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The Legacy of Dobbs: How the Supreme Court's Decision to Review Gender- Affirming Care Bans Signals Its Intent to Eliminate The Protections of Bostock and Obergefell Against Laws Designed to Discriminate Against LGTBQ+ Individuals

Jennifer S. Bard
University of Cincinnati College of Law; University of Cincinnati College of Medicine

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The Legacy of *Dobbs*: How the Supreme Court's Decision to Review Gender-Affirming Care Bans Signals Its Intent to Eliminate The Protections of *Bostock* and *Obergefell* Against Laws Designed to Discriminate Against LGTBQ+ Individuals

Jennifer S. Bard†

> "[Escalating conservative attacks on LGBTQ people in the United States are] all happening in the same context that we're seeing the criminalization of abortion care, that we're continuing to see [in] the massive suppression of votes across the country . . . . All of these things are interconnected and creating chaos and fear among individuals, families, and communities."
>
> — Chase Strangio, ACLU attorney, Co-director for Transgender Justice with the organization's LGBT & HIV Project[1]

Introduction[2]

On June 24, 2024, at the end of its 2024 term, the United States Supreme Court granted the petition of the U.S. Solicitor General's office, filed six months earlier,[3] to review a decision by the

†. Jennifer S. Bard, J.D., M.P.H., Ph.D. is a Professor of Law at the University of Cincinnati College of Law and a Professor in the Department of Internal Medicine at the University of Cincinnati College of Medicine. Many thanks to Professor Tracy Thomas, director of the CCL and the Seiberling Chair of Constitutional Law. Thank you also to Professor Jane Cambell Moriarty, the Carol Los Mansmann Chair in Faculty Scholarship and Professor of Law at Duquesne University Kline School of Law for support of this work. Thank you to Sarah Saadeh, Megan Fisher, Brian Patrick, and Madison White, University of Cincinnati College of Law Class of 2025; and Carrington Calder Class of 2024 for their excellent research assistance. Of course, all errors are my own.

1. *Chase Strangio: Alabama Ban on Trans Youth Healthcare Is Part of Wider GOP Attack on Bodily Autonomy*, DEMOCRACY NOW! (May 30, 2022), https://www.democracynow.org/2022/5/30/chase_strangio_alabama_ban_on_trans [https://perma.cc/HH6U-GYRX].

2. A note on terminology: This article follows the GLAAD glossary of terms for media. *Glossary of Terms: LGBTQ*, GLAAD, https://glaad.org/reference/terms/ [https://perma.cc/CC7Y-GRNR]. However, the judicial opinions and secondary material quoted in this article span many decades and therefore quoted material will reflect the language of the source.

3. Petition for Writ of Certiorari at *4–6, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440. *Cf.* L.W. *ex rel.* Williams v.

Sixth Circuit Court of Appeals not to stay enforcement of a Tennessee law imposing criminal penalties on physicians providing gender-affirming care to minors (hereinafter, "Bans").[4] Based on a close analysis of recent Supreme Court decisions, the reasoning of the Sixth Circuit and other appellate courts that have supported these Bans, and the advocacy efforts of organizations promoting them, this Article predicts that in the coming term, the Supreme Court will not only uphold Tennessee's ban but will also set a precedent that undermines existing protections for the LGBTQ+ community against discriminatory state laws.

Specifically, if the Supreme Court upholds Tennessee's ban by adopting the arguments of the Sixth Circuit, the Court will also have the opportunity to:

1. Limit its holding in *Bostock v. Clayton County*, that discrimination based on transgender status was a form of gender stereotyping to cases brought under Title VII's prohibition against sex discrimination.[5]
2. Extend its holdings in *Dobbs v. Jackson Women's Health Organization* by finding both that there is no constitutional right to make any decisions related to reproduction and that such laws do not meet the criteria for sex discrimination even though they disproportionally affect women.[6]
3. Limit its holding in *Obergefell v. Hodges* to clarify that LGBTQ+ status is not entitled to heightened scrutiny as a protected class.[7]
4. Narrow its holding in *Troxel v. Granville*, which has been interpreted as giving parents a protected interest in directing the health care of their children.[8]

Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023) (holding that plaintiffs could not prove a likelihood of success on the merits because the issue of prescribing hormones to treat gender-affirming care was unresolved and citing the "recent proliferation of legislative activity across the country"), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

4. *See* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Amy Howe, *Supreme Court Takes Up Challenge to Ban on Gender-affirming Care,* SCOTUSBLOG (June 24, 2024), https://www.scotusblog.com/2024/06/supreme-court-takes-up-challenge-to-ban-on-gender-affirming-care/ [https://perma.cc/W9K7-RSG7]; *US Supreme Court Decisions: The Biggest Cases This Term and Their Outcomes*, THE GUARDIAN (July 1, 2024), https://www.theguardian.com/us-news/ng-interactive/2024/jul/01/supreme-court-cases-decisions-rulings-2023-2024-term [https://perma.cc/CU4U-SV56].

5. 590 U.S. 644, 659–60 (2020).

6. 597 U.S. 215, 230–31, 235–38 (2022).

7. 576 U.S. 644, 663–676 (2015).

8. 530 U.S. 57, 72–73 (2000).

5. Extend deference to state decisions made on behalf of health and safety to the extent of not recognizing the existence of a "standard of care" to which states are required to respect in making laws.[9]
6. Excuse states from the obligation of offering any evidence in support of a law related to health care.[10]

The Court's decision in *Skrmetti* will mirror in magnitude the consequences of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which although specific to abortion, effectively dismantled established rights.[11] As with the detrimental impact of near-total abortion bans, the prohibition of gender-affirming care for minors and adults poses severe risks to health and well-being.[12] This is because once states are no longer prohibited from passing laws that discriminate based on LGBTQ+ status and can substitute their own judgment for that of medical professionals, they will be free to enact and enforce a wide variety of laws that, as professors Jon D. Michaels and David L. Noll argue in their article "Vigilante Federalism," serve to "stoke politically salient grievances, rally their base, and further silence or weaken would-be opposition forces."[13]

This Article begins with a brief overview of the relevant statutes and the role of advocacy organizations in promoting them. I will then explore the plaintiffs' petitions, the district court rulings on stays, and the appellate court decisions that reviewed these cases. These judicial outcomes suggest a trajectory of jurisprudence that could empower states to pursue increasingly discriminatory agendas by dismantling existing barriers to state authority in healthcare matters.

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9. Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

10. *See infra* Part III.A.iii.

11. *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/GCP2-NRCA].

12. Brooke Migdon, *Transgender Youth Health Care Bans Have a New Target: Adults*, THE HILL (Jan. 13, 2023), https://thehill.com/homenews/state-watch/3810926-transgender-youth-health-care-bans-have-a-new-target-adults/ [https://perma.cc/7XQL-N7N4].

13. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1219–20 (2023) ("Vigilante federalism is not simply a novel regulatory technique; it is the confluence of specific power, a partisan mandate at a moment of surging Christian nationalism, and imputed institutional significance that in many respects positions governors and state legislators to push especially stridently on tools that will stoke politically salient grievances, rally their base, and further silence or weaken would-be opposition forces.").

Next, I analyze the aspects of the Sixth and Eleventh Circuit opinions that present the Supreme Court with opportunities to expand state powers under the rational basis test.

Finally, I conclude by predicting the immediate consequences of an opinion upholding Bans on gender-affirming care and predicting the extended consequences of a holding that strips LGBTQ+ individuals of quasi-protected class status and endangers the fundamental rights of parents to direct the medical care of their children and of all individuals to equal "respect, dignity, and rights."[14]

I. Background

A. Defining Gender-Affirming Care

The restrictive laws now under constitutional review "mostly take aim at gender-affirming medical treatments" prescribed for minors diagnosed with gender dysphoria that delay the onset of puberty.[15] As the Association of American Medical Colleges (AAMC), a nonprofit organization that issues position statements on behalf of the academic medicine community, explains, "[s]uch care for young people often begins at puberty with medications—the effects of which are reversible—that halt changes like a

14. Caroline Medina, Sharita Gruberg, Lindsay Mahowald & Thee Santos, *Improving the Lives and Rights of LGBTQ People in America*, CTR. FOR AM. PROGRESS (Jan. 12, 2021), http://www.americanprogress.org/article/improving-lives-rights-lgbtq-people-america/ [https://perma.cc/5EQ4-GDT2].

15. Stacy Weiner, *States are Banning Gender-affirming Care for Minors. What Does that Mean for Patients and Providers*?, ASSOC. OF AM. MED. COLLS. (Feb. 20, 2024), https://www.aamc.org/news/states-are-banning-gender-affirming-care-minors-what-does-mean-patients-and-providers [https://perma.cc/A54Y-MTMS]; *see also* Joseph H. Bonifacio, Catherine Maser, Katie Stadelman & Mark Palmert, *Management of Gender Dysphoria in Adolescents in Primary Care*, 191 CANADIAN MED. ASS'N J. E69, E72 (2019) ("The Endocrine Society's clinical practice guidelines recommend hormonal suppression for adolescents with gender dysphoria because many experience extreme discomfort with their changing bodies during puberty.") (citing Wylie C. Hembree, Peggy T. Cohen-Kettenis, Louis Gooren, Sabine E. Hannema, Walter J. Meyer, M.Hassan Murad, Stephen M. Rosenthal, Joshua D. Safer, Vin Tangpricha & Guy G. T'Sjoen, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM, 3869 (2017)*; AACE Position Statement: Transgender and Gender Diverse Patients and the Endocrine Community*, AM. ASSOC. OF CLINICAL ENDOCRINOLOGY (Mar. 7, 2022), https://pro.aace.com/recent-news-and-updates/aace-position-statement-transgender-and-gender-diverse-patients [https://perma.cc/Z4HS-VCK6] (recommending gender-affirming care in updated guidance).

deepening voice."[16] This is a treatment only available to children who have not yet gone through puberty and who have been diagnosed as having gender dysphoria.[17] The American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (DSM) defines gender dysphoria as an incongruence in gender identity and assigned sex causing significant impairment and distress.[18] The purpose of hormone therapy in young children who have not yet developed secondary sex characteristics is to prevent or "delay the onset of puberty."[19] The medications prescribed to delay puberty are FDA-approved for delaying puberty in children with certain diagnoses, of which gender dysphoria is not included.[20] Many, but not all, public and private insurers routinely

16. Weiner, *supra* note 15. These laws also ban surgical procedures, but they are being challenged solely on the issue of access to medications that delay puberty. *See also Get the Facts on Gender-Affirming Care*, HUM. RTS. CAMPAIGN (July 25, 2023), https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care [https://perma.cc/HX3S-HC82] ("Transgender and non-binary people typically do not have gender-affirming surgeries before the age of 18. In some rare exceptions, teenagers under the age of 18 have received gender-affirming surgeries in order to reduce the impacts of significant gender dysphoria, including anxiety, depression, and suicidality.").

17. *Get the Facts on Gender-Affirming Care*, *supra* note 16.

18. *What Is Gender Dysphoria?*, AM. PSYCH. ASSOC. (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/J37X-3545]. *See also* Arthur S. Leonard, *Supreme Court Declines to Review 4th Circuit Ruling That Gender Dysphoria Is A "Disability" Under the Americans with Disabilities Act*, 2023 LGBT L. NOTES 6, 7 (2023) (describing the Supreme Court's decision to deny certiorari in *Kincaid v. Williams* with particular attention to Justice Alito's skepticism of "Americans who suffer from 'feeling[s] of stress and discomfort' resulting from their 'assigned sex'" in his dissent) (quoting Kincaid v. Williams, 143 S. Ct. 2414, 2415 (2023) (Alito, J. dissenting), *cert. denied*).

