

# HOW TO WIN THE WAR ON 100 FRONTS: WHAT CAUSED THE RISE OF ANTI-TRANS BILLS AND HOW TO DEFEAT THEM

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## Introduction

In a 2021 interview about the significant rise of anti-trans legislation, Professor Jules Gill-Peterson of the University of Pittsburgh stated, “What we saw was unprecedented, and it was an avalanche... There’s this relentlessness and exhaustion. How do you fight a war on 100 fronts simultaneously?”<sup>1</sup> State legislatures across the United States considered over 560 bills attacking trans rights in 2023, marking the fourth-consecutive record-breaking year for anti-trans legislation in recorded history.<sup>2</sup> These anti-trans bills primarily attacked trans children’s access to gender-affirming medical care, such as hormone therapy and puberty blockers, and the ability of trans children, particularly trans girls, to participate in sports.<sup>3</sup> In 2023, over 134 bills were introduced and 22 bills were passed blocking access to gender-affirming services to trans youth and over 77 bills were introduced and 12 passed restricting the ability of trans athletes to participate in sports.<sup>4</sup>

The legislation proposed in 2023 and the previous three legislative cycles differs significantly from the last time trans rights came under close scrutiny at the state level. Rather than targeting medical care or participation in sports, North Carolina’s HB2<sup>5</sup> in 2016 targeted access to bathrooms. This Note analyzes how and why the recent rise in anti-trans legislation has not resulted in the same level of backlash that occurred in response to HB2. Between 2016 and the early 2020s, conservative lawmakers and activists deliberately changed their focus from targeting trans folks’ access to bathrooms to attacking trans youth’s access to medical care and participation in sports. This shift represents a calculated effort by the conservative right to avoid public backlash; a change in focus from bodies in space to shaping the future in their own image. Ultimately, this Note investigates the recent rise in anti-trans legislation in an attempt to expose the conservative right’s ultimate goal in attacking trans rights: to maintain the cis-hetero patriarchy and to shape the future. It is necessary to understand the enemy’s goals in order to defeat them.

## Section I: The 2016 North Carolina Anti Trans Bathroom Bill

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<sup>1</sup> Sam Levin & Rashida Kamal, *Mapping the Anti-Trans Laws Sweeping America: “A War on 100 Fronts,”* GUARDIAN (June 14, 2021, 1:31 PM), <https://perma.cc/KTZ8-YG2D>.

<sup>2</sup> *2023 anti-trans bills tracker*, TRANS LEGISLATION TRACKER, <https://perma.cc/V5HK-ZCVZ> (September 28, 2023).

<sup>3</sup> Anti-trans bills of the early 2020s are not just limited to bans on gender-affirming care and participation of trans athletes in sports, however, other anti-trans legislation is outside the scope of this Note.

<sup>4</sup> *What anti-trans bills passed in 2023?*, TRANS LEGISLATION TRACKER, <https://perma.cc/G4F3-BSL8> (September 28, 2023); *Anti-Transgender Medical Care Bills*, EQUALITY FED’N, <https://perma.cc/6JFB-3YZX> (September 28, 2023); *Anti-Transgender Student Athletics*, EQUALITY FED’N, <https://perma.cc/5ZX2-8B7J> (September 28, 2023).

<sup>5</sup> H.B. 2, 2015-2016 Gen. Assemb., 2nd Extra Sess. (N.C. 2016).

In 2016, the state of North Carolina became the first state to institute a “bathroom bill” when it passed the notorious HB2.<sup>6</sup> HB2, formally titled the Public Facilities Privacy & Security Act, was a response to a nondiscrimination ordinance put in place by the city of Charlotte, North Carolina.<sup>7</sup> Charlotte’s nondiscrimination ordinance included a policy that explicitly allowed trans people to use the bathroom of their choice.<sup>8</sup> North Carolina’s General Assembly called a special session to consider HB2, which Governor Pat McCrory signed into law a mere twelve hours after its introduction.<sup>9</sup> HB2 earned its moniker as a “bathroom bill” for its “Gender Inspection” clause which required trans people in North Carolina to use the bathroom that aligned with their sex assigned at birth.<sup>10</sup> Moreover, the law overrode all local ordinances concerning wages, employment, and public accommodations, which prevented municipalities such as Charlotte from creating nondiscrimination ordinances that would prohibit discrimination in public places based on sexual orientation and gender identity.<sup>11</sup>

Similarly to proponents of recent anti-trans legislation, proponents of HB2 portrayed the bill as a means to protect the vulnerable rather than as explicitly anti-trans. John Rustin, president of the North Carolina Family Policy Council, argued before the Senate that the Charlotte antidiscrimination ordinance “means men could enter women’s restrooms and locker rooms -- placing the privacy, safety, and dignity of women and the elderly at great risk.”<sup>12</sup> This conception of a bathroom predator, or a (cisgender) man who would justify entering women’s bathrooms to spy on or assaulting women by claiming a trans identity, was widespread by 2016. While there are certainly many conservative lawmakers who believe all trans women are just “men in dresses,”<sup>13</sup> the right used the concept of a bathroom predator to make even liberal supporters of LGBTQIA+ rights fearful of legislation like Charlotte’s. *TIME Magazine* even characterized the idea that “allowing transgender people to use the restroom that aligns with their gender identity will end up letting male sexual predators into women’s bathrooms” as something that had become “a common refrain in recent months.”<sup>14</sup> This fear had become so ubiquitous over the years that the Williams Institute published a study in 2018 demonstrating that there was no evidence that letting transgender people use public facilities that align with their gender identity increases safety risks.<sup>15</sup> Unfortunately, this study came years after the bathroom bill

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<sup>6</sup> Editorial, *Transgender Law Makes North Carolina Pioneer in Bigotry*, N.Y. TIMES (Mar. 25, 2016), <https://perma.cc/F95X-DJ5X>.

<sup>7</sup> Eugene Scott & Tal Kopan, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016, 11:12 AM), <https://perma.cc/D9CB-LXXD>.

<sup>8</sup> *Id.*

<sup>9</sup> Adam Polaski, *Less than 12 Hours After Its Introduction, North Carolina Governor Signs Anti-LGBT Bill into Law*, FREEDOM FOR ALL AMERICANS (Mar. 24 2016), <https://perma.cc/46C5-ER9B>.

<sup>10</sup> *Id.*

<sup>11</sup> Avianne Tam, *North Carolina’s Controversial Anti-LGBT Bill Explained*, ABC NEWS (Mar. 24, 2016), <https://perma.cc/84DK-V6HZ>.

<sup>12</sup> *Id.*

<sup>13</sup> Matthew Rodriguez, *Texas Lawmaker Briscoe Cain Calls Anti-Trans Violence “Dudes in Dresses Getting Beat Up,”* MIC (Feb. 9, 2017), <https://perma.cc/CXP8-SK8Y>.

<sup>14</sup> Katy Steinmetz, *Why LGBT Advocates Say Bathroom “Predators” Are Red Herring*, TIME (May 2, 2016), <https://perma.cc/84DK-V6HZ>.

<sup>15</sup> Amira Hasenbush, Andrew Flores, & Jody Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL’Y, 70, 81 (2019) <https://perma.cc/8MBK-QA4G>.

controversy in North Carolina was essentially over. Still, many saw through the bathroom predator myth in 2016 and called out HB2 for what it was: an attack on trans rights.

The National Collegiate Athletic Association (“NCAA”) was one such group that took a strong and principled stance for trans rights in 2016 by opposing the North Carolina bathroom bill.<sup>16</sup> On April 27, 2016, the NCAA Board of Governors adopted a new requirement for sites hosting or bidding on NCAA events in all divisions “to demonstrate how they will provide an environment that is safe, healthy, and free of discrimination, plus safeguards the dignity of everyone involved in the event.”<sup>17</sup> In a statement released by the NCAA, the organization wrote:

The board's decision follows the recent actions of legislatures in several states, which have passed laws allowing residents to refuse to provide services to some people based on their sexual orientation or gender identity. While proponents of the laws focus on how they protect religious beliefs, critics have voiced concerns that they create an environment of sanctioned discrimination.<sup>18</sup>

The NCAA hence characterized its decision as a response to anti-LGBTQIA+ legislation in general, but further decisions in 2016 by the NCAA Board of Governors made it clear that this policy specifically targeted the North Carolina bathroom bill.

