surgery*, and HIV treatments cannot be safely secured without the aid of a physician,” and “[t]he rights of the individual physician plaintiffs and their patients here are thus closely intertwined.”<sup>91</sup> The court ultimately vacated the rule in its entirety because it was invalid, so the free speech claim was not explicitly analyzed.<sup>92</sup>

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85. *See id.* at 17 (discussing the increased judicial willingness to protect coming out speech over the past decade).

86. *See Gay Students Org. of the Univ. of N.H. v. Bonner*, 367 F. Supp. 1088 (D. N.H.), *modified*, 509 F.2d 652 (1st Cir. 1974).

87. Inglehart et al., *supra* note 84, at 18 (describing the holding of *Bonner*, 367 F. Supp. 1088).

88. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998).

89. *See City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019); *cf. June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (characterizing the rule against third-party standing as “hardly absolute,” and allowing abortion providers and clinics to have standing on behalf of their actual or potential patients).

90. *Azar*, 411 F. Supp. 3d at 1005, 1011.

91. *Id.* at 1011 (emphasis added).

92. *Id.* at 1025.

Further, in *Brandt v. Rutledge*, a Federal District Court for the Eastern District of Arkansas concluded (and the Eighth Circuit affirmed), *inter alia*, that doctors likely have a First Amendment right of free speech to refer transgender youth patients to gender-affirming care specialists.<sup>93</sup> Issuing a preliminary injunction on the ban on such referrals, the court noted the challenged law was “a content and viewpoint-based regulation because it restrict[ed] healthcare professionals only from making referrals for ‘gender transition procedures,’ not for other purposes.”<sup>94</sup> The court found that the ban “cannot survive strict scrutiny or even rational scrutiny.”<sup>95</sup> The court also found that the ban on physicians providing or discussing gender-affirming care very likely violates the Equal Protection Clause.<sup>96</sup> The statute banned care for transgender patients, but left the cisgender versions of such care unrestricted, and it could not survive rational basis scrutiny, let alone heightened scrutiny.<sup>97</sup>

### C. Body Modification

A few cases have addressed the issue of body modification as protected speech. The majority of such cases stem from litigation regarding tattooing regulations. Historically, tattoos have been so taboo in the eyes of the general public that litigation regarding protection for people with tattoos was generally unsuccessful.<sup>98</sup> The recent trend in such litigation, however, is a growing recognition of First Amendment protection for tattoos.<sup>99</sup> This growing protection comes notwithstanding an ongoing circuit split on the matter. While the Ninth and Eleventh Circuits have protected tattoos and tattooing businesses as pure speech under the First Amendment,<sup>100</sup> the Eighth Circuit has indicated that a

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93. *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022); *cf.* *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at \*1141 n.13, \*1149 (M.D. Ala. May 13, 2022) (noting support for trans youth care from over twenty major medical organizations and granting partial preliminary injunctive relief against a similar trans youth healthcare ban in the state of Alabama, though without accepting the physician speech claim). In *Brandt*, the physicians had third-party standing to challenge the ban on behalf of their patients, and they had standing in their own right. *Brandt*, 551 F. Supp. 3d at 888.

94. *Id.* at 893.

95. *Id.* at 894.

96. *Id.* at 891–92.

97. *Id.*

98. See Alicen Pittman, *Tattoos and Tattooing: Now Fully Protected As “Speech” Under the First Amendment*, 38 W. ST. U. L. REV. 193, 195–98 (2011).

99. See Wendy Rima, *The Human Body: The Canvas for Tattoos; the Public Workplace: An Exhibit for A New Form of Art?*, 66 DRAKE L. REV. 705, 714–19 (2018).

100. See *Buehrle v. City of Key W.*, 813 F.3d 973 (11th Cir. 2015) (“[T]attooing [is] virtually indistinguishable from other protected forms of artistic expression.”); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (“[W]e hold that tattooing is purely expressive activity rather than conduct expressive of an idea[.]”).

tattoo is symbolic speech that must survive a *Spence-Hurley* analysis to obtain First Amendment protection.<sup>101</sup> Notably, when the Eighth Circuit denied a tattoo as being protected by the First Amendment, its reasoning did *not* rest on the fact that tattoos are body modification.

In *Stephenson v. Davenport Community School District*, a student initially asserted that her tattoo constituted “political speech” that should be protected under the First Amendment.<sup>102</sup> The Eighth Circuit did not take issue with the fact that a tattoo is body modification; it simply conducted a *Spence-Hurley* analysis to determine whether Stephenson’s tattoo was protected conduct.<sup>103</sup> Ultimately, it determined that the tattoo in question was “nothing more than ‘self-expression’” and was therefore not protected under the First Amendment.<sup>104</sup> However, the *Stephenson* court left open the possibility that a different tattoo with a particularized meaning could pass the *Spence-Hurley* test.<sup>105</sup> Thus, while tattoos are subject to a First Amendment circuit split over whether they are pure or symbolic speech, that tattoos are body modification is not relevant to this analysis.