19. Patrick Boyle, *What is Gender-affirming Care? Your Questions Answered*, ASSOC. OF AM. MED. COLLS. (Apr. 12, 2022), https://www.aamc.org/news/what-gender-affirming-care-your-questions-answered [https://perma.cc/KT8P-32W9]; *see also Gender Dysphoria*, MAYO CLINIC (May 14, 2024), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262 [https://perma.cc/3W5U-L525] ("Medical treatment of gender dysphoria might include . . . hormone therapy to better align the body with gender identity."); Johanna Olson-Kennedy, Laer H. Streeter, Robert Garofalo, Yee-Ming Chan & Stephen M. Rosenthal, *Histrelin Implants for Suppression of Puberty in Youth with Gender Dysphoria: A Comparison of 50 mcg/Day (Vantas) and 65 mcg/Day (SupprelinLA)*, 6 TRANSGENDER HEALTH 36–42 (2021) (recommending delayed puberty for adolescents experiencing gender dysphoria).

20. Simona Giordano & Søren Holm, *Is Puberty Delaying Treatment "Experimental Treatment"?*, 21 INT'L J. TRANSGENDER HEALTH 113–21 (2020) ("[P]rovision of puberty delaying medications to adolescents with gender dysphoria is not experimental, or at least not any more experimental than standard pediatric practice when there are no licensed treatment options for a pediatric patient population.").

cover this medication as a treatment for minors with gender dysphoria.[21]

B. Using State Laws to Target Transgender Individuals

Tennessee's ban on gender-affirming care is similar to twenty-five others passed since 2021 that "criminalize" the practice of providing what can be life-saving gender-affirming care treatment "for trans youth, and in some cases, adults."[22] There is no single, standard definition, or even spelling, of the term "gender-affirming care." However, the U.S. Department of Health and Human Services, Office of Population Affairs (OPA) defines it as "a supportive form of healthcare" consisting of "an array of services that may include medical, surgical, mental health, and non-medical services for transgender and nonbinary people."[23] PFLAG, "the nation's largest organization dedicated to supporting, educating, and advocating for LGBTQ+ people and those who love them,"[24] describes gender-affirming care as "safe, medically sound, affirming—and . . . life-saving."[25] A recent report by the Columbia University Department of Psychiatry explains that "[i]t is well documented that (TGNB) [transgender and nonbinary] adolescents and young adults experience anxiety and depression, as well as suicidal ideation, at a much higher rate than their cisgender peers," and that "gender-affirming care leads to improved mental health among TGNB youth."[26] The American Academy of Pediatrics (AAP) agrees and has joined other medical organizations, including the

21. Ivette Gomez, Usha Ranji, Alina Salganicoff, Lindsey Dawson, Carrie Rosenzweig, Rebecca Kellenberg & Kathy Gifford, *Update on Medicaid Coverage of Gender-Affirming Health Services*, KFF (Oct. 11, 2022), https://www.kff.org/womens-health-policy/issue-brief/update-on-medicaid-coverage-of-gender-affirming-health-services/ [https://perma.cc/5CSC-9BFK]; Nadia L. Dowshen, Julie Christensen & Siobhan M. Gruschow, *Health Insurance Coverage of Recommended Gender-Affirming Health Care Services for Transgender Youth: Shopping Online for Coverage Information*, 4 TRANSGENDER HEALTH 131–35 (2019).

22. *Far-Right Groups Flood State Legislatures with Anti-Trans Bills Targeting Children*, S. POVERTY L. CTR. (April 26, 2021), https://www.splcenter.org/hatewatch/2021/04/26/far-right-groups-flood-state-legislatures-anti-trans-bills-targeting-children [https://perma.cc/Z9HV-4J2D].

23. *Gender-Affirming Care and Young People*, OFF. OF POPULATION AFFS., https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf [https://perma.cc/9HWA-QX4C].

24. *About Us*, PFLAG, https://pflag.org/about-us/ [https://perma.cc/FZ2T-HBD9].

25. *Medical Bans*, PFLAG, https://pflag.org/resource/medical-bans/ [https://perma.cc/EU3C-ESY8].

26. Kareen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives*, COLUMBIA UNIV. DEP'T PSYCH. (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/55VV-UGJ8].

American Medical Association, the American College of Obstetricians and Gynecologists, and the World Health Organization to "support giving transgender adolescents access to the health care they need."[27]

Today, "[t]ransgender people under 18 face laws that bar them from accessing gender-affirming health care in 25 states—just a few years ago, not a single state had such a law."[28] As described by the Human Rights Campaign, these laws represent a "coordinated push led by national anti-LGBTQ+ hate groups, [where] legislators across the country have overridden the recommendations of the American medical establishment and introduced hundreds of bills that target transgender, non-binary and gender-expansive youth's access to age-appropriate, medically necessary care."[29] Taking the leadership position among these anti-LGBTQ+ hate groups is the Alliance Defending Freedom (ADF), which describes itself as "the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life."[30] It does so by drafting state laws that test the limits of Supreme Court precedent, lobbying for the passage of those laws, and then vigorously defending them in court.[31] It has, so far,

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27. Alyson Sulaski Wyckoff, *AAP Reaffirms Gender-affirming Care Policy, Authorizes Systematic Review of Evidence to Guide Update*, AM. ACAD. OF PEDIATRICS (Aug. 4, 2023), https://publications.aap.org/aapnews/news/25340/AAP-reaffirms-gender-affirming-care-policy [https://perma.cc/6GAZ-6BFQ].

28. Selena Simmons-Duffin & Hilary Fung, *In Just a Few Years, Half of All States Passed Bans on Trans Health Care for Kids*, NPR (July 3, 2024), https://www.npr.org/sections/shots-health-news/2024/07/03/nx-s1-4986385/trans-kids-health-bans-gender-affirming-care [https://perma.cc/M7SP-2UR5].

29. *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/3RHW-STJL].

30. *Who We Are*, ALL. DEFENDING FREEDOM, https://adflegal.org/about-us [https://perma.cc/JT2D-JR5W] (describing ADF as an organization that "advances the God-given right to live and speak the Truth" and that "contend[s] for the Truth in law, policy, and the public square, and equip[s] the alliance to do the same"); *see Alliance Defending Freedom*, ALL. DEFENDING FREEDOM, https://adflegal.org/about/ [https://perma.cc/JP3S-VJGR].

31. *See ADF at the Supreme Court*, ALL. DEFENDING FREEDOM, https://adflegal.org/us-supreme-court [https://perma.cc/W8MC-MLAZ] ("Within only a few short weeks of our launch in 1994, ADF was funding a case at the U.S. Supreme Court and supported our first victory. Since then, we have played various roles in 77 Supreme Court victories, and since 2011, we have directly represented parties in 15 victories at the Supreme Court.") (emphasis omitted); *Alliance Defending Freedom: Staunch Enemy of Equality*, HUM. RTS. CAMPAIGN (Jan. 22, 2024), https://www.hrc.org/news/alliance-defending-freedom-staunch-enemy-of-equality [https://perma.cc/5SG4-QZLP] ("ADF poses an existential threat to our community, writing anti-transgender legislation for school boards and statehouses across the

been extremely successful, claiming "15 U.S. Supreme Court wins" in cases where it served as lead or co-counsel.[32] These "wins" include *Dobbs v. Jackson Women's Health Organization* in 2022 which overturned *Roe v. Wade*.[33] Although ADF is not counsel of record in *Skrmetti*, it filed amicus briefs supporting Tennessee's ban to both the Sixth Circuit and the Supreme Court.[34]

Writing in June 2023, Jae A. Puckett, a psychology professor at Michigan State University, noted that "[t]here have been almost 500 bills proposed this legislative cycle seeking to limit the rights of LGBTQ+ people and their access to essential resources like medical care, nearly twelve times as many as there were in 2018."[35] The Human Rights Campaign (HRC) describes these bills as a "weaponization of public policy" that "has been driven by extremist groups that have a long history in working to oppress the existence and rights of LGBTQ+ people."[36] Among these groups, the ADF has been deemed a hate group by the Southern Poverty Law Center.[37]

Even as it continues its attacks on reproductive freedom, the Alliance Defending Freedom is pursuing its "next priority," which Kristen Waggoner, ADF's chief executive and general counsel, described as "fighting 'the radical gender-identity ideology

country and arguing against same-sex marriage, conversion therapy bans and reproductive rights at the federal level, all the way up to the U.S. Supreme Court . . . . ADF also reaches out to legislators to write anti-equality bills directly. In 2022 alone, it authored at least 130 bills in 34 states; more than 30 were passed into law.").

32. *ADF at the Supreme Court*, *supra* note 31.

33. *Id.*; 597 U.S. 215 (2022); 410 U.S. 113 (1973).

34. Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents, United States v. Skrmetti, No. 23-477, (U.S. Oct. 15, 2024) 2024 WL 4546386; Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants and for Reversal, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) 2023 WL 4901836.

35. Jae A. Puckett, *Anti-trans Bills and Political Climates Are Taking a Significant Mental Health Toll on Trans and Nonbinary People–Even During Pride*, THE CONVERSATION (June 12, 2023), http://theconversation.com/anti-trans-bills-and-political-climates-are-taking-a-significant-mental-health-toll-on-trans-and-nonbinary-people-even-during-pride-199859 [https://perma.cc/HA5V-GASJ]. *See also Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/JU5G-VDL3]; Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been introduced This Year*, CNN (Apr. 6, 2023), https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/78J2-WMQ8].

36. Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country*, HUM. RTS. CAMPAIGN (May 23, 2023), https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country [https://perma.cc/35LV-X2RD].

37. *Id.*

infiltrating the law'"—in other words, transgender rights.[38] This effort has been highly successful. The laws ADF has advanced have led HRC to "officially declare[] a state of emergency for LGBTQ+ people in the United States."[39] What these hundreds of bills passed and proposed all over the country that have "begun to radically reshape life for trans youth across the nation, bringing restrictions on everything from health care to how their gender identity is treated at school" have in common is that they fall under the nearly unreviewable plenary powers states have to protect the health and safety of children.[40]

In January 2023, Matt Sharp, senior counsel and Director of the Center for Public Policy at ADF, posted an open memo on ADF's website to state legislators subtitled, "State Legislators Must Enact Laws Protecting Minors From Life-Altering, Dangerous Gender Transition Procedures," which contained both a call to action and detailed instructions on how to draft laws banning gender-affirming care.[41] The memo addressed to state legislatures urged them to pass laws that ban gender-affirming medical care for minors, including

38. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/H2K5-3MUR] ("A.D.F. began a pushback against 'gender identity' in 2014, shortly after Waggoner joined the organization, as the head of its allied-attorney program. Its first effort centered on public bathrooms and school locker rooms, implicitly portraying transgender girls as a menace to others.").