On September 12, 2016, the NCAA announced that “based on the NCAA's commitment to fairness and inclusion,” the organization would be relocating all seven previously awarded championship events from North Carolina during the 2016-17 academic year.<sup>19</sup> HB2 was explicitly cited as one of the reasons for the NCAA decision: the September statement included the assertion that “the dynamic” in North Carolina was different from other states partially because “North Carolina has the only statewide law that makes it unlawful to use a restroom different from the gender on one’s birth certificate, regardless of gender identity.”<sup>20</sup>

The NCAA was not alone in its decision to boycott North Carolina in response to the state’s bathroom bill. The NBA announced in July of 2016 that it would be pulling the 2016-2017 All Star Game from Charlotte, North Carolina.<sup>21</sup> A statement announcing the organization’s decision read, “While we recognize that the NBA cannot choose the law in every city, state and country in which we do business, we do not believe we can successfully host our All-Star festivities in Charlotte in the climate created by the current law.”<sup>22</sup> Moreover, sixty-eight companies including NIKE, Capital One, and Morgan Stanley filed a court brief against North Carolina along with the

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<sup>16</sup> *Board of Governors Approves Anti-Discrimination Process for Championships Bids*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Apr. 27, 2016), <https://perma.cc/KLS7-QRAK>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *NCAA to Relocate Championships from North Carolina for 2016-17*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Sept. 12, 2016), <https://perma.cc/W5QC-J7HG>.

<sup>20</sup> *Id.*

<sup>21</sup> *NBA Statement Regarding 2017 NBA All-Star Game*, NAT’L BASKETBALL ASS’N (July 21, 2016), <https://perma.cc/8URC-ZBF5>.

<sup>22</sup> *Id.*

Human Rights Campaign on July 8th to block HB2.<sup>23</sup> Many performers ranging from Bruce Springsteen to Demi Lovato and Nick Jonas canceled performances in the state, citing their opposition to HB2 as their reason for pulling out.<sup>24</sup> The NCAA was hence in good company when it took action against North Carolina, and while Republican politicians of North Carolina may have criticized the “selective corporate elite” for “imposing their political will on communities in which they do business,”<sup>25</sup> these organizations and individuals’ choices to take action against the state for passing HB2 into law were by no means unpopular with society at large.<sup>26</sup>

## Section II: The Legislative Intent of Anti-Trans Bills

Overwhelmingly, state legislators behind recent anti-trans legislation have argued that they were introducing these bills with the intent to protect children – whether that be “protecting children” from “profoundly unethical and morally wrong” medical practices<sup>27</sup> or protecting young cis girls from “unfair competition” in sports.<sup>28</sup> HB1570, the bill attacking gender-affirming care that Arkansas Governor Asa Hutchinson signed into law in 2021, was even titled the “Save Adolescents From Experimentation (SAFE) Act.”<sup>29</sup> Similarly, SB 1028, which passed in Florida and was signed by Governor Ron DeSantis on the first day of Pride Month, was titled the “Fairness in Women’s Sports Act.”<sup>30</sup> These titles are intentionally misleading and meant to distract from their real legislative intent: instilling fear in trans people, particularly children. To avoid the perception that the right is attacking the rights of a marginalized group solely to further marginalize them, these state legislatures have adopted a rhetorical framework to frame their attacks on trans rights as efforts to protect the rights of other marginalized groups – namely young girls and children as a whole.

Advocates have called attention to lawmakers’ efforts to disguise their true intent in introducing anti-trans bills. A 2021 investigation by the *19th* found that the word “transgender” itself was missing from the vast majority of anti-trans bills.<sup>31</sup> Instead, anti-

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<sup>23</sup> Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina over the HB2 ‘Bathroom Bill’*, NEWSWEEK (Sept. 14, 2016), <https://perma.cc/PV4W-JBDH>.

<sup>24</sup> *Id.*

<sup>25</sup> Scott Cacciola & Alan Blinder, *N.B.A. to Move All-Star Game from North Carolina*, N.Y. TIMES (July 21, 2016), <https://perma.cc/4PR8-9YMJ>.

<sup>26</sup> *Id.*

<sup>27</sup> Frank Gluck, *Tennessee’s GOP Leadership Proposes Ban on Gender-Affirming Care as First Bill for 2023*, TENNESSEAN (Nov. 9, 2022), <https://perma.cc/929R-KTA8>.

<sup>28</sup> Natalie Haddad, *Texas House Initially Passes College Transgender Athlete Bill, ‘Save Women’s Sports Act,’* KVUE NEWS (Austin) (May 17, 2023), <https://perma.cc/H3U7-7UMX>.

<sup>29</sup> H.B. 1570, 93rd Gen. Assemb., Reg. Sess., 2021 (Ark. 2021).

<sup>30</sup> Meredith Deliso, *Florida Governor Signs Bill Targeting Transgender Athletes on 1st Day of Pride Month*, ABC NEWS (June 1, 2021), <https://perma.cc/7NSB-7NAL>; Fla. Stat. Ann. § 1006.205 (West, Westlaw through July 4, 2023).

<sup>31</sup> Orion Rummeler & Kate Sosin, *The Word Missing from the Vast Majority of Anti-Trans Legislation? Transgender*, THE 19TH (Nov. 12, 2021), <https://perma.cc/VL5K-ZPTZ>. See, e.g., S.B. 199, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (referencing “males” and “females” and “gender transition,” but not “transgender.”); S.F. 538, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) (referencing “biological males” and “biological females”); S.B. 480, 124th Gen. Assemb., Reg. Sess. (Ind. 2023) (same); H.B. 2238, 2023 Leg., Reg. Sess. (Kan. 2023) (referencing “biological

trans legislation frequently refers to “biological males” or “biological females” – a simplistic and inaccurate reduction.<sup>32</sup> Many different components make up “biological sex”, including but not limited to chromosomal makeup, secondary sex characteristics, and hormones present.<sup>33</sup> Someone with a penis and breasts who takes estrogen injections is hence not necessarily “biologically” one sex or another. Emmett Schelling, who serves as Executive Director of the Transgender Education Network of Texas, has claimed that it’s not that lawmakers are simply uneducated on the existence and needs of the trans community; rather, they refuse to acknowledge the existence of trans people and the extent of the harm they are doing to the trans community.<sup>34</sup> Similarly, Rev. Remington Johnson, who testified five times in Texas in 2021 against anti-trans bills, has called out lawmakers’ efforts to hide the true intention of their anti-trans bills. She claims, “You simply hear, ‘Save women’s sports, save girls’ sports ... they’re not saying, ‘We’re against trans people, we’re against trans kids.’ They’re just removing the language entirely.”<sup>35</sup> Rev. Johnson also argues that this language of “saving women’s sports” is intentionally used to confuse voters into supporting these bills and prevent them from seeing these bills for what they truly are: an assault on the rights of trans people.<sup>36</sup>

Anti-trans bills do not accomplish the supposed goals of protecting adolescents from “experimentation.”<sup>37</sup> Overwhelmingly, the scientific evidence demonstrates that the kind of gender-affirming care these bills attack, particularly hormone replacement therapy and puberty blockers, are completely safe methods.<sup>38</sup> In fact, the *Journal of Adolescent Health* published a study demonstrating that access to gender-affirming hormone therapy reduces rates of depression, suicidal ideation, and suicide attempts in trans youth.<sup>39</sup> Moreover, framing gender-affirming care as “experimentation” is misleading, especially given that puberty blockers are entirely reversible – whereas puberty is not.<sup>40</sup> Puberty blockers thus improve the mental health of trans youth while also reducing the need for gender-affirming surgeries in the future.<sup>41</sup> Additionally, puberty blockers can help reduce the onset of secondary sex-based characteristics

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sex,” “males,” and “females”); S.B. 145, 2023 Leg., Reg. Sess. (Ky. 2023) (referencing “male sex” and “female sex”).

<sup>32</sup> Rummler & Sosin, *supra* note 31.

<sup>33</sup> Kim Elsesser, *The Myth of Biological Sex*, FORBES (June 15, 2020), <https://perma.cc/BGZ7-5NDZ>.

<sup>34</sup> Rummler & Sosin, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See H.B. 1570, 93rd Gen. Assemb., Reg. Sess., 2021 (Ark. 2021) (asserting “gender transition” to be an “experiment”).

<sup>38</sup> Gesine Meyer, Moritz Mayer, Antonia Mondorf, Anna Katharina Flügel, Eva Herrmann, & Joerg Bojunga, *Safety and Rapid Efficacy of Guideline-Based Gender-Affirming Hormone Therapy: An Analysis of 388 Individuals Diagnosed with Gender Dysphoria*, 182 EUR. J. ENDOCRINOLOGY, 149, 149-56 (2020) <https://doi.org/10.1530/EJE-19-0463>.