Similarly, while body piercing has rarely been litigated regarding the First Amendment, at least one court has protected body piercing as a form of symbolic speech. In an unpublished opinion, the court in *Difeo v. Town of Plaistow* ruled that body piercing is symbolic speech.<sup>106</sup> In its decision, the court noted that, as body piercing’s inherent health risks can be substantially reduced through proper medical licensure, a total ban was unconstitutionally overbroad.<sup>107</sup>

In addition to case law framing simple forms of body modification (e.g., piercings) as protected symbolic speech,<sup>108</sup> several scholars have previously addressed the possibility of First Amendment speech protection for much more complex forms of body modification. One such argument asserts the use of brain-enhancing or mind-altering drugs or medical interventions would fall under the umbrella of free speech protection.<sup>109</sup> Just as writing in a journal or electronically recording one’s

101. See *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

102. *Id.*

103. *Id.*

104. *Id.*

105. See *Blue Horseshoe Tattoo, V, Ltd v. City of Norfolk*, No. CL06-3214, 2007 WL 6002098, at \*2 (Cir. Ct. Va. Jan. 17, 2007) (“[The] *Stephenson* case seems to leave open the possibility that a particular tattoo might constitute protected political speech.”).

106. *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 WL 31059361, at \*3 (N.H. Super. Ct. Mar. 7, 2002).

107. *Id.* at \*6.

108. This case law refers to non-medical body modification, as opposed to the more medicalized forms of body modification inherent to gender-affirming care.

109. See Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive*

thoughts is protected as speech, medical interventions can constitute similar tools of enhancing the mind's ability to communicate.<sup>110</sup> Likewise, one author argues the inverse is true: just as the First Amendment's free speech clause prohibits the government from banning mind-enhancing medicine, it should be prohibited from forcing mind-affecting drugs onto unwilling citizens, as this would alter the organ responsible for conceptualizing speech—akin to dictating speech.<sup>111</sup> This body of writing illustrates that, contrary to what some may argue, legal writers have long recognized a place for free speech law in the world of drugs and medicine. The whirlwind of litigation surrounding gender-affirming care simply differs in that it is perhaps the first form of body modification to garner so much attention from the public and the legal sphere.

#### IV. Applying the Law to Gender-Affirming Care Bans

With this background in mind, applying a First Amendment theory of symbolic speech to the constitutionality of a ban on gender-affirming health care for transgender patients requires several steps. First, a court must determine whether or not the regulated conduct—gender-affirming care—is protected symbolic speech. As Section A illustrates, gender-affirming care should be protected as symbolic speech. Next, the proper level of scrutiny must be determined, and the deciding court must apply the correct level of scrutiny once ascertained. As Section B illustrates, the *O'Brien* test and its intermediate scrutiny likely apply to bans on gender-affirming care, and such a ban would fail this test and should be found unconstitutional.

##### A. Gender-Affirming Care and Spence-Hurley

This Article argues that the practice of gender-affirming care—its receipt and provision—is protected symbolic conduct.<sup>112</sup> To establish

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*Enhancement and the Constitution*, 2010 WIS. L. REV. 1049 (2010).

110. *Id.* at 1070 (“If freedom of thought covers journal writing because it is an extension of one’s thought and makes further use or refinement of that thought possible, it should perhaps also insulate from state regulation alterations of one’s thinking with neural prosthetics or cognitive-enhancement drugs.”); cf. Adnan K. Husain, *Spillage from the Fountain of Youth: The Regulation of Prospective Anti-Aging Molecular and Genetic Therapies*, 2006 U. ILL. J.L. TECH. & POL’Y 159, 184 (2006) (discussing the First Amendment implications of a government ban on life-extending drugs).

111. Kevin Newman, *Sounding the Mind: On the Discriminatory Administration of Psychotropics Against the Will of the Institutionalized*, 22 S. CAL. REV. L. & SOC. JUST. 265, 274 (2013) (citations omitted) (“The ability to produce one’s own ideas, which psychotropic medication jeopardizes, is necessary to have a meaningful First Amendment right to communicate those ideas. . . . Forcible medication frequently and drastically curtails this fundamental right of cognitive liberty.”).