39. *National State of Emergency for LGBTQ+ Americans*, HUM. RTS. CAMPAIGN, https://www.hrc.org/campaigns/national-state-of-emergency-for-lgbtq-americans [https://perma.cc/74CV-JD59] (declaring a state of emergency for LGBTQ+ Americans "for the first time following an unprecedented and dangerous spike in anti-LGBTQ+ legislative assaults sweeping state houses this year"); *see also* Russell Contreras, *The Forces Behind Anti-Trans Bills Across the U.S.*, AXIOS (Mar. 31, 2023), https://www.axios.com/2023/03/31/anti-trans-bills-2023-america [https://perma.cc/NWP4-V5T6] ("The sudden flood of state-level efforts to restrict transgender rights is being fueled by many of the Christian and conservative groups that led the charge against *Roe v. Wade*."); Terry Gross, *How One Christian Legal Group is Shaping Policy, from Abortion to LGBTQ Rights*, NPR (Oct. 18, 2023), https://www.npr.org/2023/10/18/1206760032/how-one-christian-legal-group-is-shaping-policy-from-abortion-to-lgbtq-rights [https://perma.cc/XF5N-KTN5] ("The Alliance Defending Freedom, the ADF, is an activist legal group that works through the courts where it's been very successful.").

40. Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth Are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports [https://perma.cc/S6Y9-LJ3M].

41. Matt Sharp, *We Must Protect Minors from Gender Transition Procedures*, ALL. DEFENDING FREEDOM (Feb. 8, 2023), https://adflegal.org/article/we-must-protect-minors-gender-transition-procedures [https://perma.cc/XY9S-H9FU] ("It is imperative that we encourage our state lawmakers to stand for truth by passing these critical protections for our children.").

"puberty blockers . . . hormones, and surgeries."[42] Sharp ended his memo with a progress report, writing that although "[a]s of January 2023, only two states have enacted laws completely protecting children from these harmful medical procedures: Alabama and Arkansas . . . . [O]ver a dozen states are already considering similar bills in the 2023 legislative session . . . ."[43] It has been a highly successful endeavor.[44]

ADF is not acting alone. The Southern Poverty Law Center identifies ADF as part of a much larger "pseudoscience network" of organizations working together to "provide scientific justification for the political priorities of conservative Christians."[45] An analysis by the Associated Press found that "the texts of more than 130 bills in 40 state legislatures" to restrict gender-affirming care for youths "as introduced or passed, are identical or very similar to some model legislation" or ready-made bills suggested to lawmakers by interest groups.[46] A March 2023 article in *Mother Jones* magazine discussing the newly passed ban in South Dakota reported that they had obtained "a trove of emails" between the senator sponsoring the bill and "representatives of a network of activists and organizations at the forefront of the anti-trans movement."[47] The article described these emails as "show[ing] the degree to which these activists shaped [the South Dakota representative's] repressive

42. *Id.*

43. *Id.*

44. *See* Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some with the Possibility of a Felony Charge*, CNN (June 6, 2023), https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html [https://perma.cc/W2H3-AERQ]; *see also* Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021), https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124 [https://perma.cc/8EGA-83RS] ("Bills in at least 20 states are targeting the transgender community in what LGBTQ advocates say is an organized assault by conservative groups.").

45. *Group Dynamics and Division of Labor within the Anti-LGBTQ+ Pseudoscience Network*, S. POVERTY L. CTR. (Dec. 12, 2023), https://www.splcenter.org/captain/defining-pseudoscience-network [https://perma.cc/J63M-32SW].

46. Jeff McMillan, Kavish Harjai & Kimberlee Kruesi, *Many Transgender Health Bills Came from a Handful of Far-Right Interest Groups, AP Finds*, AP NEWS (May 20, 2023), https://apnews.com/article/transgender-health-model-legislation-5cc4a7cb4ab69150f670d06fd0f361ab [https://perma.cc/3RFQ-3SDX].

47. Madison Pauly, *Inside the Secret Working Group That Helped Push Anti-Trans Laws Across the Country*, MOTHER JONES (Mar. 8, 2023), https://www.motherjones.com/politics/2023/03/anti-trans-transgender-health-care-ban-legislation-bill-minors-children-lgbtq/ [https://perma.cc/9TJS-KEEC].

legislation . . . and the tactics, alliances, and goals of a movement that has sought to foist their agenda on a national scale."[48]

There is evidence from as early as 2014 that ADF has been lobbying states to adopt laws and targeting students identified as transgender.[49] A 2021 overview of legal developments published by the Harvard Law Review declared that "[g]ender-affirming healthcare for minors has become a new frontier in the culture war."[50] It reported that "[i]n the first months of 2020 alone, legislators in at least fifteen states introduced bills that would have prohibited and, in many cases, criminalized providing gender-affirming healthcare services to minors."[51] It concluded, however, that "[n]one of these bills became law."[52] That changed quickly. According to a briefing prepared by the Kaiser Family Foundation (KFF) in January 2024, "In less than two years, the number of states with laws or policies limiting minor access to gender affirming care has increased more than five-fold, climbing from just four states in June 2022 . . . to 23 states by January 2024 . . . ."[53]

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48. *Id.*

49. *See* R. G. Cravens, *Documents Reveal ADF Requested Anti-Trans Research from American College of Pediatricians*, S. POVERTY L. CTR. (June 5, 2023), https://www.splcenter.org/hatewatch/2023/06/05/documents-reveal-adf-requested-anti-trans-research-american-college-pediatricians [https://perma.cc/3W7U-RDDV] ("Between Sept. 30 and Dec. 1, 2014, ADF sent letters to school boards in Minnesota, Rhode Island, Virginia and Wisconsin warning that they could be open to litigation for policies allowing transgender students to use appropriate facilities such as bathrooms and locker rooms.").

50. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021) [hereinafter *Outlawing Trans Youth*].

51. *Id.* (citing *Past Legislation Affecting LGBT Rights Across the Country*, ACLU (Jan. 20, 2021), https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020) [https://perma.cc/NY8J-JZR9]).

52. *Id.*

53. Lindsey Dawson & Jennifer Kates, *The Proliferation of State Actions Limiting Youth Access to Gender Affirming Care*, KFF (Jan. 31, 2024), https://www.kff.org/policy-watch/the-proliferation-of-state-actions-limiting-youth-access-to-gender-affirming-care/ [https://perma.cc/2HYN-BE3K] (identifying states with laws in 2022 as Alabama, Arkansas, Texas, and Arizona versus states with laws in 2024 as Alabama, Arkansas, Arizona, Florida, Georgia, Iowa, Idaho, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia); *see also Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/2YMQ-6YZK] ("In a coordinated push led by national anti-LGBTQ+ hate groups, legislators across the country have overridden the recommendations of the American medical establishment and introduced hundreds of bills that target transgender, non-binary and gender-expansive youth's access to age-appropriate, medically-necessary care."); Elana Redfield, Kerith J. Conron, Will

C. Using Dobbs *to Defend Gender-Affirming Care Bans*

Many commentators make a direct link between the passing of laws targeting the LGBTQ+ community and the Supreme Court's 2022 ruling in *Dobbs v. Jackson Women's Health Organization*,[54] reversing *Roe v. Wade*. *Dobbs* reversed prior courts' holdings that laws restricting abortion warranted strict scrutiny review.[55] It also rejected arguments that these laws should be subject to intermediate scrutiny because they discriminated based on sex.[56]

As an article in the Illinois Bar Journal explained, "hundreds of bills have been introduced nationwide targeting the LGBTQ+ community."[57] This is because in *Dobbs*, "Justice Clarence Thomas' [concurrence] gave the first warning shot over the bow" by "declaring that the Due Process Clause does not secure any substantive rights, including the right to an abortion and, by extension, the right to same-sex marriage."[58]

Not only did *Dobbs* leave states free to limit access to reproductive care for people who are pregnant, it has "also endangered other constitutional privacy matters that determine the right to purchase and use contraception, the right of same-sex intimacy and marriage, and the right to marry across racial lines."[59] What connects *Dobbs* to Bans on gender-affirming care is a "coordinated push led by national anti-LGBTQ+ groups" directed at state legislators.[60]

Tentindo & Erica Browning, *Prohibiting Gender-Affirming Medical Care for Youth*, THE WILLIAMS INST., UCLA SCH. OF L. 6–9 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf [https://perma.cc/38FS-VSTY] (documenting states with Bans as of March 2023).

54. 597 U.S. 215 (2022).

55. *See id*. at 300.

56. *See id*. at 236; *see also* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 67 (2022) (offering a full discussion of equal protection claims in *Dobbs*) ("In two paragraphs at the beginning of *Dobbs v. Jackson Women's Health Organization*, the Supreme Court rejected the Equal Protection Clause as an alternative ground for the abortion right.").

57. *See* Brian Fliflet, *Refusing the Right: Gender-Affirming Care and LGBTQ+ Rights Under Assault Nationwide*, 111 ILL. B.J. 42, 42 (2023).

58. *Id*. at 43 (citing *Dobbs*, 597 U.S. at 331).

59. Zane McNeill, *The Supreme Court Ruling the Right Is Using to Eradicate Transgender People*, NEW REPUBLIC (Feb. 14, 2024), https://newrepublic.com/article/178681/dobbs-ruling-war-trans-community [https://perma.cc/38FS-VSTY].

60. Peele, *supra* note 36; *see also* Christy Mallory, Madeline G. Chin & Justine C. Lee, *Legal Penalties for Physicians Providing Gender-Affirming Care*, 329 JAMA

But while all of these rights remain very much in danger, "what's become clear is that the far right intends to test the judicial system for future breaches by first targeting transgender people's access to gender-affirming care."[61] This fear has become real. As laid out below, the opinions of the Sixth and Eleventh Circuits rely heavily on *Dobbs* in finding the gender-affirming care bans constitutional.

II. The Path to the Supreme Court

A. Seeking the Protection of the Fourteenth Amendment: From Legislation to Litigation

Almost as soon as these laws were passed, they were challenged in court by parents of children diagnosed with gender dysphoria.[62] The plaintiffs filing complaints seeking stays of their states' gender-affirming care bans are primarily parents of children who will be deprived of treatment.[63] Plaintiffs challenging the Bans argue that laws violate the Equal Protection Clause of the Fourteenth Amendment by imposing "disparate treatment on the basis of transgender status" and "based on sex" with no justification that this disparate treatment is "substantially related to an

1821, 1821 (2023) ("The policy landscape on gender-affirming care has significantly changed within the past decade, with high variability in access to care between states. By 2022, approximately half of US states had implemented protective state-level health policies related to gender-affirming care coverage in private and public insurance.").

61. McNeill, *supra* note 59; *see generally,* Emily Kaufman, *On Liberty: From Due Process to Equal Protection — Dobbs' Impact on the Transgender Community*, 14 U. MIA. RACE & SOC. JUST. L. REV. 81 (2023) (tracing parallels between the consequences of the *Dobbs* decision and the likely consequences of the bans on gender-affirming care).

62. *See Gender Dysphoria*, *supra* note 19.

63. *See* Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023); Petition for a Writ of Certiorari, Doe 1 v. Kentucky *ex rel.* Cameron, No. 23-492 (6th Cir. Nov. 3, 2023), 2023 WL 7549199; Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023); Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024); *see, e.g.*, *Brandt et al v. Rutledge et al*, ACLU (2021), https://www.aclu.org/cases/brandt-et-al-v-rutledge-et-al [https://perma.cc/Z2ZB-5TC7] (providing an example of the fact that some of the plaintiffs are no longer minors and some doctors have joined in the claims).

important state interest."[64] Therefore, they claim, the statute is unconstitutional as written.[65]

As of January 2024, KFF has been tracking legal challenges of the twenty-three state laws banning some form of gender-affirming care.[66] Although there is no single organization representing all the plaintiffs, there is considerable overlap with the ACLU, Lambda Legal, and the Southern Poverty Law Center filing appearances in more than one case.[67] In general, many of the same individuals and organizations have filed amicus briefs on behalf of plaintiffs.[68] ADF is as active in defending the laws banning gender-affirming care as it was in lobbying for their passage. Its website boasts that "ADF was honored to work alongside Mississippi in drafting and defending the Gestational Age Act before the Supreme Court."[69] ADF either directly represents or files amicus briefs in support of the states whose laws are being challenged.[70]

The laws banning gender-affirming care are a subset of "an unprecedented wave of state legislation and executive action" targeting "LGBTQIA+ (or, collectively, 'queer') people in the United States, with special virulence aimed at transgender, nonbinary, and gender-nonconforming (collectively, 'transgender' or 'trans')

64. *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

65. *See id*.