<sup>39</sup> Amy Green, Jonah DeChants, Myeshia Price, & Carrie 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, 643-49 (2022) <https://doi.org/10.1016/j.jadohealth.2021.10.036>.

<sup>40</sup> Jack Turban, Dana King, Jeremi Carswell, & Alex Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 PEDIATRICS (2020) <https://doi.org/10.1542/peds.2019-1725>.

<sup>41</sup> Mayo Clinic Staff, *Pubertal Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 14, 2023), <https://perma.cc/DXE6-5RAK>.

in people assigned male at birth (“AMAB”), the very same characteristics which lawmakers argue give trans girls an unfair competitive advantage in women’s sports.<sup>42</sup> Preventing trans girls from being able to participate in women’s sports while simultaneously blocking access to gender-affirming care is hence hypocritical.

Additionally, these bills do not achieve the goal of promoting “fairness” in women’s sports. Bills restricting the participation of trans women and girls in sports are solutions in search of a problem. There is simply no evidence that trans women and girls are dominating sports; many states and athletic associations have allowed trans women and girls to compete alongside their cisgender peers for years.<sup>43</sup> Additionally, no evidence exists to back up the notion that trans women are dominating certain sports or competitions. Sometimes they win, but sometimes they lose – just like any other athlete. In March 2022, Lia Thomas, a trans woman swimmer at the University of Pennsylvania, came under fire after becoming the first openly transgender athlete to win an NCAA Division I national championship in any sport.<sup>44</sup> While Thomas’ win in the women’s 500-yard freestyle became the immediate focus on conservative pundits, few reported that Thomas’ time was 4:33.24.<sup>45</sup> This time is a full 9.18 seconds short of Katie Ledecky’s NCAA record of 4:24.06.<sup>46</sup> Putting aside the question of whether sports are truly fair and free of athletes with biological advantages in the first place,<sup>47</sup> society should not allow trans athletes to compete only so long as they never win over cis athletes. Sometimes trans athletes will win over cisgender athletes, but there is simply no proof that trans athletes as a whole are dominating sports. There have been no studies carried out on performance advantages of adolescent trans athletes, so no data exists on trans athletes who took puberty blockers or gender-affirming hormone therapy during puberty — and certainly none before puberty.<sup>48</sup> However, anecdotal evidence supports the claim that allowing trans girls to compete in sports will not result in them dominating the competition.<sup>49</sup> Many states, including the state of California, have long had policies accepting of trans girls in sports and there is no evidence that bills such as California’s have limited the ability of cisgender girls to compete and win.<sup>50</sup>

Moreover, these bills have no basis in science. Dr. Eric Vilain, a pediatrician and geneticist who has advised the International Olympic Committee and the NCAA, argues that there is no reason

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<sup>42</sup> *Id.*

<sup>43</sup> Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, AM. C.L. UNION (April 30, 2020), <https://perma.cc/TSK2-8ZLG>; Mark Joseph Stern, *It Wasn’t About Bathrooms, and It’s Not About Women’s Sports*, SLATE (Apr. 7, 2021), <https://perma.cc/6BS3-HWPB>.

<sup>44</sup> Jason Owens, *Swimmer Lia Thomas Becomes NCAA’s First Transgender D-I Champion in Any Sport*, YAHOO! SPORTS (Mar. 17, 2022), <https://perma.cc/HAU5-CEGU>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> For a more detailed discussion of this point, see Gregg Bloche, Opinion, *Do Transgender Athletes Have an Unfair Advantage?*, HILL (Jan. 20, 2020), <https://perma.cc/94Y6-P2R8>.

<sup>48</sup> All Things Considered, *Arguments That Trans Athletes Have an Unfair Advantage Lack Evidence to Support*, NPR, at 01:36 (Apr. 9, 2023), <https://perma.cc/C376-GDQV>.

<sup>49</sup> Stern, *supra* note 43.

<sup>50</sup> *Id.*

to limit the participation of transgender athletes at the high school level.<sup>51</sup> Though men have, on average, an advantage in performance in athletics of about 10% to 12% over women, which scientists have attributed to the hormone testosterone, there is no evidence that testosterone causes performance advantages in real life.<sup>52</sup> Proponents of transgender sports bans often cite studies which purportedly demonstrate that transgender female athletes have a competitive advantage over cisgender athletes, however, these studies misleadingly use either cisgender men or sedentary transgender women as proxies for elite transgender female athletes.<sup>53</sup> In reality, current studies do not support the claims that sex-based differences in skills such as speed and strength are enough to significantly impact competitive advantage. For example, one study found that after being on hormones for two years, trans women retained a 12% advantage over cisgender women in run times.<sup>54</sup> However, the author of the study stated that differences in running time need additional perspective; to be in the top 10% of female runners, one has to be 29% faster than the average cis woman, and to be an elite runner, one has to be 59% faster than the average cis woman.<sup>55</sup> Therefore, the biological differences between trans women athletes and cis women athletes may not outweigh the competitive advantages both groups of women have over cis women non-athletes. In other words, competitive advantages of athletes compared to the general population are an essential aspect of sports. Further studies comparing trans women athletes to cis women athletes are necessary, but the anecdotal evidence currently available does not suggest that trans women athletes have a significant advantage over their cis competitors.<sup>56</sup> There is simply no evidence that trans girls are dominating women's sports.<sup>57</sup>

Additionally, far from promoting “fairness” in women's sports, these bills harm cisgender girls. In a brief written by the National Women's Law Center against the Idaho “Fairness in Women's Sports Act,” which aimed to ban trans girls from participating in youth female sports, the organization stated, “The law allows anyone for any reason to question whether a student athlete is a woman or girl. And then the student has to verify her gender by undergoing invasive testing, which could include a gynecological exam, blood work or chromosome testing.”<sup>58</sup> One of the plaintiffs in the suit, Jane Doe, argued that even though she is cisgender, this law would potentially be harmful to her given that she does not conform to gender norms in her dress or build and that being forced to submit to a test to prove she was assigned female at birth

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<sup>51</sup> Given that the majority of legislation targeting trans athletes focuses on the K-12 level, the scope of this student note is limited to that level. Further research on trans athletes at the collegiate and pro level is necessary. Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NPR (Mar. 18, 2021), <https://perma.cc/PMB4-W2G8>.

<sup>52</sup> *Id.*

<sup>53</sup> *Transgender Women Athletes and Elite Sport: A Scientific Review*, CAN. CTR. FOR ETHICS IN SPORT (2022), <https://perma.cc/BRU9-YLTT>.

<sup>54</sup> Timothy Roberts, Joshua Smalley, & Dale Ahrendt, *Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organizations and legislators*, 55 BRIT. J. SPORTS MED. 577, 577 (2020), <https://perma.cc/LSN6-DRFD>.

<sup>55</sup> Stephanie Burnett, *Fact Check: Do Trans Athletes Have an Advantage in Elite Sport?*, DEUTSCHE WELLE (July 24, 2021), <https://perma.cc/H26V-E2KW>.

<sup>56</sup> See Stern, *supra* note 43; Ermyas & Wakeam, *supra* note 51; Burnett, *supra* note 55; Joe Ali, *Trans Women Have No Advantage in Elite Sports, New Report Finds*, PINK NEWS (Jan. 26, 2023), <https://perma.cc/M4LD-XRGB>.

<sup>57</sup> See Stern, *supra* note 43; Burnett, *supra* note 55; Ali, *supra* note 56.

<sup>58</sup> Cassandra Menash & Sunu Chandy, *NWLC Leads Amicus Brief Against Idaho Law That Targets Trans Women and Girls and Harms All Female Students*, NAT'L WOMEN'S L. CTR. (Dec. 21, 2020), <https://perma.cc/L9VF-N8D4>.

(“AFAB”) would be detrimental to her wellbeing.<sup>59</sup> Ergo, these bills do not serve the supposed aim of promoting fairness in women’s sports.

