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The Supreme Court Upholds a Ban on Gender-Affirming Care: What Advocates Should Know about *US v. Skrmetti*

On June 18, the Supreme Court issued its decision in *U.S. v. Skrmetti,* allowing states to ban gender-affirming care for minors. The case was brought by three transgender youth, their families, and a medical provider to challenge the constitutionality of a Tennessee law called SB1, which banned medically necessary gender-affirming care for transgender youth. (A detailed history of the *Skrmetti* case can be found in a previous edition of Health Care in Motion.)

The Basics of Gender-Affirming Care

- Gender-affirming care refers to a range of social, psychosocial, behavioral, reproductive, and surgical and non-surgical medical interventions aimed at affirming a person's gender identity.
- Some examples of non-surgical interventions include hormone replacement therapy, speech therapy, psychiatric services, or laser hair removal.
- For children in particular, the timing and specific interventions depend on a series of factors including, among others, parental consent.

This decision will have devastating consequences for the health, safety, and well-being of transgender and gender-diverse youth because they will no longer be able to access the widely accepted, evidence-based standard of care for gender dysphoria advanced by leading professional organizations. As a result, it denies access to necessary, often life-saving medical care, particularly for individuals and families unable to travel out of state for treatment. Justice Sotomayor observed in her dissent, the law "authorizes, without second thought, untold harm to transgender children and the parents and families who love them."

This Health Care in Motion will summarize the *Skrmetti* majority opinion, discuss the legal implications, and offer a brief forecast on future legal challenges along with other resources.

The *Skrmetti* Decision

The central question before the Supreme Court was whether SB1 violates the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs argued that restricting access to gender-affirming care for transgender youth constitutes discrimination on the basis of sex and transgender status, as it denies access to medical treatment that would otherwise be available to minors. The State of Tennessee contended that SB1 permissibly draws distinctions based on age and medical condition. In a 6-3 decision authored by Chief Justice

Roberts, the Supreme Court sided with Tennessee and upheld the Sixth Circuit's ruling that SB1 classifies based on age and medical condition and is therefore constitutional.

Writing for the majority of all six conservative justices, Chief Justice Roberts upheld Tennessee's law as within the Constitution's promise of Equal Protection. The case drew concurring opinions from Justice Thomas, Justice Barrett, and Justice Alito, each adding as to where they would have pushed the Court's condemnation of the challengers' theories further. Justice Sotomayor, joined for the most part by Justice Kagan, and entirely by Justice Brown-Jackson, wrote a stinging dissent "with sadness." Justice Kagan added a separate, technical dissent as well.

What is Equal Protection?

Equal Protection is a right guaranteed under the United States Constitution and bars the government from discriminating, or drawing impermissible distinctions, in its laws or actions. How closely courts scrutinize laws for violating equal protection depends on part if the law is impacting certain rights or groups. It has historically been a bedrock concept for protecting civil rights.

The majority opinion has some significant oversights and omissions. Of note, Chief Justice Roberts includes no discussion whatsoever of the plaintiffs themselves, their lived experience, or the harm that they describe in their complaint. Instead, he focuses on methodically rejecting each of the legal claims made by the plaintiffs and supported by the Biden Administration.

What is Facial Sex Discrimination?

Both the Biden Administration and the plaintiffs argued that SB1 was "facial" sex discrimination. Facial discrimination is present where the distinctions made by the law are obvious discrimination because of an individual's sex. To understand SB1 as facial sex discrimination, one need only swap out the sex assigned at birth of an affected person. If a transgender girl assigned male at birth seeks access to puberty blockers for the purpose of affirming her gender and alleviating gender dysphoria, SB1 forbids access to puberty blockers. Yet, swap that kid's sex assigned at birth to female, and the same puberty blockers would be permissible under SB1, to treat precocious puberty.

The majority opinion frames SB1 as merely making distinctions on the basis of medical conditions, and not on sex or transgender status. Because he characterizes SB1 as differentiating only the basis of medical condition *(i.e.*, whether a patient needs treatment because of gender dysphoria or another diagnosis), Roberts concludes that there is no reason to impose heightened scrutiny on Tennessee's ban. In other words, Chief Justice Roberts believes that the Tennessee law is not facial sex discrimination, that it does not discriminate on the basis of transgender status, and that it does not invoke impermissible sex stereotypes. The majority opinion holds that SB1 simply bans gender-affirming care treatments, regardless of sex assigned at birth, for the purpose of treating gender dysphoria, a medical condition.

Skrmetti in Context

The *Skrmetti* opinion draws upon arguments similar to those that long stopped courts from recognizing same-sex marriage. There was an era where courts upheld same-sex marriage bans on the basis that they forbade

everyone, regardless of sex or sexual orientation, from marrying a person of the same sex. Ten years ago in *Obergefell v. Hodges*, the Supreme Court rejected this argument as running afoul of both Equal Protection and common sense. Now the same logic has been resurrected to sanction state laws making basic health care for transgender kids illegal.