66. Dawson & Kates, *supra* note 53.

67. *See, e.g.*, *Lambda Legal Sues to Block Louisiana's Ban on Gender-Affirming Medical Care for Transgender Youth*, LAMBDA LEGAL (2024), https://lambdalegal.org/newsroom/soela20240108_ll-sues-to-block-ban-on-genderaffirming-medical-care-for-transgender-youth/ [https://perma.cc/N8JK-9KE5]; *Poe v. Drummond*, ACLU (2023), https://www.aclu.org/cases/poe-v-drummond [https://perma.cc/77K5-2UP9]; Aryn Fields, *Federal Judge Issues Injunction That Restores Health Care for Georgia Transgender Children*, HUM. RTS. CAMPAIGN (2023), https://www.hrc.org/press-releases/federal-judge-issues-injunction-that-restores-health-care-for-georgia-transgender-children [https://perma.cc/JVL7-79BB].

68. *See, e.g.*, *AAMC Joins 3 Amicus Briefs Opposing State Bans on Gender-Affirming Care*, ASS'N OF AM. MED. COLLS. (Dec. 15, 2023), https://www.aamc.org/advocacy-policy/washington-highlights/aamc-joins-3-amicus-briefs-opposing-state-bans-gender-affirming-care [https://perma.cc/UVT2-YKW4]; Samantha Riedel, *Trans Celebs Are Asking SCOTUS to Strike Down Gender-Affirming Care Bans Once and For All*, THEM (Dec. 15, 2023), https://www.them.us/story/trans-celebs-legal-brief-scotus-strike-down-gender-affirming-care-bans [https://perma.cc/3NDR-E9JC].

69. *ADF at the Supreme Court*, *supra* note 31.

70. *Id.*

people."[71] In response, the parents challenged these laws on behalf of their children based on the Fourteenth Amendment's promise of Equal Protection and Substantive Due Process.[72] The parents argued, and the district courts agreed, that the laws targeting LGBTQ youth discriminate on the basis of sex and transgender status without the justification of an important government interest.[73]

B. The District Courts[74]

Federal district court is the first stop for individuals seeking to stay the implementation of laws that they claim violate their right to equal protection of the law protected by the Fourteenth Amendment. To stay the enforcement of state law, plaintiffs must present a "clear showing" that they are likely to prevail on the merits, that they face irreparable harm without an injunction, that the balance of equities favors them, and that the public interest supports an injunction.[75] When a complaint involves a "constitutional challenge, the likelihood-of-success inquiry is the first among equals."[76]

Making this determination of the likelihood of success requires identifying the legal criteria for making a successful claim. When that claim involves a violation of civil rights, the key determination is what level of scrutiny the state's action must survive.[77] Suppose a district court does find that a plaintiff has proved a "likelihood" of success on the merits. In that case, it must also consider the other

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71. Anne Alstott, Melisa Olgun, Henry Robinson & Meredithe McNamara, *"Demons and Imps": Misinformation and Religious Pseudoscience in State Anti-Transgender Laws*, 35 YALE J.L. & FEMINISM 223, 226 (2024).

72. *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

73. *See, e.g.*, Jeannie Baumann, *Early Transgender Care Challenge Wins Falter at Appeals Courts*, BLOOMBERG L. (Aug. 24, 2023), https://news.bloomberglaw.com/health-law-and-business/early-transgender-care-challenge-wins-falter-at-appeals-courts [https://perma.cc/3JJ2-DQRJ].

74. For a chart comparing the District Court cases and analyzing the background of the Judge, see Appendix.

75. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20–22 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

76. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 414 (6th Cir. 2023).

77. Brandt *ex. rel.* Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022) ("[t]o evaluate Plaintiffs' likelihood of success on the merits of their equal protection claim, we must first determine the appropriate level of scrutiny").

criteria outlined in *Winter v. Natural Resources Defense Council, Inc.,* including that the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[78]

In assessing whether or not a plaintiff is likely to succeed in their constitutional claim, a district court judge is not supposed to evaluate a law based on their views but rather on precedent in their circuit. Nor are they supposed to criticize the precedent on which they base their decision. As Professor Oren Kerr explains, even if a lower court disagrees with the conclusions of a higher court, "[w]hen you write a judicial opinion, you should limit yourself to what you have formal authority to decide."[79] Rather than express disagreement in an opinion, lower court judges "should respect that role by resolving the case and controversy before them in their opinions and saving commentary for other forums, like law reviews."[80]

Once the district court has made its decision, the losing party has a right to appeal to the federal circuit court of appeals in their jurisdiction.[81] That court will review certain district court decisions for "abuse of discretion."[82] While a district court's factual findings are usually given deference, its determination of legal issues, as the Sixth Circuit explained, is reviewed with "fresh eyes."[83] While there

78. 555 U.S. 7 at 20.

79. *See* Orin Kerr & Michael C. Dorf, *Criticizing the Court: How Opinionated Should Opinions Be?*, 105 JUDICATURE, Fall/Winter 2021–2022, at 84 (stating that lower court judges should respect their role "by resolving the case and controversy before them in their opinions and saving commentary for other forums, like law reviews").

80. *Id.*; *see also id.* ("[J]udges shouldn't use their legal opinions to criticize U.S. Supreme Court decisions. Lower court judges were not nominated and confirmed to a seat on the Supreme Court, and they are bound by the Supreme Court's decisions.").

81. *About the U.S. Courts of Appeals*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals [https://perma.cc/86S5-5GHL]; *see also Introduction to the Federal Court System*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/5HRS-2M8N] (describing the federal court system and its appeals process); 28 U.S.C. § 41 (describing the composition of each circuit under statute).

82. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (finding that "an abuse of discretion" occurs when a court's decision represents a "clear error of judgment"); *see generally* Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 309–16 (2002) (summarizing the abuse of discretion standard in detail).

83. *L.W.* ex. rel. *Williams v. Skrmetti*, 73 F.4th at 414 (quoting Arizona v. Biden, 40 F.4th 375, 381 (6th Cir. 2022)).

are other factors, failure to provide a likelihood of success is fatal to a claim alleging violation of the Fourteenth Amendment. [84]

A series of federal district courts found that plaintiffs met this burden in cases challenging the constitutionality of gender-affirming care bans, and issued stays to prevent the implementation of laws banning youth with gender dysphoria from accessing a continuum of gender-affirming care.[85] To illustrate, on July 28, 2023, two federal district judges, one in Tennessee and one in Kentucky, issued stays on nearly identical laws that "prohibit[ed] any minor . . . from receiving certain medical procedures if the purpose of receiving those procedures [was] to enable that minor to live with a gender identity that is inconsistent with that minor's sex at birth."[86]

Initially, the parents' success in obtaining stays from eight different federal district courts and the Eighth and Ninth Circuit Courts of Appeals seemed like a much-needed infusion of good news amidst the unfolding consequences of states limiting access to reproductive care in the wake of the Supreme Court's reversal of *Roe v. Wade*.[87] Almost all of the legal challenges brought against gender-affirming care bans were successful.[88] The majority of courts hearing these challenges wrote strongly worded opinions based on

84. *Id.* at 419 (noting plaintiffs were unlikely to succeed since a state law need only a "rational basis" to survive an equal protection challenge) ("It's highly unlikely, as an initial matter, that the plaintiffs could show that the Act lacks a rational basis. The State plainly has authority, in truth a responsibility, to look after the health and safety of its children.").

85. Sarah Parshall Perry, *More Courts Uphold Bans on "Gender-Affirming" Care for Minors. Is Supreme Court Next Stop?*, HERITAGE FOUND. (Aug. 30, 2023), https://www.heritage.org/gender/commentary/more-courts-uphold-bans-gender-affirming-care-minors-supreme-court-next-stop [https://perma.cc/Z5PX-NX6S].

86. L.W. *ex rel.* Williams v. Skrmetti, 679 F.Supp.3d 668, 677 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) (addressing Tennessee's SB1); Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) (addressing Kentucky's parallel SB 150).

87. *Cf.* BECCA DAMANTE & KIERRA B. JONES, A YEAR AFTER THE SUPREME COURT OVERTURNED ROE V. WADE, TRENDS IN STATE ABORTION LAWS HAVE EMERGED, CTR. FOR AM. PROGRESS (2023) https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/ [https://perma.cc/Z55Q-B47P] (summarizing the change in access to abortion care across the nation after the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*).

88. *See* Ian Millhiser, *The Case for Optimism about LGBTQ Rights in the United States*, VOX (June 26, 2023), https://www.vox.com/politics/2023/6/26/23752360/supreme-court-lgbtq-transgender-bathrooms-sports-gender-affirming-care-bostock [https://perma.cc/LHP7-AQ9M].

Supreme Court precedent and precedent within their circuits that the Bans were unconstitutional based on the protections of the Fourteenth Amendment.[89]

The *New York Times* described the first victory in obtaining a stay in Arkansas as "a significant victory for the L.G.B.T.Q. community."[90] Rather than being an outlier, as the summer of 2023 continued, "federal judges [around the country] were consistently blocking bans on gender-affirming care from taking effect."[91] Not only were these judges "[s]iding with LGBTQ+ and civil rights groups, [they] repeatedly found that banning gender-affirming care is likely unconstitutional on the grounds of the equal protection and due process clauses of the 14th Amendment."[92] However, the tide turned when the Sixth and Eleventh Circuits issued opinions reversing their decisions and withdrawing the stays.[93]

III. The Sixth and Eleventh Circuits' Opinions

The plaintiffs' winning streak ended on August 21, 2023, when the Eleventh Circuit Court of Appeals in *Eknes-Tucker v. Governor of Alabama* vacated the preliminary injunction issued by the district court, writing that the court had "abused its discretion" when staying the enforcement of Alabama's ban on gender-affirming care "because it applied the wrong standard of scrutiny" to both of plaintiffs' constitutional claims.[94] First, the court found that the plaintiff parents' assertion of "a constitutional right to 'treat [one's] children with transitioning medications subject to

89. *See id*. ("[T]he Supreme Court has long held that any law or government policy that discriminates on the basis of sex is presumptively unconstitutional").

90. Rick Rojas & Emily Cochrane, *Judge Strikes Down Arkansas Law Banning Gender Transition Care for Minors*, N.Y. TIMES, (June 20, 2023), https://www.nytimes.com/2023/06/20/us/arkansas-transgender-care-ban.html [https://perma.cc/MFW7-SNQ6]; *see also* Millhiser, *supra* note 88 ("[T]he picture for LGBTQ litigants has thus far been more favorable than anyone reasonably could have predicted on the day Kennedy announced his retirement.").