The latest assault on LGBTQIA+ rights, like other attacks over the years, is the result of a coordinated effort by far-right conservative advocacy groups such as the Alliance Defending Freedom (“ADF”).<sup>60</sup> The ADF, which is classified as a hate group by the Southern Poverty Law Center,<sup>61</sup> helped write the first slate of bills attacking trans women in sports.<sup>62</sup> Anti-trans bills introduced in Arizona, Kansas, Mississippi, Montana, and Idaho in 2021 had extremely similar language which all drew from the same source: model legislation written by the ADF.<sup>63</sup> The Alliance Defending Freedom does not have a long history of supporting women’s sports.<sup>64</sup> They do, however, have an extensive history of attacking LGBTQIA+ rights: prior to making trans women and girls in sports their crusade, the Alliance Defending Freedom was behind the anti-trans bathroom bills that proliferated in 2016 and 2017 across the country.<sup>65</sup> However, it soon became clear that the supposed “bathroom predator” from whom bathroom bills purported to protect women did not exist. States that allowed trans people to use the bathroom that aligned with their gender identity did not experience any cases of someone pretending to be trans in order to assault women or girls in restrooms.<sup>66</sup> The “bathroom predator” threat hence lost its edge, leading the ADF to change course to focus on trans women and girls in sports.<sup>67</sup>

### **Section III: The Response to Anti-Trans Bills: 2016 vs. 2020s**

LGBTQIA+ movement organizations have taken a strong stance against the anti-trans bills introduced and passed in the early 2020s. Lambda Legal, an organization dedicated to advancing LGBTQIA+ rights via impact litigation, societal education, and public policy work, has filed suits in over a dozen states challenging laws that discriminate on the basis of transgender status.<sup>68</sup> The Human Rights Campaign (“HRC”), the largest LGBTQ advocacy group and LGBTQ political lobbying organization in the United States, took out a full-page ad in the *New York Times* in April 2021 appealing to corporations to denounce the anti-trans bills that have proliferated in Republican-controlled legislatures.<sup>69</sup> HRC also filed lawsuits in Florida and

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<sup>59</sup> *Id.*

<sup>60</sup> Sam Levin, *How Trans Children Became ‘a Political Football’ for the Republican Party*, GUARDIAN (Mar. 23, 2021), <https://perma.cc/5G6R-TN6Q>.

<sup>61</sup> *Alliance Defending Freedom*, S. POVERTY L. CTR. (last visited Nov. 10, 2023), <https://perma.cc/3BSU-P8E9>.

<sup>62</sup> Nico Lang, *A Hate Group Is Reportedly Behind 2021’s Dangerous Wave of Anti-Trans Bills*, THEM, (Feb. 19, 2021), <https://perma.cc/TNH4-7P7A>.

<sup>63</sup> *Id.*

<sup>64</sup> ADF’s first involvement with women’s sports began in 2019, when it initiated the first significant suit opposing the participation of trans athletes in girls’ sports. David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), <https://perma.cc/7DX3-U7JB>.

<sup>65</sup> *Id.*

<sup>66</sup> Hasenbush et al., *supra* note 15.

<sup>67</sup> Stern, *supra* note 43.

<sup>68</sup> *Litigation Library*, LAMBDA LEGAL, <https://perma.cc/22VY-KVWH> (last visited Oct. 20, 2023).

<sup>69</sup> Alphonso David, *What Do We Need from Corporate America?*, HUM. RTS. CAMPAIGN (Apr. 12, 2021), <https://perma.cc/H723-ZT4M>.



Alabama challenging anti-trans bills passed in the states in 2022 and 2023.<sup>70</sup> The American Civil Liberties Union (“ACLU”) has also filed lawsuits in dozens of states challenging anti-trans laws passed since 2020.<sup>71</sup> These lawsuits blocked the enforcement of gender-affirming care bans in six states.<sup>72</sup> While these suits are important, these actions have overwhelmingly been reactive rather than proactive. As the slate of bathroom bills in the mid-2010s demonstrated, impact litigation can stop the bleeding, but it rarely leads to the kind of societal change necessary to stop these transphobic bills from being introduced in the future.

Despite the enormous increase in the number of anti-trans bills introduced in the early 2020s compared to previous years, these bills sparked shockingly little backlash from people outside of the LGBTQIA+ community. Corporations initially made some efforts to stand in solidarity with trans folks; for example, over 330 corporations including Facebook, Amazon, Google, and Microsoft have signed the HRC Business Statement on Anti-LGBTQ State Legislation.<sup>73</sup> Additionally, representatives of four of the largest American food companies wrote an op-ed in USA Today condemning “dangerous, discriminatory legislation that serves as an attack on LGBTQ+ individuals, particularly transgender and nonbinary people.”<sup>74</sup> However, words without action are just attempts at virtue signaling, and some corporations have succumbed to anti-trans hysteria, with Anheuser-Busch’s kowtowing to conservative backlash to their ad with transgender celebrity Dylan Mulvaney being just one example.<sup>75</sup> In fact, many of the same corporations that signed the Business Statement on Anti-LGBTQ State Legislation have also contributed millions of dollars to anti-trans politicians at the state and federal levels.<sup>76</sup> So far, no corporation has taken any real action to combat anti-trans legislation focused on medical care and participation in sports – the backlash sparked by these bills from corporations has been constituted primarily by harsh condemnations and stern looks rather than monetary action.

The sports and medical industries have also barely, if at all, expressed opposition to these bills. The NCAA, the main organization regulating student athletes in America, released a statement on April 12, 2021 in support of trans athletes in the face of an onslaught of bills targeting trans student-athletes.<sup>77</sup> The statement indicated that “NCAA policy directs that only locations where

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<sup>70</sup> Aryn Fields, *Florida Parents Announce Lawsuit Challenging State Ban on Essential Medical Care for Transgender Children*, HUM. RTS. CAMPAIGN (Mar. 16, 2023), <https://perma.cc/RK87-8GNL>; Aryn Fields, *Doctors and Families to Challenge Alabama’s Criminalization of Healthcare for Transgender Children and Adolescents*, HUM. RTS. CAMPAIGN (Apr. 7, 2022), <https://perma.cc/KDV5-8DLB>.

<sup>71</sup> LGBTQ Rights Court Cases, AM. C.L. UNION, <https://perma.cc/F5ED-8BRU> (last visited Oct. 20, 2023).

<sup>72</sup> *Federal Appeals Court Rejects Request to Block Tennessee Ban on Gender-Affirming Care*, AM. C.L. UNION (Sept. 28, 2023), <https://perma.cc/CWA8-C8XG>.

<sup>73</sup> *Business Statement on Anti-LGBTQ State Legislation*, HUM. RTS. CAMPAIGN, <https://perma.cc/A9XR-AJU3> (last visited Oct. 20, 2023).

<sup>74</sup> Chris Adamo, Brad Figel, Molly Fogarty, & Tom Langan, *Corporate Leaders: Companies Should Work Against Anti-LGBTQ Bills in Texas, Other States*, USA TODAY (Apr. 7, 2021), <https://perma.cc/VKH4-7K95>.

<sup>75</sup> See Samantha Riedel, Abby Monteil, & James Factora, *Everything You Need to Know About the Bud Light and Dylan Mulvaney Fiasco*, THEM (Aug. 14, 2023), <https://perma.cc/79VQ-ZQK3>.

<sup>76</sup> Harshawn Ratanpal and Taylor Giorno, *Companies That Publicly Condemned Legislation Targeting the LGBTQ+ Community Send Political Contributions to State Lawmakers Who Advanced Anti-LGBTQ+ Bills*, OPEN SECRETS (June 9, 2023), <https://perma.cc/TL9S-YYPL>.

<sup>77</sup> Jo Yurcaba, *NCAA Backs Transgender Athletes, Says Events to Be in Places Free of Discrimination*, NBC NEWS (Apr. 12, 2021), <https://perma.cc/4WTS-DQ7M>.

hosts can commit to providing an environment that is safe, healthy and free of discrimination should be selected.”<sup>78</sup> However, this strong commitment to upholding trans rights was almost immediately undermined when an NCAA spokesperson revealed that the organization was not yet committed to not holding championship games in discriminatory states, stating, “The Board of Governors continues to monitor the situation and has not made a decision regarding championships.”<sup>79</sup> This statement stands in strong contrast to the NCAA’s decision in 2016 to pull championship events that were to be held in North Carolina that year, citing the state’s decision to pass a discriminatory trans bathroom ban.<sup>80</sup> It is unclear why the NCAA would not take a similar stance in response to bills specifically targeting the student-athletes the NCAA is supposed to serve. Additionally, the NCAA violated its own April 2021 statement by announcing softball tournaments at schools in Alabama, Arkansas, and Tennessee, all states that passed anti-transgender legislation in 2021.<sup>81</sup> In 2022, the NCAA adopted a sport-by-sport approach to inclusion of transgender athletes, mirroring the approach taken by US and International Olympic committees.<sup>82</sup> The organization has continued to fail to take a stand against states that have banned transgender athletes from competing in women’s sports.<sup>83</sup> The 2021 NCAA statement hence appears to be another example of virtue signaling by an organization more dedicated to having a good social image than actually helping trans people.