112. Gender-affirming care is not “pure speech,” as pure speech as a category is generally reserved for more direct forms of speech, such as written or spoken word. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (differentiating between

that gender-affirming care is protected symbolic speech, a court must first apply some version of the *Spence-Hurley* test.<sup>113</sup> As the Second Circuit's interpretation of the test is the most demanding version,<sup>114</sup> this version of the *Spence-Hurley* test is the best one to use to test this Article's present theory. The Second Circuit has left the original *Spence* test effectively unchanged since *Hurley*,<sup>115</sup> so the question at issue is whether a trans person, through altering their body with gender-affirming care, (1) intends to convey a particularized message that (2) the audience has a great likelihood of understanding given the surrounding circumstances.

i. Gender-Affirming Care Conveys a Particularized Message

First, gender-affirming care conveys a particularized message. Through its practice, gender-affirming care expresses to the world that gender is a malleable social construct not solely dictated by one's sex chromosomes and sex assigned at birth. Through the effects of gender-affirming care, a patient makes a statement to the world of their internal sense of femininity, masculinity, androgyny, or lack of connection to the gender binary. It is both the act and the end product of gender-affirming care that communicates particularized ideas of gender to the world. More simply, gender-affirming care acts as a key facilitator and communicator of gender identity and gender expression.

As discussed previously, several courts have indicated gender expression conveys a particularized message,<sup>116</sup> and gender-affirming care should plainly be considered part of gender expression. At least one district court has already agreed that cosmetic gender-affirming procedures are part of the aggregated conduct that constitutes an individual's gender expression.<sup>117</sup> Further, at least two courts have indicated that transgender women dressing in traditionally "feminine" clothing conveys a particularized message.<sup>118</sup> Albeit limited, this case law supports a finding that gender identity expression—at least for trans people—conveys a particularized message. From there, one needs to simply extend protection of these forms of gender expression to the ways in which gender-affirming care, by altering how the patient's body presents to the world (such as through creation or removal of breasts, changes to skin complexion, etc.), sends a distinct and particularized

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symbolic speech and pure speech).

113. See *supra* Section II.A.

114. See *supra* Section II.A.

115. See *Tomasik*, *supra* note 36, at 286–88.

116. See *supra* Section II.A.

117. See *Vuz v. DCSS III, Inc.*, No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at \*5–6 (S.D. Cal. Dec. 9, 2020); see also *supra* Section I.B.

118. See *supra* Section II.A for an in-depth discussion of these cases.

message of gender identity, be it feminine, masculine, androgyne, or other.

Finally, *Doe ex rel. Doe v. Yunits* could here prove to be a sort of bridge between gender expression in the form of clothing and gender expression through gender-affirming healthcare as a particularized message.<sup>119</sup> Doe's therapist had specifically noted that the student wearing gender-affirming feminine clothes was necessary for her health and well-being, and the court seemed to find this factor important for showing a particularized message, noting that "therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."<sup>120</sup> As has been noted, gender-affirming care is evidence-based, supported by leading medical organizations, and can be medically necessary for the treatment of gender dysphoria in transgender patients.<sup>121</sup> The practice of such care can similarly be a "necessary symbol" of transgender individuals' gender identity and convey a particularized message.

### *1. Body Modification is Not a Distinguishing Factor*

Though it is evidence-based and often medically necessary healthcare, gender-affirming care is also in a sense body modification.<sup>122</sup> Therefore, the next question is whether this body modification aspect would somehow distinguish it from cases like *Zalewska*, *Yunits*, and *Monegain*, which indicated conduct like choice of dress could be protected gender expression. Making this distinction is especially important precisely because opponents of gender-affirming care are likely to argue that such care is neither speech nor medicine, but simply and exclusively body modification.<sup>123</sup> While such assertions are not true, the issue would also be moot if it can be shown that body modification does not distinguish gender-affirming care from other forms of gender expression that have been protected as symbolic speech.

Little case law on surgical body modification exists. However, case law on tattoos and body piercing (arguably the most popular forms of body modification today) suggests that just because conduct involves body modification does not necessarily mean it cannot be protected

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119. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*2 (Mass. Super. Ct. Oct. 11, 2000)

120. *Id.*

121. See sources cited *supra* note 7.

122. See sources cited *supra* note 7.

123. Cf. Kelsey Bolar, *Stop the Mutilation of Our Girls with So-Called 'Gender-Affirming Care'*, FOX NEWS (Mar. 11, 2023), <https://www.foxnews.com/opinion/stop-mutilation-girls-gender-affirming-care> [<https://perma.cc/G6HP-MU25>] (arguing that gender-affirming care is "bodily mutilation").

speech.<sup>124</sup> In the case of tattooing, while courts disagree on the level of First Amendment protection to give tattoos, even the courts more hostile toward protecting tattooing as speech have not focused on the body modification aspect of tattooing.<sup>125</sup> Similarly, in the case of body piercing, that piercings are body modification was not a problem for plaintiffs arguing that their conduct was protected by the First Amendment, and the practice of body piercing has been protected as symbolic speech.<sup>126</sup>