91. *See* Orion Rummler, *The 19th Explains: The Groundwork for a Supreme Court Case on Gender-Affirming Care Is Being Laid Now*, 19TH (Oct. 12, 2023), https://19thnews.org/2023/10/supreme-court-transgender-rights-gender-affirming-care/ [https://perma.cc/83NU-DFM6] [hereinafter Rummler, *Groundwork for SCOTUS*]; *see also* Orion Rummler, *Anti-LGBTQ+ Laws Are Being Blocked in Federal Courts Across the Country*, 19TH (July 5, 2023), https://19thnews.org/2023/07/anti-lgbtq-laws-blocked-federal-courts/ [https://perma.cc/3M9J-M529] [hereinafter Rummler, *Anti-LGBTQ+ Laws*].

92. Rummler, *Groundwork for SCOTUS*, *supra* note 91.

93. Rummler, *Anit-LGBTQ+ Laws*, *supra* note 91.

94. 80 F.4th 1205, 1210 (11th Cir. 2023) (vacating district court order to stay Alabama's gender-affirming care ban); *see also* Perry, *supra* note 85.

medically accepted standards'" was without "any authority that supports the existence of" such right.[95] Second, the court held that plaintiffs had failed to show that Alabama's Ban on gender-affirming care "classifies on the basis of sex or any other protected characteristic."[96] Therefore, the court concluded that the Ban "is subject only to rational basis review"—not subject to strict scrutiny for the parents' substantive Due Process claim, nor to intermediate scrutiny based on a finding of sex- and transgender-based discrimination as applied by the district court.[97]

Then, on September 28, 2023, the Court of Appeals for the Sixth Circuit issued an opinion reversing orders granted by federal district court judges in Kentucky and Tennessee on grounds that closely mirrored those of the Eleventh Circuit.[98] In affirming the state's right to declare a specific form of medical treatment illegal, the Sixth Circuit framed the issue of gender-affirming care as a choice between whether a state or the courts should have the final word in a debate over access to medical treatment rather than recognizing the right of an individual patient or the doctor's right to make a medical judgment.[99]

Unlike the Eleventh Circuit's opinion, which had not reached the stage of final review, the Sixth Circuit's opinion was final.[100] Eventually, the list of published opinions would include the Eighth[101] and Ninth Circuit Courts of Appeals.[102]

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95. *Eknes-Tucker*, 80 F.4th at 1224.

96. *Id*. at 1210.

97. *Id*. *See also* Perry, supra note 85 (summarizing *Eknes-Tucker*).

98. *See* L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).; *cf.* Doe 1 v. Thornbury, 75 F.4th 655 (6th Cir. 2023) (declining to lift the stay in Kentucky, in light of *Skrmetti*).

99. *Skrmetti*, 73 F.4th at 412–13.

100. *See e.g.,* Rummler, *Groundwork for SCOTUS*, *supra* note 91; Chris Geidner, *LGBTQ Cases Are Coming to the Supreme Court. A Law Dork Guide on What to Watch.*, L. DORK (Oct. 27, 2023), https://www.lawdork.com/p/lgbtq-cases-coming-to-scotus [https://perma.cc/B4Z6-63KK] (predicting that for procedural reasons, the bans on gender-affirming care were most likely "headed to the Supreme Court within the coming year"); *see generally* Alstott et al., *supra* note 71, at 271 (analyzing the Sixth Circuit's 2023 summer litigation up to the September 28, 2023 decision).

101. Brandt *ex. rel.* Brandt v. Rutledge, 47 F. 4th 661, 669–70 (8th Cir. 2022) (citing United States v. Virginia, 518 U.S. 515, 531 (1996)) (concluding that the gender-affirming care ban was illegal sex discrimination and required heightened scrutiny).

102. Hecox v. Little, 79 F.4th 1009, 1026 (9th Cir. 2023) (concluding that, with a gender-based athletics Ban, "discrimination on the basis of transgender status is a form of sex-based discrimination"), *opinion withdrawn,* 99 F.4th 1127 (9th Cir. 2024).

Both the Sixth and Eleventh Circuit Court of Appeals reversed the district courts' grants of stays because, the courts held, the district courts applied the wrong standard of review. In summary, both circuits held that the gender-affirming care bans were presumed constitutional as legitimate exercises of their plenary powers.[103] They then rejected the plaintiffs' claims of discrimination against minors under the Equal Protection Clause and the parents' claims that the laws violated their fundamental liberty to direct the medical care of their children.[104] Having dismissed all of the plaintiffs' arguments for heightened scrutiny, both courts applied the rational basis test and found it likely that on full review they would be found constitutional.[105]

A. How States Use Their Plenary Powers

States' use of their plenary powers has changed as the understanding of what it means to provide for the public's health has evolved.[106] When the Constitution was ratified in 1787, the former colonies were already making laws related to maintaining health and safety within their geographic boundaries.[107] They did so by preventing contamination of public drinking water sources and isolating people showing symptoms of serious diseases such as yellow fever or smallpox.[108]

However, nothing like the "practice of medicine" existed until the 1860s, when there was still "little public support for medical professionalism" and there were "no powerful medical organizations."[109] As these groups grew in number and influence, they lobbied their state legislatures to adopt these standards and

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103. L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 413 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1210 (11th Cir. 2023).

104. *Skrmetti*, 73 F.4th at 421; *Eknes-Tucker* 80 F.4th at 1229.

105. *Skrmetti*, 73 F.4th at 419; *Eknes-Tucker*, 80 F.4th at 1225.

106. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (discussing historical development of police powers).

107. Ed Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations,* 8 ANNALS HEALTH L. 201 (1999) (providing a history of how laws related to health and sanitation developed into regulating the practice of medicine).

108. *See generally* Paige Gibbons Backus, *Medicine has Scarcely Entered its Threshold*: *Medicine in the 1700s,* AM. BATTLEFIELD TR. (Jan. 18, 2021), https://www.battlefields.org/learn/articles/medicine-has-scarcely-entered-its-threshold-medicine-1700s [https://perma.cc/M554-UZBM] (describing medicine in the 1700s).

109. Richards, *supra* note 107, at 210.

give them the power of law.[110] This set the scene for legal conflicts between states and individuals over the extent of state authority to decide who could be licensed as a medical doctor and the grounds on which that license could be rescinded.[111] In 1898, one of these disputes over the removal of a license reached the United States Supreme Court, giving it the opportunity to describe the scope of state authority over the practice of medicine that it continues to follow today.[112]

The dispute between Dr. Hawker and the state of New York arose over a law passed while Dr. Hawker was in prison, which prohibited convicted felons from holding a license to practice medicine.[113] Dr. Hawker complained that the law should not apply to him because it was passed after he had already been licensed.[114] Writing for the U.S. Supreme Court, Justice Brewer upheld New York's right to create and apply new licensing criteria based on the state's "police power" to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine."[115] This decision established a state's plenary power to control both who could practice medicine and the parameters of that practice.

Since then, states have exercised this authority by creating licensing boards staffed by professional peers.[116] These boards can operate independently based on standards set by state law but have only the power that the state is willing to give them.[117] For example, in *Missouri Board of Registration for the Healing Arts v. Levine*, a Missouri court held that a state licensing board could not, against the wishes of the state, discipline a physician for conduct relating to serving as an expert witness.[118] This, the court wrote, was

110. *Id.*

111. *Id.* at 210–11.

112. *See generally* People v. Hawker, 152 N.Y. 234, 46 N.E. 607 (1897), *aff'd sub nom.* Hawker v. People of New York, 170 U.S. 189 (1898).

113. Hawker v. People of New York, 170 U.S. 189, 191 (1898).

114. *Id.*

115. *Id.*

116. *About Physician Discipline*, FED'N STATE MED. BDS., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-discipline/ [https://perma.cc/RJK5-ATHK].

117. *See generally* Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States* U.S. BUREAU LAB. STATS. (2015), https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm [https://perma.cc/9FTP-TGBG] (providing more information about professional licensing at the state level).

118. Mo. Bd. Registration for Healing Arts v. Levine, 808 S.W.2d 440, 443 (Mo. Ct. App. 1991).

because "[i]f the legislature had wanted to regulate the conduct of a physician acting as a non-treating expert medical witness, it would have statutorily so provided."[119]

Another example of a state's power over the delivery of healthcare comes in the form of laws that protect healthcare providers from the legal consequences of failing to provide care that violates their religious or personal beliefs, also known as "conscience clauses."[120] Originally, these laws were advanced by Catholic doctors and hospitals that did not want to be forced to perform abortions or provide birth control.[121] Their reach today has expanded beyond religiously affiliated hospitals as loosening restrictions on hospital mergers allowed many previously secular institutions to merge with national Catholic chains.[122]

These laws shield providers from the liability they would otherwise have to patients harmed by their failure to provide what would otherwise be the standard of medical care.[123] This not only protects providers from the consequences of refusing to offer care, but also relieves them of the responsibility to tell patients what is happening.[124] Many also excuse providers from the obligation of

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119. *Id.*

120. *See e.g.*, Isa Ryan, Ashish Premkumar & Katie Watson, *Why the Post-Roe Era Requires Protecting Conscientious Provision as We Protect Conscientious Refusal in Health Care*, 24 AMA J. ETHICS E906 (2022); *see Physician Exercise of Conscience*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/ethics-opinions/physician-exercise-conscience [https://perma.cc/3LSP-H9ZN] (conveying a provider's perspective of conscience clauses).

121. *See* Nancy B. Shuger, *Does the State Action Doctrine Compel Nominally Private Hospitals to Make Abortion Services Available despite "Conscience Clauses?"*, 4 MD. L. FORUM 113 (1974) (providing an early analysis of the effect of conscience clauses); *see also* Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, HASTINGS CTR. (June 30, 2023), https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/ [https://perma.cc/NK59-9GCC] ("Debates about the practice and limits of conscientious objection in health care often arise in relation to the beginning or end of life – specifically, to pregnancy termination, pregnancy prevention, and actions that may hasten death in the context of terminal illness.").

122. *See generally* Janet D. Steiger, Former Chairman, Fed. Trade Comm'n, *Health Care Antitrust Enforcement Issues*, (Nov. 9, 1995) (discussing hospital mergers); Maya Inka Ureno-Dembar, *Shifting Antitrust Laws and Regulations in the Wake of Hospital Mergers: Taking the Focus off of Elective Markets and Centering Health Care*, 86 BROOK. L. REV. 763 (2021) (arguing that hospital mergers between secular and nonsecular hospitals result in patients being forced to travel further for reproductive care).

123. *See* AM. MED. ASS'N, *supra* note 120.

124. *See* Am. Acad. of Pediatrics, Comm. on Bioethics, *Policy Statement—Physician Refusal to Provide Information or Treatment on the Basis of Claims of Conscience*, 124 AM. ACAD. OF PEDIATRICS, 1689 (2009).

referring patients to a doctor who will provide the care.[125] Today, conscience clauses are being used in many states to deny care related to contraception, miscarriage management, and assisted reproductive technologies, among other treatments.[126] Finally, the most recent example of states using their plenary power came during the COVID-19 public health emergency when states granted all providers immunity from liability for what would, again, otherwise be negligent behavior.[127]

Under intermediate scrutiny review, a state must justify a statute that discriminates even if the discrimination was not deliberate.[128] So, for example, Judge Richardson in Tennessee concluded that the ban could not survive heightened scrutiny because "the benefits of the medical procedures banned . . . are well established," and the state had not established that the Ban was "substantially related to an important government interest."[129] Similarly, Judge Jane Kelly of the Eighth Circuit found that the statutes did constitute sex discrimination "[b]ecause the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law" and that such discrimination was not justified by "an 'exceedingly persuasive justification.'"[130]

Along the same theme, Judge B. Lynn Winmill of the District of Idaho explained that the answer to whether Idaho's gender-affirming care ban violated the Fourteenth Amendment was

125. *See Conscience Protections*, U.S. DEP'T HEALTH AND HUM. SERVS., https://www.hhs.gov/conscience/conscience-protections/index.html [https://perma.cc/43PQ-PDJS].