Though the medical industry has spoken out against the recent rise in anti-trans bills, the onslaught has continued. The American Medical Association (“AMA”) released a statement on June 15, 2021 opposing legislation limiting access to gender-affirming care.<sup>84</sup> AMA Board Member Michael Suk stated, “Gender-affirming care is medically-necessary, evidence-based care that improves the physical and mental health of transgender and gender-diverse people.”<sup>85</sup> The American Association of Pediatrics (“AAP”) also released a statement in response to anti-trans legislation in January 2022.<sup>86</sup> The AAP statement spoke out against all forms of anti-trans bills, including those targeting access to bathrooms and sports.<sup>87</sup> AAP Immediate Past President Lee Savio Beers stated:

As pediatricians, we will continue to speak up and advocate for our patients. We also want transgender and gender-diverse youth to know that not only do we care

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Christopher Dean Hopkins, *NCAA Pulls 7 Championship Events From North Carolina, Citing Transgender Law*, NPR (Sept. 13, 2016), <https://perma.cc/4ZZJ-MDB2>.

<sup>81</sup> Wyatt Ronan, *Human Rights Campaign Calls on NCAA Not To Host Future ‘Final Four’ In States With Anti-Trans Discrimination*, HUM. RTS. CAMPAIGN (Oct. 1, 2021), <https://perma.cc/GA9U-NCVZ>.

<sup>82</sup> Ralph D. Russo, *Demonstrators Protest NCAA’s Transgender Athletes Policy*, ASSOCIATED PRESS, (Jan. 12, 2023) <https://perma.cc/SAC9-HKNA>.

<sup>83</sup> *Id.*

<sup>84</sup> Robert Mills, *AMA Reinforces Opposition to Restrictions on Transgender Medical Care*, AM. MED. ASS’N (June 15, 2021), <https://perma.cc/AN4L-3Q7J>.

<sup>85</sup> *Id.*

<sup>86</sup> Alyson Sulasi Wyckoff, *AAP Continues to Support Care of Transgender Youths as More States Push Restrictions*, AM. ACAD. PEDIATRICS (Jan. 6, 2022), <https://perma.cc/3Z8S-7YBA>.

<sup>87</sup> *Id.*

for them, we care about them, we value them and we will do all we can to ensure they have access to the care they need and deserve.<sup>88</sup>

Moreover, many doctors and other health professionals have testified in state legislatures targeting trans youth across the nation, confirming that gender-affirming care is safe and essential.<sup>89</sup> There is a growing effort by some medical professionals to support bans on gender-affirming care, but these medical professionals often have no actual experience treating gender dysphoria with the hormone therapy and puberty blockers they seek to ban, and have even been discredited as experts by the very courts in which they have testified.<sup>90</sup> Despite the general consensus among medical professionals and legitimate expert medical organizations that bills limiting access to gender-affirming care are discriminatory and unnecessary, conservative lawmakers have continued their efforts to limit trans rights.<sup>91</sup> These efforts demonstrate that the legislators behind these bills know that they are not actually protecting children; rather, children are just the scapegoat for the right to limit trans rights. What happened between 2016 and 2020 that allowed anti-trans bills to become so commonplace, and why have the anti-trans bills of the 2020s not received the level of backlash that HB2 did?

#### **Section IV: Enforcing Discriminatory Policies: HB2 vs. Anti-Trans Legislation of the 2020s**

There are stark differences between North Carolina's HB2 in 2016 and the anti-trans bills that have proliferated in state legislatures in the 2020s, the main differences being enforceability and public perception. Primarily, the "bathroom bill" aspect of HB2 that forced trans people to use the bathroom that aligned with their assigned sex at birth was clearly unenforceable in practice. Not all trans people are visibly trans, and there was no authority identified by the bill to remove trans people from the "wrong" bathroom. Moreover, there is a long history of women of color, specifically dark-skinned Black cis women, being accused of being trans women.<sup>92</sup> The bill could hence impact some cis women while allowing some trans women to fly under the radar.<sup>93</sup> The anti-trans legislation of the 2020s, on the other hand, have much more specific enforcement mechanisms. These bills clearly outline how states will punish doctors and parents for providing/allowing gender-affirming care for trans children and what measures states will take to bar trans children from participating in sports/participating on teams that align with their gender identity.<sup>94</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Doctors Agree: Gender-Affirming Care Is Life-Saving Care*, AM. C.L. UNION (Apr. 1, 2021), <https://perma.cc/X6DE-X5UH>.

<sup>90</sup> Aviva Stahl, *Four Controversial Doctors Helping Republicans Attack Trans Healthcare*, GUARDIAN (June 9, 2023), <https://perma.cc/TD8K-2P2W>; Stephen Caruso, *A Texas Judge Ruled This Doctor Was Not an Expert. A Pennsylvania Republican Invited Him to Testify on Trans Health Care*, PA. CAP.-STAR (Sept. 15, 2020) <https://perma.cc/3J7V-8NMR>; Alejandra Caraballo, *The Anti-Transgender Medical Expert Industry*, 50(4) J. L., MED. & ETHICS 687, 689 (2023), <https://doi.org/10.1017/jme.2023.9>

<sup>91</sup> See AMERICAN CIVIL LIBERTIES UNION, *supra* note 89.

<sup>92</sup> Hannah Eko, *As a Black Woman, I'm Tired of Having to Prove My Womanhood*, BUZZFEED NEWS (Feb. 27, 2018), <https://perma.cc/4EDE-XAPV>.

<sup>93</sup> "Trans women" rather than "trans people" is used here because although the bill impacted all trans people in North Carolina, its clear targets were trans women.

<sup>94</sup> The language of legislation targeting trans athletes so far only prevents trans girls and women from participating on women's sports teams, forcing them to compete on men's sports teams. See Fla. Stat. Ann. § 1006.205 (West,

This difference in enforcement mechanisms impacted the general public’s (lack of) response to these bills. Because the “bathroom bill” aspect of HB2 was clearly unenforceable, it was viewed as an attack on trans existence in public. Ability to access a bathroom is a basic element of participating in society. Restricting trans people’s access to safe bathrooms would force them to remain in hiding, which would force them to either stay in private or hide their trans identity from the public eye. Because the “bathroom bill” aspect of HB2 was clearly unenforceable, the general public interpreted the bill as a message to trans people that they were not welcome in public spaces. Additionally, many people interpreted the bill’s impact on local nondiscrimination protections in North Carolina as an attempt to roll back LGBTQIA+ rights – Demi Lovato, who has since come out as nonbinary, stated that “North Carolina’s discriminatory HB2 law is extremely disappointing, and it takes away some of the LGBT community’s most basic rights and protections,” when justifying their choice to cancel tour dates in the state.<sup>95</sup> Moreover, everyone can understand the need to access a bathroom and to feel safe while using it. The anti-trans legislation of the 2020s, however, has so far not sparked similar levels of backlash. This is due to the difference in perception by society at large of the importance of different trans issues; while it is clear that everyone needs to access a bathroom, playing sports or accessing gender-affirming care as a minor are not likewise seen as “needs.” The perception of the anti-trans bills of the 2020s is hence less negative than the perception of HB2, despite the fact all these forms of legislation have the same intent to limit trans rights. The anti-trans legislation of the 2020s, despite their perception, are in fact even more punitive than the 2016 “bathroom bill” because the recent bills are so much more enforceable. The right will be able to more effectively roll back trans rights and instill fear in trans people by targeting their access to social spaces and to medical care. These bills play into Americans’ limited understanding of biology and medical care as well as their limited knowledge of trans people as a whole.

## Section V: How We Got Here

The platforming of detransitioners and the rise in visibility of trans youth between 2016 and the 2020s allowed the right to choose access to medical care and sports for trans youth as their next target. Additionally, the right chose these issues as their next target because conservatives have been able to justify their attacks on these issues by claiming that anti-trans legislation is designed to “protect” (primarily cisgender) women and children.<sup>96</sup> Compared to access to bathrooms, the public perceives access to gender-affirming care and participation of trans people in sex-segregated sports as more complicated issues.

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Westlaw through July 4, 2023). However, as courts have repeatedly recognized, the effect of many of these bills is to fully bar trans women and girls from sports. *Hecox v. Little*, 479 F. Supp. 3d 930, 984 (D. Idaho 2020) (“[T]he Proponents’ argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men’s team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex.”); *Roe v. Utah High School Activities Ass’n*, No. 220903262, 2022 WL 3907182, at \*8 (D. Utah Aug. 19, 2022) (“If they are not eligible to play on girls’ teams, they have no meaningful opportunity to play at all.”).

<sup>95</sup> Daniel Kreps, *Nick Jonas, Demi Lovato Cancels North Carolina Shows to Protest HB2*, ROLLING STONE (Apr. 26, 2016), <https://perma.cc/YA63-EFU9>.

