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# Protecting Trans Health Care: Battling Gender-Affirming Care Bans in the Courts

Last month, in between issuing decisions about mifepristone, EMTALA, *Chevron* deference, and presidential immunity, the Supreme Court of the United States also agreed to review a case that could upend transgender access to health care: *U.S. v. Skrmetti.* In the coming term, *Skrmetti* will give the Court an opportunity to decide whether a state law banning transgender minors from accessing medically necessary gender-affirming care violates the Equal Protection Clause of the Fourteenth Amendment.

*Skrmetti* is one of 17 lawsuits challenging gender-affirming care bans for minors across the country—seven of which were brought in state court under state law. This means that while a Supreme Court decision about transgender health could resolve the equal protection issue for the 10 cases (including *Skrmetti*) that were filed in federal court, it won't necessarily be the final word on the seven other lawsuits that rely on state statutory and constitutional law. But a Supreme Court decision about whether the federal Equal Protection Clause prohibits discrimination against transgender people as a class could send shockwaves across other areas of federal nondiscrimination law, with potentially dire consequences for the transgender community.

Read on for a closer look at the history and landscape of gender-affirming care bans, the legal challenges to these bans that have been brought across the country, and what lies ahead.

## How did we get here? *Bostock* and its complicated legacy

Four years ago, LGBTQ+ advocates celebrated when the Supreme Court decided *Bostock v. Clayton County*, a Title VII employment law case that clarified that discrimination against an employee on the basis of sexual orientation or transgender status is inherently discrimination "because of . . . sex." *Bostock* hinged on the notion that it is impossible to discriminate against an employee based on the gender of their sexual partners (i.e., based on their sexual orientation) without also discriminating "because of" the employee's sex. Likewise, it is impossible to discriminate against an employee based on their gender identity and/or gender presentation without discriminating "because of" the employee's sex assigned at birth. As the Court put it, "transgender status [is] inextricably bound up with sex," and when an employer "penalizes a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth," the person's "sex plays an unmistakable" role. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-42 (2020).

Back in 2020, many saw *Bostock* as a promising blueprint to strengthen legal protections for the LGBTQ+ community, with an obvious application to other nondiscrimination laws outside the employment context. Indeed, a number of courts, including the Fourth and Ninth Circuits, have agreed that discrimination on the

basis of transgender status is a form of sex-based discrimination in cases involving Title IX, Section 1557 of the Affordable Care Act, and the federal Equal Protection Clause. *See Kadel v. Folwell*, 100 F.4th 122, 153-54 (4th Cir. 2024); *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616-17 (4th Cir. 2020). But the *Bostock* decision also contributed to a conservative backlash that has resulted in numerous anti-LGBTQ+ laws like "Don't Say Gay" bills; bathroom bans; and bans on medical care for transgender people who seek gender-affirming care.

In recent years, medical care for transgender youth has become a particular target for partisan ire. Until 2021, although gender-affirming care was out of reach for many, no states outright *banned* gender-affirming care for youth. That changed in 2021, when the Arkansas legislature passed the first gender-affirming care ban for minors. The Arkansas law was quickly enjoined in federal court, but then 24 more states passed similar bans. Proponents of these bans claim, falsely, that gender-affirming care treatments for youth are somehow uniquely dangerous and "experimental"—even though gender-affirming care has a long history in the United States, and major medical organizations such as the American Medical Association, American Academy of Pediatrics, and the American Psychological Association have all endorsed access to gender-affirming care for trans youth. Youth access to gender-affirming care significantly decreases gender dysphoria and is associated with better mental health outcomes across the board, while integration of gender-affirming care with HIV care, when necessary, has been shown to improve health outcomes for youth and adults.

## What do gender-affirming care bans prohibit?

Gender-affirming care bans prevent transgender minors (and in some states, transgender adults) from accessing medical care consistent with their gender identity, including puberty-delaying medication, hormone therapy, and surgical interventions. (Surgical interventions for trans youth are rare, and typically only recommended for older teens.) Not all trans people experience gender dysphoria, and not all trans people choose to pursue medical treatment; however, for many trans individuals, including many trans youth, access to gender-affirming care is medically necessary.

Gender-affirming care bans deny medically necessary care to transgender minors while still explicitly permitting cisgender minors to access the same medical care. For example, Tennessee Senate Bill 1 (SB1), the gender-affirming care ban at issue in *Skrmetti*, prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity." The language used in the SB1 is stigmatizing, implying that transgender identity is somehow only "purported" (i.e., not real), and denying the reality of gender dysphoria. Additionally, the bill's emphasis on the purpose of the banned care makes clear that minors who are *not* transgender may continue to access the same care for other purposes.

For example, under SB1, a child assigned female at birth who identifies as a girl (i.e., a cisgender girl) could be prescribed puberty-delaying medication to treat precocious puberty; but a child assigned male at birth who identifies as a girl (i.e., a transgender girl) could *not* be prescribed puberty-delaying medication to treat gender dysphoria. Similarly, a cisgender boy could be prescribed testosterone to correct a hormone imbalance; but a transgender boy could not be prescribed testosterone to treat gender dysphoria. In both examples, under SB1,

two otherwise identical adolescents could be granted or denied medically necessary care on the basis of their assigned sex at birth.