126. *See* Elizabeth Sepper & James D. Nelson, *Disestablishing Hospitals*, 49 J. L. MED. ETHICS 542, 543 (2021).

127. *See e.g.,* Elaine S. Povich, *States Braced for a Wave of COVID Lawsuits. It Never Arrived.*, STATELINE (July 21, 2021), https://stateline.org/2021/07/21/states-braced-for-a-wave-of-covid-lawsuits-it-never-arrived/ [https://perma.cc/C8NC-43W4] ("[N]ew liability protection laws vary, but most of them seek to protect all or specific kinds of businesses from lawsuits that attempt to establish culpability. Exceptions are usually made for negligence, willful misconduct or a provable failure to follow public health orders.").

128. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1219 (N.D. Fla. 2023) (plaintiffs challenged the Ban, arguing that even if not intentional, the statute "discriminate[d] on the basis of sex and transgender status and that either alone would be sufficient to trigger intermediate scrutiny").

129. L.W. *ex rel.* Williams v. Skrmetti, 679 F.Supp.3d 668, 712 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (holding that the Ban was not sufficiently related to the state's asserted interest of protecting minors from the risk of the covered treatments since only a "tiny fraction" of the minors to whom it was prescribed were receiving it as a treatment for gender dysphoria).

130. Brandt *ex. rel.* Brandt v. Rutledge, 47 F. 4th 661, 669–670 (8th Cir. 2022) (quoting United States v. Virginia, 518 U.S. 515, 531 (1996).

"intuitive and obvious to lawyers and laypeople alike . . . [p]arents should have the right to make the most fundamental decisions about how to care for their children."[131]

He explained that the Ban warrants heightened scrutiny both because it relies on "sex-based classifications" and because it discriminates based on transgender status, which satisfies all of the Ninth Circuit's traditional criteria for recognizing a suspect classification.[132] But there is no justification sufficient for a statute that was passed with the intent to discriminate.[133] As Judge Hinkle explained, the Ban in his state was "motivated in substantial part by the plainly illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities. This was purposeful discrimination against [transgender people]."[134]

i. Reviewing Constitutionality of Laws Passed Under State Plenary Powers

When the former colonies ratified the 1787 Constitution in order to create a strong federal government, they did not intend to give up any of "the authority [they had] . . . 'to provide for the public health, safety, and morals'" of their citizens."[135] This is evidenced by their refusal to sign without the promise that the document would be immediately amended to include a guarantee that "[t]he powers not delegated to the United States by the Constitution, nor

131. Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1178 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024) ("[T]he Fourteenth Amendment's primary role is to protect disfavored minorities and preserve our fundamental rights from legislative overreach . . . . It is no less true for transgender children and their parents in the 21st Century.").

132. *Id.* at 1190–92; *see also id*. at 1178 ("Time and again, these cases illustrate that the Fourteenth Amendment's primary role is to protect disfavored minorities and preserve our fundamental rights from legislative overreach.").

133. *Ladapo*, 676 F. Supp. 3d at 1220.

134. *Id.*; see also *id.* at 1216 (finding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under the Due Process Clause) ("I find that the plaintiffs' motivation is love for their children and the desire to achieve the best possible treatment for them. This is not the State's motivation.").

135. WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 3 (2022) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)) ("Under the United States' federalist system, states and the federal government share regulatory authority over public health matters, with states traditionally exercising the bulk of the authority in this area pursuant to their general police power. That power authorizes states, within constitutional limits, to enact laws 'to provide for the public health, safety, and morals' of the states' inhabitants. In contrast to this general power, the federal government's powers are confined to those enumerated in the Constitution.").

prohibited by it to the States, are reserved to the States respectively, or to the people."[136] Until the Civil War, not only did the federal government leave it to the states to pass and enforce laws related to its authority over the public health, safety, and morals of their citizens, it also "relied on the state courts to vindicate essential rights arising under the Constitution and federal laws."[137] However, "that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers."[138]

Part of those increased federal powers was the authority to review state statutes that, while within their plenary powers, infringed on rights protected by the U.S. Constitution.[139] Faced with this new task of reviewing state law for infringement of Constitutional rights, the Supreme Court developed, or as one scholar put it more bluntly, "invented" a hierarchy of rights.[140] Justice Alito writing for the Court in *Dobbs*, described the rights at the top of the hierarchy as "first" those "guaranteed by the first eight Amendments" to the U.S. Constitution.[141] Then second, "a select list of fundamental rights that are not mentioned anywhere in the Constitution."[142] In contrast, laws that do not infringe on guaranteed or fundamental rights are entitled to a "strong presumption of validity," and "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests."[143] Among all the laws that a state

136. U.S. CONST. amend. X.

137. Zwickler v. Koota, 389 U.S. 241, 245 (1967).

138. *Id.* at 246

139. Michelle D. Deardorff, *Equal Protection of the Laws*, CTR. FOR THE STUDY OF FEDERALISM (2018), https://federalism.org/encyclopedia/no-topic/equal-protection-of-the-laws/ [https://perma.cc/5HLZ-L5EG].

140. Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 374 n.2 (2016) (quoting United States v. Carolene Products *Co.* 304 U.S. 144, 152 (1938)) ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some *rational* basis within the knowledge and experience of the legislators.") (emphasis added).

141. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022).

142. *Id.*

143. *Id.* at 221 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.") (internal citation omitted).

might pass, those related to health and safety are given the most deference and assumed constitutional.[144]

In contrast to state laws that might infringe on rights "guaranteed" in the first eight amendments, state laws that infringe on the right to equal protection of the laws protected by the Fourteenth Amendment are evaluated differently.[145] Today, when the U.S. Supreme Court evaluates laws or policies that may violate the Fourteenth Amendment's guarantee of equal protection of the laws, it describes them as laws that "discriminate."[146] However, using the language of the time, instead of "discrimination," the Court used the term "classification."[147] "Classification" is often used to refer to laws that discriminate based on race.[148] However, "[n]othing in the text of the Fourteenth Amendment limits Congress to the protection of racial minorities, and nothing in the text of the Amendment treats *racial* discrimination differently from discrimination on account of sex, religion, disability, or any other factor."[149] In sum, whether a state law exercising its plenary power over health and safety infringes on a fundamental liberty or discriminates by treating people in similar situations differently, individuals affected have the right to seek the protection of a federal court.[150]

Plaintiffs challenging the Bans on gender-affirming care argued that they were unconstitutional both because they engaged

144. Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J. L. & MED. 121, 130 (1993) (citing Gibbons v. Goden 22 U.S. (9 Wheat.) 1 (1824)) ("Although the Supreme Court has recognized since *Gibbons v. Ogden* that the Supremacy Clause requires state police power laws to give way to federal laws, this seldom posed a difficulty for states because the federal government rarely regulated health care.").

145. Deardorff *supra* note 139; *cf.* Michael Les Benedict, *The Ratification of the Fourteenth Amendment*, OHIO STATE UNIV.: ORIGINS (June 2018), https://origins.osu.edu/milestones/july-2018-150-years-fourteenth-amendment?language_content_entity=en [https://perma.cc/HE64-P24F] (providing a history of ratification for the Fourteenth Amendment).

146. Deardorff *supra* note 139; *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16 (2020) (applying strict scrutiny review to a set of COVID-19 era limits on occupancy that "violate 'the minimum requirement of neutrality' to religion" because "they single out houses of worship for especially harsh treatment").

147. Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 UNIV. MIA. INTER-AM. L. REV., 63, 65 (2020) (reviewing historical cases where the Supreme Court "has found that race, national origin, and alienage are all suspect classifications").

148. Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1241 (2017) (noting the Supreme Court's "oft-repeated mantra that the Fourteenth Amendment prohibits all racial classifications in government").

149. *Id.* at 1244.

150. Deardorff, *supra* note 139.

in illegal discrimination and because they violated fundamental rights.[151] Whether or not the plaintiffs ultimately succeed in either of these challenges depends first on how the U.S. Supreme Court categorizes the rights they claim have been violated, and second, whether they categorize the state's behavior as discrimination, and if so, whether that discrimination violates the constitution.[152] In making these determinations, the Court is not bound by decisions of previous courts evaluating similar statutes or even its own previous decisions.[153] However, the criteria it applies in reviewing these Bans is likely to indicate how it would evaluate laws raising similar issues of fundamental rights and discrimination in the future. As the *Dobbs* dissenters warned, "no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."[154]

Moreover, not only is the Supreme Court the sole judge of which liberties are identified as "substantial," but it has also granted itself the sole authority to determine whether a state law denies individual citizens equal protection.[155] Because the jurisprudence of substantial fundamental liberties and illegal classifications is entirely the creation of the Supreme Court and not

151. *See, e.g.,* L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 413 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

152. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985) ("[A]bsent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); Mitchell *supra* note 148, at 1275 ("[T]he Supreme Court interprets 'equal protection of the laws' to require equal treatment on account of race and sex (most of the time), to forbid discrimination with respect to a court-defined category of 'fundamental rights,' and to forbid discrimination that a court deems irrational."). *See also* Daniels v. Williams, 474 U.S. 327, 332 (1986) ("The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.").

153. See Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 142 (2020) (arguing that the Supreme Court's declining deference to its own precedent "is only likely to increase on the Court in the years to come, as more Justices find it a convenient mechanism for overturning decisions with which they substantively disagree").

154. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 362 (2022).

155. *See, e.g., id.* (overturning the precedent of *Roe. v. Wade*).

in the text of the Constitution, the Court retains the sole power to determine when state law violates the Fourteenth Amendment.[156]

ii. Health Care As a "Legitimate State Interest"

The Supreme Court has consistently identified health and safety as the paradigms of legitimate state interests.[157] Therefore, a state law related to protecting health or children, as in the case of laws banning gender-affirming care, is presumed constitutional unless it infringes on substantial fundamental liberty or discriminates in violation of the standards of the Fourteenth Amendment.[158]

While the Supreme Court has yet to "elaborate[e] on the standards for determining what constitutes a 'legitimate state interest,'" it has identified a "broad range of governmental purposes and regulations [that] satisfies these requirements."[159] Among these, the two that are consistently held to be legitimate and often compelling are laws that protect the health of the population at large[160] or the safety of children.[161] The Sixth and Eleventh Circuits held that the Gender-Affirming Care Bans were rationally related to both reasons. The Sixth Circuit held that the state could "rationally take the side of caution before permitting irreversible medical treatments of its children."[162] Using very similar language, the Eleventh Circuit held that "states have a compelling interest in protecting children from drugs, particularly those for which there is

156. *See* Mitchell *supra* note 148, at 1279 ("Today the Supreme Court acts as if the word 'protection' had never been enacted. The Justices think that *any* law that classifies or discriminates implicates the Equal Protection Clause, and they have concocted their own criteria for determining whether a discriminatory law gets 'rational basis review,' 'intermediate scrutiny,' or 'strict scrutiny.'").

157. *Dobbs*, 597 U.S. at 221 (internal citation omitted) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.").

158. *Outlawing Trans Youth*, *supra* note 50, at 2183.

159. *See, e.g.,* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 834–85 (1987).

160. *See Dobb*s, 597 U.S. at 301 ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'").