<sup>96</sup> *See supra* Section II.

The 2016 North Carolina bill and “bathroom bills” as a whole focused on bodies in space and restricting the presence of trans bodies in public. However, this kind of an open assault on trans existence in public was met with significant backlash.<sup>97</sup> Continuing to attack trans people through bathroom bills was clearly a failing strategy for the right, and so they pivoted to targeting trans youths’ access to medical care and sports. Furthering the goals of maintaining strict gender norms under the white supremacist patriarchy was clearly going to require a more believable scapegoat. Additionally, as LGBTQIA+ rights became more widely supported in the years following 2016, it also became apparent that the right would have to justify any attempts to limit or roll back the rights of trans people as efforts to protect the rights of another historically marginalized group.<sup>98</sup> The American right’s strategic shift coincided with two phenomena that would prove to be pivotal to the next proliferation of anti-trans bills: trans-exclusionary radical feminists (“TERFs”) in the United Kingdom started to platform “detransitioners,” and the number of children in America who identify as trans rose significantly.

In October 2019, United Kingdom-based news organization *SkyNews* ran a story about the “Detransition Advocacy Network,” a new charity founded by Charlie Evans, a former transgender man who detransitioned in 2018.<sup>99</sup> People who identify as “detransitioners” are those who once identified as transgender and who had sought out gender-affirming care, but ultimately regretted their decision to do so and wish to return to their sex assigned at birth.<sup>100</sup> While the hysteria surrounding bathroom predators focused on fear of trans women, the fear of decision regret interestingly focuses almost exclusively on trans men.<sup>101</sup> For example, the *Intelligencer* published an article in 2019 where one interviewee expressed concern that “many teenage women ... have been convinced too quickly that the only solution [to gender dysphoria] is to change their sex.”<sup>102</sup> TERFs and detransitioners often claim that they’re not transphobic; they’re just concerned about (cisgender) women.<sup>103</sup> Though there are certainly TERFs that are against the existence of all trans people, the concerns they raise about gender-affirming surgery are almost exclusively focused on protecting young “women.”

However, the data available does not support TERFs’ claims about the dangers and regrets of transitioning – only .4% of nearly 28,000 respondents in a 2015 National Center for Transgender

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<sup>97</sup> See *supra* Section III.

<sup>98</sup> Though outside the scope of this Note, this effort to reframe attacks on trans rights as efforts to protect women and children coincided with the religious right’s reframing of abortion restrictions as “pro-woman.” For a more detailed discussion of this topic, see Amanda Roberti, “Women Deserve Better:” *The Use of the Pro-Woman Frame in Anti-Abortion Policies in the U.S. States*, 42(3) J. WOMEN, POL. & POL’Y 207, 207-24 (2021), <https://doi.org/10.1080/1554477X.2021.1925478>.

<sup>99</sup> Sally Lockwood, ‘Hundreds’ of Young Trans People Seeking Help to Return to Original Sex, SKY NEWS (Oct. 5, 2019), <https://perma.cc/BP77-KNJ5>.

<sup>100</sup> Liam Knox, *Media’s ‘Detransition’ Narrative Is Fueling Misconceptions, Trans Advocates Say*, NBC NEWS (Dec. 19, 2019), <https://perma.cc/K8E2-J78R>.

<sup>101</sup> See, e.g. Joani Walsh, *Meet the “Detransitioners”*: *The Women Who Became Men - And Now Want to Go Back*, Telegraph (Nov. 16, 2019), <https://perma.cc/8ZYQ-49MJ> (characterizing all detransitioners as those assigned female at birth).

<sup>102</sup> Andrew Sullivan, *The Hard Questions About Young People and Gender Transitions*, INTELLIGENCER (Nov. 1, 2019), <https://perma.cc/F7QS-TFZ9>.

<sup>103</sup> At Liberty Podcast, “Protecting Women and Children” Is a Shield for Transphobia, AM. C.L. UNION, at 1:09 (Mar. 17, 2022), <https://perma.cc/BUA2-QLDB>.

Equality survey reported detransitioning after realizing that transitioning wasn't right for them.<sup>104</sup> A study published in *LGBT Health* in 2021 found that among adults with a reported history of detransition, the vast majority reported that they detransitioned due to external pressures, such as pressure from family, pressure from an employer, and loss of health insurance coverage for gender-affirming hormones.<sup>105</sup> These people hence still identified internally as trans but did not feel safe doing so externally, meaning efforts to further marginalize trans people and limit access to gender-affirming care would cause more trans people to not present as trans publicly. Nevertheless, the voices of TERFs, uplifted by UK media and celebrities such as J.K. Rowling, have managed to drown out the voices of the many trans people for whom transitioning was essential.<sup>106</sup>

This supposed concern for young “women” interested in transitioning coincided with an increase in the number of youth who identify as trans, both in the US and the UK. A 2022 Williams Institute study found that the youngest age group surveyed (between 13 and 17 years old) had the highest percentage of individuals who identified as transgender.<sup>107</sup> The sheer number of trans youth remained immensely small – only 300,100 (as opposed to 1.6 million adults who identify as trans).<sup>108</sup> Only 18.3% of those who identify as trans are 13 to 17 years old, whereas the majority of people who identify as transgender are ages 25 or older.<sup>109</sup> However, this is still double the number of youth who identified as transgender in 2017.<sup>110</sup> The number of youth who identify as trans hence seems to have been increasing steadily over the past five years.<sup>111</sup> Of course, any changes in youth populations have a large impact on schools, and the increase in openly trans children is no exception. Trans children have an interest in extracurriculars just like any other child, so as the number of openly trans children began to rise, a new battleground presented itself for the right: participation of trans people in sports.

Therefore, the right was remodeling their attack on trans people just as detransitioners and trans youth started to gain more attention. As stated, the right recognized that in order to avoid the kind of backlash that the bathroom bill received, they would need to reframe their attacks on trans people as attempts to protect another marginalized group(s).<sup>112</sup> Gender-affirming care and trans youth became the perfect targets for the right, not just because of their increase in visibility,

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<sup>104</sup> This is the most recent large study available of trans people that asks about detransitioning in the United States. See Knox, *supra* note 100.

<sup>105</sup> Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan, & Alex S. Keuroghlian, *Factors Leading to 'Detransition' Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis*, 8(4) *LGBT Health*, 273, 273–80 (2021), <https://doi.org/10.1089/lgbt.2020.0437>.

<sup>106</sup> Kalhan Rosenblatt, *J.K. Rowling Doubles down in What Some Critics Call a 'Transphobic Manifesto'*, NBC NEWS (June 10, 2020), <https://perma.cc/LQ6P-C9AL>.

<sup>107</sup> Jody L. Herman, Andrew R. Flores, & Kathryn K. O'Neill, *HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 5 (June 2022), <https://perma.cc/L22S-QV96>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6.

<sup>110</sup> In 2017, the Williams Institute reported that 149,750 youth identified as transgender. Jody L. Herman, Andrew R. Flores, Taylor N.T. Brown, Bianca D.M. Wilson, & Keith J. Conron, *AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES* 4 (Jan. 2017), <https://perma.cc/A5YX-MRKC>.

<sup>111</sup> Herman, Flores, & O'Neill, *supra* note 107; Herman, Flores, Brown, Wilson & Conron, *supra* note 110.

<sup>112</sup> Rishika Dugyala, *Looking Behind the Wave of Anti-Trans Bills*, POLITICO (July 16, 2021), <https://perma.cc/GP3L-JNFN>.

but also because the right could justify their attacks on these issues by arguing that they were acting only to protect (cisgender) women and children. Detransitioners' framing of gender-affirming care as a dangerous act that "women" and children would eventually come to regret allowed legislators to portray their attacks on gender-affirming care for trans youth as attempts to protect young women. It certainly didn't hurt that the right has a long history of attacking the rights of gender-marginalized people supposedly in order to "protect" them or others.<sup>113</sup> It's no coincidence that the right's targeting of gender-affirming care has occurred simultaneously as they have ramped up their attacks on abortion care and access to birth control for minors.<sup>114</sup> In the cases of both anti-trans bills and legislation attacking reproductive care, the right's efforts to "protect" marginalized groups have been inherently harmful. The right has weaponized care for women, children, and fetuses in order to infringe on rights to bodily autonomy. In fact, the right's justification of protection operates under the assumption that women and trans folks do not and should not have autonomy.