Given that other forms of body modification are not distinguished simply on the grounds of being body modification when identifying protected symbolic speech, the fact that gender-affirming care involves body modification should not be a distinguishing factor in assessing whether or not such care is protected speech. That gender-affirming care is evidence-based, often medically necessary healthcare further distinguishes it from cosmetic body modification like tattoos and body piercings. Like body piercing and tattooing, speech claims grounded in gender-affirming care should be adjudicated based on their relationship with expression under the *Spence-Hurley* test, just like any other symbolic speech claims. The novelty of the body modification is not proper grounds for denying such First Amendment claims.<sup>127</sup>

## 2. The Provider-Patient Distinction

Another potential distinguishing factor between previously recognized symbolic conduct and gender-affirming care is the dichotomy between the recipient of the gender-affirming care and the physician providing the care. While cases like *Brandt v. Rutledge* show that courts may be willing to extend First Amendment speech protection to physicians providing gender-affirming care,<sup>128</sup> a physician discussing gender-affirming care with their patient is a distinct communication from the message a patient communicates in receiving such gender-affirming

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124. See *supra* Section III.C.

125. See *supra* Section III.C.

126. See *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 WL 31059361, at \*6–7 (N.H. Super. Ct. Mar. 7, 2002).

127. Additionally, articles placing mind-altering medication, brain chips, and life-extension treatments within the ambit of the free speech clause prove body modification and medical treatments are not nearly as unheard of in First Amendment law as one would initially assume. See Blitz, *supra* note 109; Husain, *supra* note 110; Newman, *supra* note 111. Additionally, gender-affirming healthcare is not the first form of healthcare at a controversial nexus of speech and medical science. See Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 780 (2016) (“[Psychotherapy] straddles the key constitutional boundary line between individuals’ inner lives, where each person should exercise autonomy free of state control, and the realm of appropriate health and safety regulations, where clients count on government to monitor medical practice.”).

128. See *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff’d*, 47 F.4th 661 (8th Cir. 2022).

care. For this reason, the provider-patient distinction must be directly addressed.

It is worth revisiting case law involving tattoos to address this issue. In litigation regarding tattooing and the First Amendment, the artist-customer dichotomy sometimes impacted a finding of symbolic speech, with some courts ruling that the tattoo artist, acting simply as a mechanism for applying the tattoo, does not engage in protected speech.<sup>129</sup> At first glance, this distinction could pose a logistical problem for protecting the right to access gender-affirming care. Essentially, one could argue that restrictions on doctors providing gender-affirming care are aimed only at the doctors' conduct, and not the patients' expression of gender—like how one might argue that the proprietor of the tattoo shop does not have the speech interest that the tattoo recipient has. In this way, a clever defendant could argue that a restriction on gender-affirming care practitioners presents a thorny standing issue.

However, the trans patient and their provider are distinguished from the tattoo customer and artist because of the special relationship between patients and providers, a relationship that has already been recognized in the context of gender-affirming care.<sup>130</sup> As *City and County of San Francisco v. Azar*, highlighted, a third-party doctor has standing to bring a First Amendment suit on behalf of their patient where “[t]he rights of the individual physician plaintiffs and their patients [are] . . . closely intertwined.”<sup>131</sup> Further, as the *Azar* court noted, gender-affirming care is at the nexus of such a physician-patient relationship.<sup>132</sup>

Just like how the physicians in *Azar* had standing to sue the government for issuing a rule which threatened the First Amendment rights of, inter alia, their transgender patients seeking gender-affirming care,<sup>133</sup> the physician-plaintiff distinction does not prevent a free speech challenge to bans on gender-affirming healthcare.

#### ii. The Audience Understands the Message

As neither the body modification issue nor the physician-plaintiff distinction can distinguish gender-affirming care from the gender expression at issue in *Zalewska*, *Yunits*, or *Monegain*, a plaintiff asserting symbolic speech protection for gender-affirming care would very likely survive the strict Second Circuit version of the *Spence-Hurley* test's first prong: intent to convey a particularized message. Next, the plaintiff would

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129. See Porter, *supra* note 45, at 1081.

130. See *supra* Section II.B.

131. *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019).

132. *Id.*; see also *Doe v. Bolton*, 410 U.S. 179 (1973) (addressing a similar patient-physician relationship in the domain of abortion care).

133. *Azar*, 411 F. Supp. 3d at 1011.



have to survive the second prong: the audience must have a great likelihood of understanding the message given the surrounding circumstances.

This prong is clearly satisfied in the case of gender-affirming care, largely for the same reason it was satisfied in *Doe ex rel. Doe v. Yunits*—namely, evidence of audience hostility. As the *Yunits* court noted, the defendant's hostility and attempts to prevent a transgender person from expressing their gender identity through symbolic speech is itself proof that the audience understands the message conveyed by the conduct.<sup>134</sup> Gender-affirming care has long been politically controversial, precisely because its message of affirming transgender gender identity and expression has been well understood by audiences. For instance, when Adolf Hitler and the Nazis burned down the Institute of Sexual Science in 1933, they did so precisely because of the hatred they had for the message its gender-affirming care broadcast.<sup>135</sup> Today, with dozens of bills being introduced to limit access to and/or criminalize gender-affirming healthcare,<sup>136</sup> the fact that gender-affirming care conveys a message of the affirmation of gender expression and identity is undeniable. Like in *Yunits*, hostility to the message proves that the audience understands what is being conveyed.