161. *See* New York v. Ferber, 458 U.S. 747, 757 (1982) (noting the state's "compelling interest in prosecuting those who promote the sexual exploitation of children" in the context of pornography); *see also Dobbs*, 597 U.S. at 301 (identifying "fetal pain" as among the compelling interests a state could have in regulating abortion).

162. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 414 (6th Cir. 2023).

uncertainty regarding benefits, recent surges in use, and irreversible effects."[163]

The U.S. Supreme Court, in *Williamson v. Lee Optical*, established the criteria for evaluating a state's method of making a choice in the face of irreconcilable differences in expert opinion on issues related to health care.[164] In *Williamson*, an optometrist challenged the constitutionality of an Oklahoma law that prohibited them from making eyeglasses without a prescription from a licensed ophthalmologist.[165] In upholding Oklahoma's decision, Justice William O. Douglas agreed with the plaintiff that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases."[166] However, in words often quoted, he explained that "the law need not be in every respect logically consistent with its aims to be constitutional."[167] Rather, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[168] Justice Douglas explained that "[f]or protections against abuses by legislatures the people must resort to the polls, not the courts."[169]

Williamson continues to be cited in conjunction with the Court's 1905 decision in *Jacobson v. the Commonwealth of Massachusetts* upholding the authority of the Cambridge Board of Health to issue criminal penalties for failure to provide proof of small pox vaccination.[170] In *Jacobson,* the Court upheld the authority of the Cambridge Board of Health to mandate smallpox vaccination despite a lack of consensus in the medical community that the threat justified the risk. [171] The Court held that absent any

163. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1225 (11th Cir. 2023).

164. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490 (1955).

165. *Id.* at 486.

166. *Id.* at 487.

167. *Id.*

168. *Id.* at 488.

169. *Id.* (quoting Munn v. State of Illinois, 94 U.S. 113, 134 (1876)).

170. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 259–60 (2022) (citations omitted) ("The standard of review from *Jacobson* does not resemble modern day constitutional law . . . . If anything, *Jacobson* was more rigorous than modern rational basis review. In *Jacobson,* Justice Harlan suggested that laws enacted for pretextual reasons would be unconstitutional. But under precedents like *Williamson v. Lee Optical*, courts uphold pretextual laws so long as there is some 'conceivable' basis to justify them."). *See also* 28 U.S.C. § 2282 (repealed 1976) (requiring, *at that time*, that an action seeking to declare a state statute unconstitutional be heard by a panel of three district court judges before it could be appealed directly to the U.S. Supreme Court).

171. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (stating that unless the state's action "has no real or substantial relation [to public health], or is, beyond all

violation of fundamental liberty, a state's plenary powers allowed it to choose among competing scientific views so long as it did so using a process that was neither arbitrary nor capricious.[172] *Jacobson* continues to be cited in support of a state's discretion in choosing among competing medical opinions.[173]

iii. Establishing Minimum Levels of Evidence

The U.S. Supreme Court has never quantified the outer limits of holding that a state law lacks logical consistency. This may change if the Supreme Court adopts either the Sixth or Eleventh Circuit's arguments relying on a lower threshold of evidence. As Professor Ann Alstott explains, "by lowering the standard of review to rational basis from heightened or intermediate scrutiny, [the Sixth and Eleventh circuits] have signaled their willingness to uphold health care bans based on even flimsy evidence by the state."[174] The Sixth Circuit Court of Appeals explained its decision to reject the factual findings of two different courts that the majority of the medical evidence favored the plaintiffs by stating "[p]lenty of rational bases exist for these laws, with or without evidence."[175]

The petitions seeking to stay gender-affirming care bans are characterized by extensive reliance on medical testimony. The district courts granting stays made frequent references to what Judge Hale in Kentucky called "the evidence-based standard of care accepted by all major medical organizations in the United States."[176] Similarly, Judge Hinkle of the Northern District of Florida wrote that "[t]he overwhelming weight of medical authority

question, a plain, palpable invasion of rights secured by the fundamental law, it is the [constitutional] duty of the courts" to defer to the state's decision).

172. *Id.*

173. *See, e.g.,* Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015) ("Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors.") (citing *Jacobson*, 197 U.S. at 37–38).

174. Alstott, *supra* note 71, at 271; *see also* Brandon Azevedo, Angela Taylor & Derrick Matthews, *Impact of Gender-Affirming Care Bans on Transgender Youth of Color*, HEALTH AFFS. (July 7, 2023), https://www.healthaffairs.org/content/forefront/impact-gender-affirming-care-bans-transgender-youth-color [https://perma.cc/3DP4-ARBU] (stating, contrary to states' arguments, that "[t]he evidence is clear that gender-affirming health care is safe and appropriate for youth").

175. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

176. Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 581 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

supports the treatment of transgender patients with GnRH agonists and cross-sex hormones in appropriate circumstances."[177] He noted, specifically, that "[o]rganizations who have formally recognized this include the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American College of Physicians, American Medical Association, American Psychiatric Association, and at least a dozen more."[178] In addition to the evidence from organizations, Judge Hinkle noted that the "record also includes statements from hundreds of professionals supporting this care."[179] In comparing the evidence provided by plaintiffs with that offered by defendants, he wrote, "[a]t least as shown by this record, not a single reputable medical association has taken a contrary position."[180]

Judge Hinkle scolded the state of Florida for dismissing "[t]he great weight of medical authority supports these treatments . . . ."[181] It is, he concluded, "fanciful to believe that all the many medical associations who have endorsed gender-affirming care, or who have spoken out or joined an amicus brief supporting the plaintiffs in this litigation, have so readily sold their patients down the river."[182]

The Sixth and Eleventh Circuits were completely unpersuaded by the lower courts' reliance on medical testimony. The Eleventh Circuit Court of Appeals, presented with the same evidence as the District court judges, acknowledged the imbalance in the evidence, writing that "a group of at least twenty-two professional medical and mental health organizations" had jointly filed an amicus brief in support of the plaintiffs.[183] But rather than finding the testimony persuasive, it wrote that "none of the binding decisions regarding substantive due process establishes that there is a fundamental right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[184]

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177. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1213 (2023) (N.D. Fla. 2023).

178. *Id.*

179. *Id.*

180. *Id.*; *see also* Gary Fineout, *Federal Judge Rips into Florida's Ban on Gender-Affirming Care for Kids,* POLITICO (June 6, 2023, 5:53 PM), https://www.politico.com/news/2023/06/06/florida-gender-affirming-care-ruling-00100387 [https://perma.cc/7YW4-7826] ("The American Academy of Pediatrics and the American Medical Association support gender-affirming care for adults and adolescents.").

181. *Ladapo*, 676 F. Supp. 3d at 1223.

182. *Id.*

183. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1215 (11th Cir. 2023).

184. *Id.* (alteration in original).

The Eleventh Circuit wrote that the question that we ask in conducting a rational relationship review "is simply whether the challenged legislation is rationally related to a legitimate state interest."[185] "Such a relationship," the court continued in the emphasized text, "may merely 'be based on rational speculation' and *need not be supported 'by evidence or empirical data*.'"[186] Making the point even more clearly, the court wrote, "Generally, we ask whether there is *any* rational basis for the law, even if the government's proffered explanation is irrational, and even if it fails to offer any explanation at all."[187]

The Sixth Circuit Court of Appeals also dismissed the extensive evidence submitted in support of the safety and efficacy of puberty-blocking drugs to treat gender dysphoria by concluding that although it "is surely relevant" that "many members of the medical community support the plaintiffs . . . it is not dispositive."[188] Making a comparison between a state legislature and a federal court, it noted that neither had any obligation to "defer" even to "a consensus" among experts.[189] In language that bears full attention, the court asked:

> What is it in the Constitution, moreover, that entitles experts in a given field to overrule the wishes of elected representatives and their constituents? Is this true in other areas of constitutional law? Must we defer to a consensus among economists about the proper incentives for interpreting the impairment-of-contracts or takings clauses of the Constitution? Or to a consensus of journalists about the meaning of free speech? Or even to a consensus of constitutional scholars about the meaning of a constitutional guarantee?[190]

The court then concluded that "[p]lenty of rational bases exist for these laws, with or without evidence."[191] Therefore, "[a]t bottom, the challengers simply disagree with the States' assessment of the risks and the right response to the risks. That does not suffice to invalidate a democratically elected law on rational-basis grounds."[192]

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185. *Id.* at 1224–25 (quoting Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 818 (11th Cir. 2004)).

186. *Id.* (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)) (emphasis added).

187. *Id.* (quoting Jones v. Governor of Florida, 950 F.3d 795, 809 (11th Cir. 2020).

188. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 416 (6th Cir. 2023).

189. *Id.* at 416.

190. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 479 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

191. *Id.* at 489.

192. *Id.*

Because Tennessee did engage in a process of gathering and hearing medical evidence opposed to a ban, the Sixth Circuit's statement that "[p]lenty of rational bases exist for these laws, with or without evidence" is only dicta.[193] But its suggestion that a dispute over the basis of a decision related to medical care could be made with no evidence of supporting facts is concerning. While the Sixth Circuit was accurately following Justice Thomas's opinion in *FCC v. Beach Communications, Inc.*, that "rational basis review requires only the possibility of a rational classification for a law," the evidence in FCC involved the regulation of cable television facilities, not the medical care of children.[194] Justice Thomas himself made the point in *Beach* that such distinction matters: "In areas of *social and economic policy*, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[195] The issue addressed by the Court in *Beach*, a decision to exempt some forms of cable TV providers from regulation and not others, is very different from a decision to ban a medical treatment prescribed by physicians and sought by parents of children with gender dysphoria. As Justice Stevens explained in his *Beach* concurrence, "Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom not to regulate."[196]

However, if the Supreme Court extends the Sixth Circuit's application of *Beach*'s standard for a decision related to cable television to healthcare—if it endorses the upholding of a law targeting specific medical interventions so long as there is "the possibility of a rational classification for a law"—then it clears a path for states to pass any restriction on health care, no matter how widely endorsed.[197]

193. *Id.*

194. *Id.* (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

195. *Beach*, 508 U.S. at 313 (emphasis added).

196. *Id.* at 320 (Stevens, J., concurring).

197. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

B. Classifications Based on Sex

Defining whether a law classifies based on sex is entirely at the discretion of the reviewing court.[198] The Supreme Court defined sex discrimination in *United States v. Virginia* as denying "to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[199] In holding that Tennessee's gender-affirming care ban was unconstitutional, the federal district court cited *Virginia,* writing that the law, as written, "subjects individuals to disparate treatment on the basis of sex."[200]

However, the majority in the Sixth and Eleventh Circuits disagreed that the plaintiffs' children had experienced sex-based discrimination for any reason.[201] Having found that the plaintiffs had failed to meet their burden to prove that they were entitled to heightened scrutiny, the Sixth Circuit concluded that even if the plaintiffs could have proved sex discrimination, the Bans would survive intermediate scrutiny. [202] Judge Brasher's concurrence in the Eleventh Circuit's opinion went even further, arguing that if the statute did discriminate based on sex, "it is likely to satisfy intermediate scrutiny" because it would be "otherwise impossible to regulate these drugs differently when they are prescribed as a treatment for gender dysphoria than when they are prescribed for other purposes."[203] He continued, "[a]s long as the state has a substantial justification for regulating differently the use of puberty blockers and hormones for different purposes, then I think this law satisfies intermediate scrutiny."[204] Adding further emphasis to its

198. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (explaining precedent holding that a state's regulation of abortion is not a sex-based classification and therefore not subject to heightened scrutiny).