Similarly, the right has justified their attacks on trans youth in sports by claiming that they are simply aiming to promote fairness in women's sports.<sup>115</sup> Trans girls specifically have been the targets of these bills and their sponsors' vitriol because targeting these athletes has allowed the right to claim that their real intentions are to protect young female athletes. In reality, these bills do more than just target trans children, they also reinforce the misogynistic idea that men, or "male" bodies, are naturally superior at sports. Additionally, bills targeting medical care for trans youth also reinforce the misogynistic idea that gender-marginalized people cannot and should not make decisions about their own bodies. It became especially clear that these bills are more focused on attacking trans rights than protecting children when legislators began introducing bills targeting medical care for trans people up to the age of 26.<sup>116</sup> Attacks on abortion access and on gender-affirming care for adults both stem from the idea that bodily autonomy does not and should not exist for women and other gender-marginalized people.

Moreover, the right's choice to shift to a focus on medical care and sports was an attempt to avoid the level of backlash that was provoked by bathroom bills in 2016. Compared to access to bathrooms, access to medical care or group activities where physical advantages may translate to competitive advantages are more complicated issues. The bathroom debate hinged on one main concern: whether or not trans people as a whole are predators. As it became clear that accusing

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<sup>113</sup> Irin Carmon, *The Shared Anti-Trans and Anti-Abortion Playbook*, INTELLIGENCER (Apr. 4, 2023), <https://perma.cc/T3A6-PFTD>. ("For years, some anti-abortion activists have tried to argue that they are the true feminists, protecting women's true maternal nature even when the arrangement has to be forced upon them. A similar co-opting of feminism is at work with anti-trans forces.") See further, Roberti, *supra* note 98.

<sup>114</sup> Rose Mackenzie & Arli Christian, *The Intertwined Future of Attacks on Abortion and Gender-Affirming Care*, AM. C.L. UNION (Jan. 18, 2023), <https://perma.cc/42CH-CHRG>.

<sup>115</sup> Bills introduced in Florida, North Carolina, Kansas, Idaho, and Arkansas are all titled the "Fairness in Women's Sports Act." See S.B. 1028, 2021 Gen. Assemb., Reg. Sess. (Fla. 2021); H.B. 74, 2023-2024 Gen Assemb., Reg. Sess. (N.C. 2023); H.B. 2238, 2023-2024 Gen Assemb., Reg. Sess. (Kan. 2023); H.B. 500, 65th Leg., 2nd Reg. Sess. (Idaho 2020); S.B. 354, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

<sup>116</sup> Oriana González, *GOP Lawmakers Expand Gender-Affirming Care Restrictions to Adults*, AXIOS (Mar. 29, 2023), <https://perma.cc/FD5G-JCZZ>.

an entire marginalized group of being pedophiles was not a winning strategy, the bathroom debate dissipated.<sup>117</sup>

Medicine and sports science, however, appear to be far more complicated issues in comparison. A February 2022 Data for Progress study found that while a plurality of voters think that trans people are a “societal good” and that a slight plurality of voters think that the government should protect trans rights, 48% (a plurality within the context of this study) of voters still think that legislation preventing transgender children from pursuing medical transition and participating in sports is “necessary to ensure the safety and wellbeing of our children.”<sup>118</sup> Hence, even some of those people who generally “support” trans people are either supportive of or divided on the issue of medical care and sports. Moreover, a 2021 poll from the Global Sport Institute at Arizona State University found that the American public lacks certainty and consensus on the issue of trans people in sports.<sup>119</sup> Interestingly, the study found that those who had competed with trans athletes before were actually more supportive of letting trans athletes compete according to their gender identity rather than their sex assigned at birth.<sup>120</sup> The less people knew about or had interacted with trans people, the more they leaned towards forcing trans people to compete according to their sex assigned at birth. Specifically, those polled who knew a trans person were 21% more likely to agree with the statement, “Legislation preventing transgender children from pursuing medical transition and participating in sports is unfair and discriminatory towards transgender children.”<sup>121</sup>

Americans’ support for access to gender-affirming care has decreased significantly in the past few years. An April 2021 PBS NewsHour public opinion poll found that 66% of adults regardless of political affiliation opposed legislation that would prohibit gender transition-related medical care for minors.<sup>122</sup> However, a May 2023 Washington Post-KFF poll found that 68% of adults oppose access to puberty-blocking medication for transgender children ages 10-14 and 58% oppose access to hormonal treatments for transgender kids ages 15 to 17.<sup>123</sup> Hence, in just two years, a majority of Americans went from opposing to supporting bans on gender-affirming care. This shift is due in large part to a rise in disinformation and misinformation surrounding gender-affirming care.<sup>124</sup> This misinformation is reflected in the bills themselves. For example,

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<sup>117</sup> This tactic interestingly resurfaced in 2022 with groups like Libs of Tiktok accusing LGBTQIA+ and queer-friendly teachers of “grooming” children. See Reina Sultan, *How Libs of TikTok Became an Anti-LGBTQ+ Hate Machine*, THEM (Sept. 30, 2022), <https://perma.cc/PEN6-U5UE>.

<sup>118</sup> Erin Thomas, *Transphobia Is a Powerful Force in American Politics, But Young Voters Are Leading a Cultural Shift Towards Inclusion*, DATA FOR PROGRESS (Feb. 23, 2022), <https://perma.cc/CK2Q-8MLA>.

<sup>119</sup> Valerie Moyer, *GSI Poll: So You Think You Know About Transgender Athletes...*, GLOB. SPORT MATTERS (June 11, 2021), <https://perma.cc/QF9J-VVNC>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR (Apr. 16, 2021), <https://perma.cc/W3L4-CLAL>.

<sup>123</sup> Jared Gans, *Majority of Americans Oppose Gender-Affirming Care for Minors, Trans Women Participating in Sports: Poll*, HILL (May 6, 2023), <https://perma.cc/2A5L-JH49>.

<sup>124</sup> Meredith McNamara, Christina Lepore, Anne Alstott, Rebecca Kamody, Laura E. Kuper, Nathalie Szilagyi, Susan D. Boulware, & Christy L. Olezeski, *Scientific Misinformation and Gender-Affirming Care: Tools for Providers on the Front Lines*, 71(3) J. ADOLESCENT HEALTH 251, 251 (2022) <https://doi.org/10.1016/j.jadohealth.2022.06.008>.



many of these bills prohibit genital surgeries, despite the fact that such surgeries on minors are exceedingly rare and are unavailable for prepubertal children.<sup>125</sup> Additionally, these bills describe hormone therapy and puberty blockers as unsafe even though, as stated, studies show these methods to be completely safe and that policies reducing access to gender-affirming care are harmful themselves.<sup>126</sup> The misinformation in the bills themselves is very likely deliberate on behalf of the legislators and far-right organizations who authored them.

The extreme focus from the media on detransitioners, who comprise a very small percentage of those who have accessed gender-affirming care, has led to confusion among the public about the rate of regret among those who have undergone this kind of care. In reality, a 2021 study published in “Plastic and Reconstructive Surgery – Global Open” found that the pooled prevalence of regret after gender-affirmation surgeries was 1%.<sup>127</sup> This rate of regret is far lower than those for other common mandatory and elective surgeries; for example, the rate of regret for breast reconstruction after mastectomy is about 47%.<sup>128</sup> However, the mainstream media does not platform those who regret breast reconstruction after receiving a mastectomy, or other similar surgeries, the way the media sensationalizes those who regret gender-affirming care, and only recently has liberal media begun to uplift the voices of trans advocates.<sup>129</sup> Advocates such as Kate Sosin, a nonbinary reporter at the *19th*, have brought attention to the fact that gender-affirming care has many mental health benefits for trans kids such as reducing rates of depression, suicidal ideation, and suicide attempts in trans youth.<sup>130</sup> In the case of puberty blockers, gender-affirming care is reversible.<sup>131</sup> Unfortunately, this attempt by the liberal media to combat misinformation regarding medical care for trans children seems to have come a bit too

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<sup>125</sup> Philip Marcelo, *Toddlers Don’t Get Gender-Affirming Surgeries, Despite Claims*, ASSOCIATED PRESS (Apr. 21, 2023), <https://perma.cc/S566-PA9S>. Only 56 insurance claims for genital surgeries on patients aged 13 to 17 were filed between 2019 and 2021. Robin Respaut & Chad Terhune, *Putting Numbers On the Rise In Children Seeking Gender Care*, REUTERS (Oct. 6, 2022), <https://perma.cc/W29V-758M>.

<sup>126</sup> Meyer, Mayer, Mondorf, Flügel, Herrmann, & Bojunga, *supra* note 38; *Impact of Gender Affirming Care Bans on LGBTQ+ Adults*, HUM. RTS. CAMPAIGN FOUND. 2 (2023), <https://perma.cc/3FGK-ZDPD> (finding that a plurality of LGBTQIA+ adults and a majority of transgender and nonbinary adults report that gender-affirming care bans impact their physical and/or mental health, or that of their loved ones).