State laws banning gender-affirming care are largely similar to one another, but some details vary. Twenty-four out of 25 bans prohibit all three types of medically necessary medical care for minors (puberty-delaying medication, hormone therapy, and surgery), while Arizona's ban permits some care, but prohibits medically necessary surgery. And while most gender-affirming care bans threaten gender-affirming care providers with severe professional consequences (including suspension or revocation of medical and other professional licenses), others take enforcement even further, with six states (Alabama, Florida, Idaho, North Dakota, Oklahoma, and South Carolina) making it a felony to provide certain forms of medical care for transgender youth.

Many state gender-affirming care bans include language allowing minors who are already engaged in gender-affirming medical care to continue their treatment—for a limited period of time. But the clock is ticking. As of June 2024, 39% of transgender youth aged 13-17 live in a state that has enacted a gender-affirming care ban. As time passes, more and more of those bans will come into effect. Trans youth whose families have the resources to do so will be forced to travel for care or move away from their home states entirely. And trans youth whose families cannot afford to travel, or who may be less supportive, will be forced to forgo care entirely.

*Soe v. LSBME*

Earlier this year, the Center for Health Law & Policy Innovation, Lambda Legal, and Davis Polk & Wardwell LLP filed a lawsuit on behalf of five transgender minors and their parents challenging Louisiana's Act 466, which bans gender-affirming care for trans minors throughout the state. The lawsuit, *Susie Soe et al. v. Louisiana State Board of Medical Examiners et al.*, was filed in Louisiana State Court and argues that Act 466 is unconstitutional under the Louisiana Constitution because it strips parents of their right to direct the health care of their children; unlawfully interferes with minors' fundamental right to obtain or reject medical treatment with the support of their parents and advice of their medical providers; and violates the Louisiana Constitution's equal protection clause by discriminating based on sex and transgender status.

## What are the legal arguments in *Skrmetti*?

Although the plaintiffs below advanced more than one constitutional argument against Tennessee's gender-affirming care ban, the Supreme Court granted cert on just one issue: whether Tennessee's gender-affirming care ban violates the Equal Protection Clause of the Fourteenth Amendment. (On appeal, *Skrmetti* was consolidated with a similar case against Kentucky, *Doe v. Thornbury*.)

The plaintiffs in Tennessee had sought a motion for a preliminary injunction that would prevent the Tennessee law from going into effect. In their motion they argued—and the district court agreed—that SB1 treats transgender minors differently from non-transgender minors, and that in doing so, SB1 discriminates on the basis of sex. This kind of discrimination is known as a quasi-suspect classification, requiring the court to review it with intermediate scrutiny. In reaching this conclusion, the district court said:

> Consider an adolescent, perhaps age 16, that a physician wishes to treat with testosterone. Under the challenged statute, is the treatment legal or illegal? To know the answer, one must know the adolescent's sex. If the adolescent is a natal male, the treatment is legal. If the adolescent is a natal female, the treatment is illegal. This is a line drawn on the basis of sex, plain and simple.

*L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 693 (M.D. Tenn.), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023). Applying the test for intermediate scrutiny, the court considered expert testimony from both sides as to the efficacy, risks, and benefits of gender-affirming care for minors. The court then found that the bill was unlikely to survive intermediate scrutiny, because the defendants were unlikely to be able to show that SB1 was substantially related to an important state interest. Therefore, the district court issued a preliminary injunction preventing the Tennessee law from going into effect.

The defendants appealed to the Sixth Circuit, which reversed. In the Sixth Circuit's view, SB1 creates distinctions based on age and medical conditions, not sex, because its prohibitions apply to transgender youth of all genders. The plaintiffs appealed to the Supreme Court seeking to reinstate the district court's decision.

## What's Next?

It remains to be seen what will happen when the Supreme Court weighs in on this issue. In the meantime, other cases continue to wend their way through the courts. Lawsuits brought in Arkansas and Florida have resulted in victories for the trans plaintiffs, with both bans permanently enjoined following trials on the merits. Arkansas and Florida have appealed, and both cases could be impacted by the Supreme Court's decision in *Skrmetti*. Likewise, courts in Montana and Ohio have issued preliminary injunctions, preventing those states from enforcing their bans—for now.

But in 19 other states, although legal challenges remain ongoing, the bans are already in effect. Transgender youth are already reporting the ill effects of these bans on their mental health, with 86% of transgender and nonbinary youth reporting that anti-transgender bills have negatively impacted their mental health and made them feel less safe among their peers. A survey of parents of trans youth likewise found that anti-transgender legislation increased depression, suicidal ideation, anxiety, and gender dysphoria in their children. And with an increasing number of trans youth seeking health care across state lines, states without bans must act to protect gender-affirming care in their states.

**What About Section 1557?**

Section 1557, the nondiscrimination provision of the Affordable Care Act, forbids health care entities receiving federal funding to discriminate on the basis of sex. In a final rule published earlier this year, the Biden Administration made clear its interpretation that discrimination "on the basis of sex" includes discrimination based on transgender status. But just before the new rule would have come into effect, three different federal courts enjoined the government from enforcing the parts of the rule interpreting "on the basis of sex" to include transgender status—leaving transgender patients unprotected across the country.

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