A plaintiff need not prove retaliation exists in their particular case to establish that their particularized message was readily understandable. The key is simply that such hostility proves the general public, and especially the American government, understand that gender-affirming care represents affirmation of trans people's gender identity. Moreover, the impetus for government restriction on gender-affirming care proves that such care sends a message to the general public, because conservative backlash against messages of affirmed gender identity is precisely why politicians in states with primarily Republican legislatures are so keen to ban gender-affirming care in the first place.<sup>137</sup>

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134. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*1, \*4 (Mass. Super. Ct. Oct. 11, 2000) ("The school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received."), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

135. See Nunn, *supra* note 7, at 614. Note, also, many of the most famous photos of Nazi book burnings are in fact decontextualized photos of this attack on the Institute for Sexual Science. See Brandy Schillace, *The Forgotten History of the World's First Trans Clinic*, *Sci. AM.* (May 10, 2021), <https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/> [ <https://perma.cc/L9ZJ-PJWA>].

136. See ACLU, *supra* note 10; see also ELANA REDFIELD, KERITH J. CONRON, WILL TENTINDO & ERICA BROWNING, UCLA SCH. OF L., WILLIAMS INST., PROHIBITING GENDER-AFFIRMING MEDICAL CARE FOR YOUTH (2023) (discussing restrictions on gender-affirming healthcare across the United States).

137. While no evidence shows a hatred of trans people on the part of the American public writ large, evidence is strong that the majority of the anti-trans laws recently passed were

If gender-affirming care did not send a particularized message, or if the message was not understood by the various audiences, the controversy would never exist in the first place. Stated simply, the existence of the message is understood by those seeking to restrict access to gender-affirming care and is exactly what those seeking restrictions are hoping to snuff out. Even in a case where a government policy is somehow only incidentally restricting this type of symbolic speech, the fact remains that the speech's message is particularized and likely to be understood by its audience. For another example of a situation where controversy signals understanding of a non-verbal message, consider a hypothetical ban on the use of the middle finger gesture in public—if it were not understood that such a gesture conveys a message many find offensive,<sup>138</sup> the interest in passing such a ban would be inexplicable.

*B. Scrutinizing Restrictions on Gender-Affirming Care —  
Applying O'Brien*

The establishment of protected symbolic speech does not end the inquiry. Recall, if a restriction on conduct does not aim at the underlying expression—if it is not content-based discrimination—it is an incidental restriction subject to intermediate scrutiny (i.e., the *O'Brien* test).<sup>139</sup> Under the *O'Brien* test: a restriction on conduct is valid “if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>140</sup> Here, the government must show that the ban on the conduct of gender-affirming care only incidentally burdens the expression inherent in such care, that it has a valid interest in banning such care, and that the incidental restriction on the First Amendment freedom of speech of transgender

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championed by a network of organized transphobes working with conservative groups mainly in Republican states. *See, e.g.*, Madison Pauly, *Inside the Secret Working Group That Helped Push Anti-Trans Laws Across the Country*, MOTHER JONES (Mar. 8, 2023), <https://www.motherjones.com/politics/2023/03/anti-trans-transgender-health-care-ban-legislation-bill-minors-children-lgbtq/> [<https://perma.cc/3Q6Q-88GL>] (discussing a communications leak amongst anti-trans litigators); Dell Cameron & Dhruv Mehrotra, *An Anti-Trans Doctor Group Leaked 10,000 Confidential Files*, WIRED (May 2, 2023), <https://www.wired.com/story/american-college-pediatricians-google-drive-leak/> [<https://perma.cc/BGX5-HM99>] (discussing a concurrent leak of emails from an anti-trans doctor group, designated by the Southern Poverty Law Center to be a hate group, in which communications reveal a religious animus against transgender people).

138. *Cf. Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) (“Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment.” (citations omitted)).

139. *See supra* Section II.B; Porter, *supra* note 45, at 1078–79.

140. *Id.* at 367.

individuals is no greater than necessary to achieve whatever interest the government identifies.<sup>141</sup>

i. There Is No Valid Substantial or Important Governmental Interest in Banning Gender-Affirming Care

While the government will likely succeed in arguing that a ban on gender-affirming care is an incidental restriction,<sup>142</sup> the government is unlikely to survive the *O'Brien* test, as there is no valid, non-pretextual interest in banning gender-affirming healthcare. The government would not have to produce novel evidence or undertake expensive new studies to prove there is a problem that the government is attempting to ameliorate by banning gender-affirming care for trans people, but it would have to show evidence that the government reasonably relied upon for the proposition that a ban is necessary to advance the government's interests.<sup>143</sup> Most government interests in banning gender-affirming care for trans people cannot be articulated without drawing on anti-trans animus, gender stereotyping, or religious belief,<sup>144</sup> all of which would amount to a need to suppress the free expression of certain people's gender identity. Obviously, these interests should be invalid for purposes of surviving the *O'Brien* test.