<sup>127</sup> Valeria P. Bustos, Samyd S. Bustos, Andres Mascaro, Gabriel Del Corral, Antonio J. Forte, Pedro Cuidad, Esther Kim, Howard Langstein, & Oscar J. Manrique, *Regret After Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, 9(3) PLASTIC & RECONSTRUCTIVE SURGERY – GLOB. OPEN e3477, e3477 (Mar. 2021), <https://doi.org/10.1097/GOX.0000000000003477>.

<sup>128</sup> Joanne Sheehan, Kerry A. Sherman, Thomas Lam & John Boyages, *Regret Associated with the Decision for Breast Reconstruction: The Association of Negative Body Image, Distress and Surgery Characteristics with Decision Regret*, 23(2) PSYCHOLOGY & HEALTH 207, 207-19 (2008) <https://doi.org/10.1080/14768320601124899>. The rate of regret for prostate surgery has been found to be 19%. Florian R. Schroeck, Tracy L. Krupski, David M. Albala, Marva M. Price, Thomas J. Polasick, Cary N. Robertson, Alok K. Tewari, & Judd W. Moul, *Satisfaction and Regret after Open Retropubic or Robot-Assisted Laparoscopic Radical Prostatectomy*, 54(4) EUR. UROLOGY 785, 785–93 (2008), <https://doi.org/10.1016/j.eururo.2008.06.063>. The rate of satisfaction for dermal fillers is only 92%, meaning that 8% of people are neutral/not satisfied, a rate of regret eight times that of gender-affirming surgery. Philippe Kestemont, Hugues Cartier, Patrick Trevidic, Berthold Rzany, Gerhard Sattler, Nabil Kerrouche, Jean-Charles Duin, *Sustained Efficacy and High Patient Satisfaction After Cheek Enhancement With a New Hyaluronic Acid Dermal Filler*, 11(1) J. DRUGS IN DERMATOLOGY 9, 9-16 (2012), <https://pubmed.ncbi.nlm.nih.gov/22497039/>.

<sup>129</sup> Brianna Scott, *Amid Wave of Anti-Trans Bills, Trans Reporters Say ‘Telling Our Own Stories’ Is Vital*, NPR (May 7, 2021), <https://perma.cc/3SGZ-8T46>.

<sup>130</sup> *Id.*; Green et al., *supra* note 39.

<sup>131</sup> Turban, King, Carswell, & Keuroghlian, *supra* note 40.

little, too late. The damage, measured by the success of bills targeting medical care for trans kids, has already been done. Hence, the right's shift of focus to sports and medical care has allowed them to successfully avoid backlash given the confusion and lack of consensus Americans have surrounding these issues.

## **Section VI: Shift From Bodies in Space to Shaping the Future**

The anti-trans legislation of the early 2020s specifically targets trans bodies themselves. As public support for conversion therapy has diminished, the right has shifted focus away from their attempts to convince LGBTQIA+ people that they are not, in fact, gay or trans. The general public's turn against conversion therapy has in part influenced the right to shift their focus from attacking the psyche of trans folks to targeting their bodies instead. Bills targeting gender-affirming care limit trans youths' ability to transition medically at a particularly crucial point in their bodily development. Additionally, bills targeting young trans athletes often include clauses that would require invasive medical examinations for any child that school and athletics officials suspect of being trans.<sup>132</sup> The right has targeted trans bodies, specifically young trans bodies, in an effort to mold the future in their own image. While the right lost the battle to prevent the existence of openly trans folks in the present with the failure of bathroom bills, limiting access to medical care and bonding activities such as sports for trans youth are essential to the right's plans to create a future without trans people. Targeting trans people's abilities to access bathrooms attacked bodies in space in the present; it sent the clear message, "Trans people, you are not welcome here." As stated, the public also perceived HB2 as a clear attack on trans existence. By shifting focus to trans bodies themselves, the right's attacks on trans rights become blurred; people interpret these actions less as attacks on trans existence and more so as limitations on modes of being. Of course, trans advocates understand that laws targeting access to medical care and sports for trans people are specifically transphobic attacks, but the general public has not received the 2020s anti-trans legislation this way. The conservative organizations such as the ADF behind these bills, on the other hand, know exactly what they are doing by targeting trans youth. The shift away from spreading fear of a hypothetical bathroom predator to a direct gaze on young trans bodies represents the right's change of focus from limiting the rights of trans adults to limiting the rights of trans children, which is part of the right's broader shift from shaping the present to shaping the future.

As a means of maintaining the cis-hetero patriarchy, the right has focused their attention on medical care and access to sports for trans youth as a means of shaping a future where trans joy does not exist. Trans joy is more than just the claiming and celebration of trans identity; it is also a form of praxis and a mode of resistance that defies norms and tears down the walls of cissexism and transphobia.<sup>133</sup> By preventing trans youth from accessing gender-affirming care and from participating in sports, the right is attempting to socially isolate trans youth while simultaneously enforcing a rigid, sex-based gender binary and hierarchy. Attempts to limit the rights of trans youth attack opportunities for trans joy while rolling back the limited success the movement for trans rights has made over the past few years. In attacking the rights of young people, the right is shaping the future by ensuring that the trans people of tomorrow will have

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<sup>132</sup> H.B. 500, 65th Leg., 2nd Reg. Sess. (Idaho 2020). *See also* Strangio & Arkles, *supra* note 43; Menash & Chandy, *supra* note 58.

<sup>133</sup> Krupa Joseph, *What Is Trans Joy?*, GAYSI FAM. (Dec. 8, 2021), <https://perma.cc/GS9S-G2Y5>.

fewer rights and opportunities than those of today. Even the trans kids who are currently participating in sports or who are on puberty blockers or hormone replacement therapy may wake up to find that anti-trans conservatives have stripped these rights from them. Anti-trans legislation has created a sense of chaos and confusion for trans youth, both out and closeted, who now fear that they will be the next victim of these bills. The right is hence using transphobic legislation to instill fear, the antidote to joy, in trans youth.

## Conclusion

The continued assault on trans rights across the United States will not stop without mass change. The continued rise in anti-trans laws in 2023 signals that legislative attacks on trans rights will continue despite assurances from legal experts that many of these laws will not stand up to legal scrutiny and successes of litigators challenging anti-trans legislation. Similar to the fight for same-sex marriage, the fight to stop anti-trans bills will require mass campaigns to change public opinion and to educate people in addition to impact litigation.

Impact litigation is an essential part of the fight against anti-trans legislation. While impact litigation does not provide a long-term solution, it provides an opportunity for judges to “stop the bleeding.” By taking harmful anti-trans laws to court, advocates can create opportunities for judges to place injunctions on these laws so that they do not harm trans children more than they already have. This is particularly essential in cases where lawsuits over anti-trans laws become protracted legal battles. Impact litigation sends the message that these laws are not constitutional and provides advocates the time and space they are often not afforded in the statehouse to demonstrate exactly how harmful and unconstitutional these bills are. Finally, impact litigation challenging anti-trans laws can result in the courts enumerating new protections for the LGBTQIA+ community, just as the Supreme Court did in *Bostock v. Clayton County*.<sup>134</sup>

LGBTQIA+ movement organizations must launch a targeted political campaign to reveal these bills for what they are: attempts to legislate trans people out of existence. This campaign will also need to undo the work done by far-right organizations to dehumanize trans people and paint their medical needs as superfluous wants. Advocates must combat misinformation by demonstrating the safety and essentiality of gender-affirming care and the lack of evidence that trans women are dominating sports. Additionally, advocates must demonstrate that access to medical care and fair treatment in society are essential to improving mental health among the trans youth. Voters who believe anti-trans bills really do “protect children” may care about the detrimental mental health effects of these bills even if the conservative legislators who are introducing and passing these bills do not. It is essential to expose the right’s true goal in targeting trans youth, which is to roll back LGBTQIA+ rights and shape the future in their own image. Finally, LGBTQIA+ advocates must work to humanize trans people. This should not be done by encouraging the trans community to assimilate, but rather requires celebrating trans people for their differences. If advocates are able to accomplish these tasks, it will become possible to stop solely playing defense and to begin enshrining trans rights into law.

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<sup>134</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Change must first be made at the societal level in order to allow legislative change to become possible. So long as transphobia remains ingrained in our society, no matter how many states are successfully sued, anti-trans bills will continue to be introduced year after year. The war on 100 fronts must be brought from the statehouse to the soapbox.