Repackaging discrimination as something else is the hallmark of many of the Supreme Court's darkest hours; every law, no matter how invidious, can be recharacterized into a more acceptable articulation. On her Strict Scrutiny podcast, Professor Leah Litman reacted to *Skrmetti* by cataloguing such infamous moments in Supreme Court history:

- In *Plessy vs. Ferguson*, Jim Crow laws mandating "separate but equal" were not deemed unconstitutional race discrimination; such laws were adjudged to treat everyone the same.
- In *Korematsu v. United States*, the government's internment of Americans of Japanese descent was not unlawful discrimination; it was characterized as a measure to protect national security.
- In *Bowers v. Hardwick*, laws banning non-procreative sex did not violate the Constitution; crediting instead arguments holding them up as measures aimed at promoting public health.
- In *Trump v. Hawaii*, the so-called "Muslim ban" was deemed not to represent impermissible religion-based hostility; rather, the executive was permitted to deny entry to entire classes of immigrants on the basis of unexamined and categorical determinations that their presence is detrimental to the interests of the United States.

History may well add *Skrmetti* to this list.

Impact on State Laws & Other Claims

The most immediate impact will be the foreclosure of federal Equal Protection arguments as a means of attacking similar bans on life-saving gender-affirming care for minors. But *Skrmetti* will have other impacts as well. The legal fights over whether states can block transgender youth (and adults) from receiving necessary health care continue.

In recent years, laws prohibiting gender-affirming care for transgender kids have proliferated, with roughly half of U.S. states enacting such restrictions. While this week's decision focused on whether the U.S. Constitution allows or prohibits these bans, *Skrmetti* leaves open the possibility of bringing legal claims under state constitutions. Although the U.S. Constitution sets a baseline for individual rights, state constitutions can provide more expansive rights and protections. For example, a Montana district court recently overturned a categorical ban on gender-affirming care for transgender youth based on the state constitution's right to privacy. Thus, while challenges under state constitutions may yield mixed outcomes, they remain a vital path forward in the fight to protect access to gender-affirming care, especially in states where courts have recognized broader individual rights than those guaranteed under the federal Constitution.

In addition, advocates should not overlook the limitations inherent in the *Skrmetti* decision. Because the majority opinion stops at step one of the Equal Protection inquiry – concluding that SB1 does not draw unconstitutional lines based on sex, sex stereotypes, or transgender status – it does not reach the question of whether transgender people constitute a protected class entitled to heightened constitutional protection.

Justice Barrett offered her view in a separate opinion, suggesting that at least three justices would reject such a position. But her opinion is not the majority position of the Court and has no formal legal effect. For that reason, some lower court precedent favorable on that question remains good law.

Skrmetti is also a narrow decision in that it is limited to Equal Protection claims alone. Advocates remain free to press claims against gender-affirming care bans that find their footing in other constitutional provisions. For example, the *Skrmetti* lower court considered claims that SB1 violated the fundamental rights of parents to direct the medical care of their children, but this claim was not brought to the Supreme Court. This Supreme Court may find arguments based in the rights of parents to make significant life choices for their minor children more appealing. It is possible that future cases challenging gender-affirming care bans that draw upon different legal arguments will be more successful.

What's Next?

Justice Sotomayor's dissent laments the Court's majority decision. Recognizing the fearmongering at the heart of recent electoral strategies, she writes, "[b]y retreating from meaningful judicial review exactly where it matters most, the Court abandons transgender children and their families to political whims." Further, her dissent debunks the villainization of the plaintiffs by taking the time and care to shine a light on their individual stories directly. Justice Sotomayor centers her view of Equal Protection where it should be – on the lives of systemically marginalized people whose numbers are too small to avoid vulnerability in the political and legislative process.

Those interested in learning more about the value of gender-affirming care for minors should read the amicus brief submitted by the American Academy of Pediatrics and other national and state medical organization and WPATH guidelines for best practices regarding gender-affirming care. The National Trans Bar Association hosted a webinar dissecting *Skrmetti*. Advocates for Trans Equality has organized resources to participate in actions to protect gender-affirming healthcare. The Trevor Project hosts links to a series of studies explaining the impact that access to gender-affirming care and bans on these health care services have on transgender youth's mental health.

Finally, prior to this decision, queer and trans advocates had already begun the work of expanding access to gender-affirming care under the threat of bans: organizations like the Queer Trans Project continue to provide a range of gender affirmation resources as well as travel assistance for those subject to state bans; the Campaign for Southern Equality has compiled a directory of trans-affirming health and legal service providers in the South; and the folks at FOLX are expanding compassionate and comprehensive healthcare for queer and trans people through a digital platform with options for people with and without insurance.

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