1. "Safety" Interests are Pretextual

The most common governmental interest in limiting access to gender-affirming care seems to be one of safety.<sup>145</sup> However, the existence of cisgender analogs to gender-affirming trans care underscore the lack of reasonable interest held by the government in the underlying safety of gender-affirming care, because the government deems the same type of care safe for cisgender patients.<sup>146</sup> The fact that nearly every respected medical association in the United States has put out statements

141. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

142. See *supra* Section II.B. This Author would still urge, however, making the argument that gender-affirming healthcare is inseparable from the message of gender affirmation it sends.

143. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (discussing the establishment of valid interests in enacting regulation under *O'Brien*).

144. See Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187 (2013).

145. See, e.g., *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 889–90 (E.D. Ark. 2021) (discussing purported state interest in patient safety as a pretense for banning trans youth care); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1185–86 (M.D. Ala. 2022) (same).

146. See *Eknes-Tucker*, 603 F. Supp. 3d at 1145 (noting that hormone treatments used in gender-affirming care have been used to treat conditions like central precocious puberty for decades); *Brandt*, 551 F. Supp. 3d at 893 ("The goal in this context is pretextual because Act 626 allows the same treatments for cisgender minors that are banned for transgender minors as long as the desired results conform with the stereotype of the minor's biological sex.").

defending the practice of gender-affirming healthcare for trans people cuts further against arguments that justify bans on gender-affirming care by arguing that bans are necessary for protecting the safety of trans patients.<sup>147</sup> In fact, gender-affirming care for trans people increases positive life outcomes and decreases suicide attempts for trans patients.<sup>148</sup> There is no compelling evidence to reasonably rely upon for justifying an interest in banning this care, and there is ample evidence that such bans on gender-affirming care would worsen health outcomes for trans patients, up to and including causing an increase in the death rate of trans patients.

This notion also holds true for bans on trans youth gender-affirming care. While opponents of trans youth care argue that surgery and hormone therapy are too big of decisions for minors to make,<sup>149</sup> they fail to understand that gender-affirming healthcare for trans minors requires that such decisions be made only after informed discussion with parents and providers.<sup>150</sup> Further, this gender-affirming care consists mostly of highly reversible, orally-administered puberty blockers, which trans youth take to pause puberty until they are old enough and mature enough to make decisions on more permanent interventions.<sup>151</sup> Considering the literature already shows that transgender youth experience a decrease in suicidal thoughts following gender-affirming healthcare, any purported governmental interest in banning such care for trans youth would have to outweigh the impact of a likely increase in suicide attempts of the affected citizens,<sup>152</sup> some portion of which may well be successful.

Most people are born with bodies that communicate the gender expression they desire, but some people desire to alter their bodies to better or more firmly express their gender; not all these people are trans. In fact, most people who choose to alter their bodies to better express their gender are cis. In the United States, well over 132,000 women

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147. See *Eknes-Tucker*, 603 F. Supp. 3d at 1145 (noting support for transgender youth care from over twenty major medical organizations).

148. See Nunn, *supra* note 7, at 622; see also Luke R. Allen, Laurel B. Watson, Anna M. Egan & Christine N. Moster, *Well-Being and Suicidality Among Transgender Youth After Gender-Affirming Hormones*, 7 *CLINICAL PRAC. PEDIATRIC PSYCH.* 302, 307 (2019) (discussing a drop in transgender youth patients' suicidal ideation following prescription of gender-affirming hormones).

149. See, e.g., *Eknes-Tucker*, 603 F. Supp. 3d at 1145 (M.D. Ala. 2022) ("Defendants proffer that the purpose of the Act is 'to protect children from experimental medical procedures,' the consequences of which neither they nor their parents often fully appreciate or understand.").

150. See Caroline Salas-Humara, Gina M. Sequeira, Wilma Rossi & Cherie Priya Dhar, *Gender Affirming Medical Care of Transgender Youth*, 49 *CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE* 100683 (2019).

151. *Id.*

152. See Allen et al., *supra* note 148, at 307.

received breast augmentation surgery in 1998.<sup>153</sup> By 2019, this number had doubled, with over 280,692 breast augmentations performed.<sup>154</sup> In the early 2000s, Pfizer's hit male-virility drug Viagra was being dispensed by over half a million American physicians a year and to as many as 30 million men worldwide, owing much of its gargantuan success to a desire to feel and seem more masculine in the middle-aged cis male population.<sup>155</sup> These wildly popular treatments are for a predominantly cis population.<sup>156</sup> All medical treatments come with risks; however, the risks associated with breast augmentation can be incredibly serious and even life-threatening, including loss of or changes to nipple sensation, hematoma, and death.<sup>157</sup> For Viagra users, there are serious risks, including hypertension and changes in or loss of vision.<sup>158</sup> Nevertheless, cis patients do not contend with the level of gatekeeping and scrutiny experienced by trans patients, and critics have long noted the double standard. Attorney and former American Civil Liberties Union fellow Dr. Elizabeth Loeb lamented the two-tiered regime in 2008:

As TV shows such as *Extreme Makeover* have repeatedly shown, plenty of folks are telling stories about uncovering a "true self" by undergoing as many invasive surgeries as they so choose without a trace of juridical approbation or punishment. The catch is that such legal and cultural permission holds steady only so long as my choices map onto the landscape of normative and normativizing physical norms of race, sex, and gender. Taking out a rib so that I can model for a Gucci show? Yes! Cutting off my penis to more fully express my felt gender? No!<sup>159</sup>

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153. See David B. Sarwer, Jodi E. Nordmann & James D. Herbert, *Cosmetic Breast Augmentation Surgery: A Critical Overview*, 9 J. WOMEN'S HEALTH & GENDER-BASED MED. 843 (2004).

154. THE AESTHETIC SOC'Y, AESTHETIC PLASTIC SURGERY NATIONAL DATABANK STATISTICS: 2019, at 5 (2020).

155. See Janice M. Irvine, *Selling Viagra*, 5 CONTEXTS 39, 39 (2006) (discussing the importance of the desire for a sense of renewed masculinity to the success of Viagra); Konstantinos Hatzimouratidis, *Sildenafil in the Treatment of Erectile Dysfunction: An Overview of the Clinical Evidence*, 1 CLINICAL INTERV. AGING 403 (2006) (discussing global usage statistics of sildenafil, the generic name for Viagra).

156. Given that transgender adults constitute less than 1% of the U.S. population, there is no reasonable way to dispute that the majority of people receiving prescriptions for Viagra or undergoing breast augmentation are cisgender. Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH 1 (2017); see *Watts v. State of Indiana*, 338 U.S. 49, 52 (1949) ("[There] comes a point where this Court should not be ignorant as judges of what we know as men.").

157. See, e.g., David A. Hidalgo & Jason A. Spector, *Breast Augmentation*, 133 PLASTIC & RECON. SURGERY 567e, 575e (2014).

158. See Luís Antônio B. Leoni, Gerson S. Leite, Rogério B. Wichi & Bruno Rodrigues, *Sildenafil: Two Decades of Benefits or Risks?*, 16 AGING MALE 85 (2013); see also Sidney M. Wolfe, *There Have Been Inadequate Warnings that Erectile Dysfunction Drugs Can Cause Blindness*, 7 MEDSCAPE GEN. MED. 61 (2005).

159. Elizabeth Loeb, *Cutting It Off: Bodily Integrity, Identity Disorders, and the Sovereign*

Now that transgender people enjoy more widespread access to gender-affirming and gender-expressive care, and the public is aware of increasing access to gender-affirming care for trans people, bad-faith actors in the legal field and in various state legislatures wish to ban such categories of healthcare for trans people often under the fig leaf of protecting patient safety, despite the excellent patient satisfaction under the presently accepted informed-consent model of gender-affirming healthcare for trans patients.<sup>160</sup>

### 2. Protecting “Detransitioners” and Fertility Concerns are Not Valid Interests

Beyond plainly pretextual “safety” interests, there remain two potentially colorable government interests in banning gender-affirming care for trans people: (1) avoiding regrets of the few cisgender people who undergo gender-affirming trans care and come to see it as a mistake later in life,<sup>161</sup> and (2) avoiding negative impacts on reproductive ability in gender-affirmed patients. However, even if these interests were to be considered valid, neither are likely to withstand any level of scrutiny.

For the first possible interest, simply put: the fact that gender-affirming healthcare significantly alleviates suicidal ideation in transgender patients, coupled with the rarity of detransitioners,<sup>162</sup> means that an interest in protecting detransitioners would have to be at the expense of risking the lives of a greater number of transgender patients. The government would have to argue it has a valid interest in sacrificing some number of transgender lives—not for the protection of cisgender lives, but for the avoidance of cisgender regret. Many surgeries, if not all, have non-zero rates of regret, but it would be ridiculous to ban knee surgeries or heart surgeries because some small percentage of such patients eventually express regret. Banning gender-affirming care to

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*Stakes of Corporeal Desire in U.S. Law*, 36 WOMEN'S STUD. Q. 44, 47 (2008) (internal citations omitted).

160. See Cassandra Spanos et al., *The Informed Consent Model of Care for Accessing Gender-Affirming Hormone Therapy Is Associated With High Patient Satisfaction*, 18 J. SEXUAL MED. 201 (2021); Timothy Cavanaugh, Ruben Hopwood & Ceil Lambert, *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 AMA J. ETHICS 1147 (2016).

161. These patients who regret receiving gender-affirming care, often referred to as “detransitioners,” are exceedingly rare, even compared to those undergoing other more socially accepted forms of medical care. See, e.g., Valeria P. Bustos et al., *Regret after Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, 9 INT'L OPEN ACCESS J. AM. SOC'Y PLASTIC SURGEONS 3477 (2021) (reporting that, of a pool of 7,298 transgender patients undergoing some form of gender-affirming surgery, only 77 expressed any form of regret; only some of these patients opted to “reverse their gender role”—detransition—indeed, many of the “regrets” identified involved regrets over poor surgical outcomes).

162. See *id.*

prevent harm against a miniscule number of detransitioners is not a valid government interest.

For the second possible interest, it could be a valid interest for the government to require patients be informed of risks to reproductive ability. However, a sacrifice of trans lives for the avoidance of assisted reproductive technology is simply irrational. Doctors have the technology today to store eggs and sperm and to use them in the future to create healthy children.<sup>163</sup> Doctors do not have the technology to revive the dead. Further, cisgender adults often obtain reproductive sterilization procedures.<sup>164</sup> For the government to rest its *O'Brien* argument on an interest in protecting reproductive ability, it would have to argue that there is a valid interest in sacrificing some number of transgender lives to predictable suicide in order to avoid the necessity of egg and sperm storage for future reproduction, and that this interest does not apply to cisgender adults who pursue sterilization procedures. This interest is irrational.

Although *O'Brien* is a relatively deferential test, it does not allow the government to pretextually substitute a desire to discriminate based on the content of expression for a valid governmental interest.<sup>165</sup> There must be some *valid* government interest.<sup>166</sup> The government cannot toss half-baked, irrational fears at the court and call them satisfactory.

ii. Banning Gender-Affirming Care Restricts the Symbolic Conduct of Transgender Individuals Greater than Necessary to Serve Any Sort of Governmental Interest

Under *O'Brien*, an “incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [an important governmental] interest.”<sup>167</sup> Even if the government survives the important or substantial interest requirement, the government will still likely fail for overbreadth in a ban on gender-affirming healthcare.

In *Difeo*, the court ruled a zoning ordinance wholly banning all body piercing was unconstitutional for being overbroad.<sup>168</sup> In so holding, the

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163. See, e.g., Joshua Sterling & Maurice M. Garcia, *Fertility Preservation Options for Transgender Individuals*, 9 TRANSLATIONAL ANDROLOGY & UROLOGY 215 (2020).

164. See, e.g., Deborah Bartz & James A. Greenberg, *Sterilization in the United States*, REV. OBSTET. GYNECOL. Winter 2008, at 23.

165. See *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 101–2 (1972) (holding the Equal Protection Clause invalidates First Amendment restrictions predicated on a government interest in content discrimination).

166. *Id.*

167. *United States v. O'Brien*, 391 U.S. 367, 367 (1968).

168. *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 WL 31059361, at \*6 (N.H. Super. Ct. Mar. 7, 2002); accord *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (“[A]

court noted that a town's health interest in regulating the safety of body piercing, though indeed a substantial government interest, did not justify a total ban on the practice.<sup>169</sup> Instead, the government's interest would have justified a ban on body piercing by those without medical licensure, provided there exists a process for licensing qualified persons.<sup>170</sup>

In the case of gender-affirming care, the parallel is clear: a total ban on all such care fails the *O'Brien* test because it bans far more conduct than is necessary to protect the government's identified interest. The medical care involved in various gender-affirming procedures is subject to governmental regulation, including licensure and training requirements.<sup>171</sup> A sweeping ban on all such care, or on an entire subcategory (e.g., a ban on all testosterone blocker prescriptions) plainly oversteps the boundaries provided by the Constitution.

## V. Conclusion

Gender-affirming healthcare communicates gender identity. Both transgender and cisgender patients recognize the gendered message certain body parts and traits express. The bans and restrictions on such care are enacted by people who have never made serious attempts to protect or assist the transgender community yet are ostensibly attempting to protect trans people from having too much access to healthcare. The timing and the target of these efforts to restrict access to gender-affirming care for trans people reveal the actual intent behind these restrictions: suppressing the symbolic speech of transgender people. Any fair adjudicator will see the case law so far and the circumstances today, and demand respect for the First Amendment symbolic speech interest inherent in gender-affirming healthcare.

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governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”).

169. *Difeo*, 2002 WL 31059361, at \*6.

170. *Id.* at \*7.

171. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2016) (setting out requirements for the provision of gender-affirming care in New York).