199. United States v. Virginia, 518 U.S. 515, 532 (1996).

200. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 695 (M.D. Tenn. 2023) (citing U.S. v. Virginia, 518 U.S. 515, 524 (1996)) ("SB1 on its face subjects individuals to disparate treatment on the basis of sex . . . the Court also agrees with Plaintiffs that SB1 subjects individuals to disparate treatment on the basis of sex because it imposes disparate treatment based on transgender status."), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

201. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023).

202. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) ("The State plainly has authority, in truth a responsibility, to look after the health and safety of its children.").

203. *Eknes-Tucker*, 80 F.4th at 1232 (Brasher, J., concurring).

204. *Id.*

conclusion that the statutes satisfied the criteria for constitutionality under rational relationship review, the Sixth Circuit continued in dicta to explain why the Bans would succeed under higher tiers of scrutiny, writing that "[t]he State plainly has authority, in truth a responsibility, to look after the health and safety of its children," far exceeding the rational relationship standard.[205]

What makes laws imposing criminal penalties for facilitating access to gender-affirming care different from the larger category of laws targeting transgender youth by limiting their participation in athletics or access to bathrooms is that their connection to children's health places them in a category of laws based on the extraordinary plenary powers retained by the states when they ceded some of their authority by ratifying the 1787 Constitution which created a strong federal government.[206]

i. Redefining Sex Discrimination Under the Equal Protection Clause of the Fourteenth Amendment

To balance the right of states to exercise their plenary power over matters related to health and the protection of individual rights, the Supreme Court has distinguished between discrimination based on the identity of individuals affected and discrimination caused by the deprivation of a protected constitutional right.[207] Within those two categories, the Court has created a hierarchy in which laws that discriminate based on sex

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205. *Skrmetti*, 73 F.4th at 419.

206. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting THE FEDERALIST NO. 45, at 293 (J. Madison)) ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy."); *see also* Mitchell, *supra* note 148, at 1275 ("[T]he Supreme Court interprets 'equal protection of the laws' to require equal treatment on account of race and sex (most of the time), to forbid discrimination with respect to a court-defined category of 'fundamental rights,' and to forbid discrimination that a court deems irrational."); Daniels v. Williams, 474 U.S. 327, 332 (1986) ("The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.").

207. *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (explaining that the Equal Protection Clause "places strict limits on the government's ability to infringe fundamental constitutional rights of all classes of persons").

are given less scrutiny than those based on race.[208] Plaintiffs challenging their states' gender-affirming care bans argue that the Bans discriminate based on sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment.[209] They claim that the Bans are discriminatory on their face, as written, and that they were passed with the intent to discriminate.[210] If they meet their burden of proof, then the state must justify the law by proving that it serves important governmental objectives and is substantially related to the achievement of those objectives.[211]

The Equal Protection Clause of the Fourteenth Amendment provides for "the absolute equality of all citizens of the United States politically and civilly before their . . . laws." [212] Even when states are using their plenary power to regulate health and safety, they cannot "deny any person the equal protection of the laws."[213] If a plaintiff can prove that a statute was passed with discriminatory intent, then the burden shifts to the state to offer a justification.[214] Discrimination based on race, color, or national origin or on the

208. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (contrasting a higher level of review for when "a statute classifies by race, alienage, or national origin" from one that classifies based on "gender" or "illegitimacy").

209. *See* Arthur S. Leonard, *6th Circuit Panel Reaffirms Denial of Preliminary Injunction Against Kentucky and Tennessee Laws Banning Gender-Affirming Care for Minors; Plaintiffs Seek Supreme Court Review*, LGBT L. NOTES (Aug. 2023); Arthur S. Leonard, *11th Circuit Panel Vacates Preliminary Injunction Against Alabama's Ban on Gender-Affirming Care for Minors*, LGBT L. NOTES (Sept. 2023).

210. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[E]qual protection . . . must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

211. *Id*.

212. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 600 U.S. 181, 201 (2023) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. Bingham)); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause of the Fourteenth Amendment also requires that "all persons similarly situated should be treated alike").

213. *See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535, (2012) (explaining that while individual states "do not need constitutional authorization to act" when exercising their plenary powers, "[t]he Constitution may restrict state governments" from acting "by forbidding them to deny any person the equal protection of the laws").

214. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose."). For further discussion of tiers of scrutiny, *see* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475 (2016).

exercise of fundamental constitutional rights can only be justified by a compelling government interest.[215] As Justice Roberts explained in *Students for Fair Admissions v. Harvard*, if the discrimination is based on race, the state actor faces "a daunting two-step examination known in our cases as 'strict scrutiny.'"[216]

Citizens are not being treated equally when a state action or law treats or "classifies" groups of people differently without adequate justification.[217] When a law classifies based on "race, color, or national origin" it is presumed discriminatory and the state must justify their action by proving that the law serves a compelling government interest.[218] But, when, as in the challenges to gender-affirming care bans, the plaintiffs are complaining of sex discrimination, the burden on the state is lower.[219] To withstand heightened scrutiny, classification by sex "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[220] The Court describes this lower standard of review of "classifications based on sex" as "intermediate scrutiny."[221]

Finally, just because a law treats people differently does not alone make it unconstitutional. As the Court explained in *Romer*, the requirement to provide equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[222] In contrast to classifications that warrant heightened scrutiny, the Court has set the general standard of review for a statute that classifies on more "prosaic grounds" than race, religion,

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215. *See SFFA*, 600 U.S. at 308–09 (Gorsuch, J., concurring) ("[C]ourts apply strict scrutiny for classifications based on race, color, and national origin . . . and rational-basis review for classifications based on more prosaic grounds.").

216. *Id*. at 206 (quoting Adarand Constructors v. Pena, 515 U.S. 200, 207 (1995)); *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16–17 (2020) (applying strict scrutiny review to a COVID-19 era limit on occupancy that "violate[s] 'the minimum requirement of neutrality' to religion" because "they single out houses of worship for especially harsh treatment").

217. *See SFFA*, 600 U.S. at 206–07 (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)) ("[W]e ask, first, whether the racial classification is used to 'further compelling governmental interests.'").

218. *Id*. at 308–09 (Gorsuch, J., concurring).

219. *Id*.

220. Craig v Boren, 429 U.S. 190, 197 (1976); *see also SFFA*, 600 U.S. at 309 (describing the standard of review for sex discrimination as "intermediate scrutiny").

221. *SFFA*, 600 U.S. at 309 (Gorsuch, J., concurring) (citing United States v. Virginia, 518 U.S. 515, 555–56 (1996); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001)).

222. Romer v. Evans, 517 U.S. 620, 631 (1996).

or gender.[223] These laws are presumed constitutional unless the plaintiff can prove that there is no "rational means to serve a legitimate end."[224]

ii. Narrowing Bostock: Declining to Characterize Transgender-Based Discrimination as Sex Discrimination

All of the courts holding that states' gender-affirming care bans constituted sex discrimination cited *Bostock v. Clayton County*, in which the Supreme Court held that discrimination based on transgender status was a form of gender stereotyping and also violated Title VII's prohibition against sex discrimination.[225] This is consistent with ADF's goal to "bring cases 'at the edges' of Bostock" in order to limit its application.[226]

In *Bostock,* the Court interpreted the prohibition against discrimination in employment "because of sex" to incorporate discrimination based on sexual orientation or gender identity.[227] It held that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[228] What was remarkable about *Bostock* was not just the holding, but the forcefulness with which it was explained. Justice Gorsuch, writing for the Court, described its holding as proclaiming that the "simple but momentous" message

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223. *SFFA*, 600 U.S. at 308–09 (Gorsuch, J., concurring).

224. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985); *see also id.* at 440 ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."); *In re* Griffiths, 413 U.S. 717, 721–22 (1973) (citations omitted) ("In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.").

225. Bostock v. Clayton Cnty., 590 U.S. 644 (2020). One of the cases joined in the *Bostock* decision was from the Sixth Circuit. *See* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004)) ("'[D]iscrimination based on a failure to conform to stereotypical gender norms' was no less prohibited under Title VII than discrimination based on 'the biological differences between men and women.'"), *aff'd sub nom*. Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

226. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023),
https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/DYK4-9E3T].

227. *Bostock*, 590 U.S. at 659–60; *see also* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023) (describing the majority's reference to the plain language of Title VII as the Court's "most salient intratextualist methodological battle").

228. *Bostock*, 590 U.S. at 683.

of Title VII was that an employee's gender is "not relevant to the selection, evaluation, or compensation of employees."[229] Extending its interpretation beyond transgender status, the Court wrote that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."[230] This, it explained, is because under the ordinary public meaning of sex discrimination an employee "fired for being gay or transgender" had experienced illegal discrimination "based on sex."[231] It continued that "a policy of firing any employee known to be homosexual . . . must, along the way, intentionally treat an employee worse based in part on that individual's sex."[232] This is because an employer's decision to fire an employee on discovering that they have a spouse of the same gender inherently involves sex-based considerations.[233]

The significance of the majority's decision can be gauged by the highly critical dissent authored by Justices Alito and Thomas.[234] They immediately warned that the case would have constitutional implications because transgender individuals would argue its extension to "the Equal Protection Clause['s] [prohibition against] sex-based discrimination unless a 'heightened' standard of review is met."[235] They also criticized the justification for interpreting the words "because of sex" as meaning "discrimination because of sexual orientation or gender identity."[236] Instead, they argued that the Court should have considered the meaning of the statute's words at the time it was written.[237] Looking at the 1960s, the dissenters concluded that, at the time, "'on the basis of sex' was well understood . . . as having [nothing] to do with discrimination

229. *Id.* at 659 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)) ("Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"). Justice Gorsuch used the word "simple" eleven times in the context of discrimination based on transgender status failing the most "simple test" of whether or not an employer had engaged in sex discrimination. *Id.* at 656–73.

230. *Id.* at 662.

231. *Id.* at 646–47 (2020).

232. *Id.* at 661–662.

233. *Id.*

234. *Id.* at 685 (Alito, J., dissenting) ("Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.") (emphasis in original).

235. *Id.* at 733.

236. *Id.*

237. *Id.* at 685.

because of sexual orientation or transgender status."[238] This, the dissenters explained, is because "[i]f every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[239]

The press immediately characterized *Bostock* as a major victory for LGBTQ+ employees.[240] Masha Gessen of the New Yorker described the decision as "the most consequential in the decades-long history of the American L.G.B.T.Q. movement."[241]

On January 25, 2021, President Biden issued an executive order extending *Bostock*'s definition of sex discrimination to all federal programs, not just those involving employment discrimination.[242] *Bostock* is cited frequently by federal courts in cases of transgender discrimination that do not fall under the jurisdiction of Title VII.[243] More broadly, "*Bostock* prompted dozens

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238. *Id.* at 709.

239. *Id.*

240. *See e.g.,* Katie Keith, *Supreme Court Finds LGBT People Are Protected From Employment Discrimination: Implications For The ACA*, HEALTH AFFAIRS FOREFRONT (June 16, 2020), https://www.healthaffairs.org/content/forefront/supreme-court-finds-lgbt-people-protected-employment-discrimination-implications-aca [https://perma.cc/UKM5-C7A4]; Ariane de Vogue & Devan Cole, *Supreme Court Says Federal Law Protects LGBTQ Workers From Discrimination,* CNN (June 15, 2020), https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html [https://perma.cc/BMK4-RZBQ].

241. Masha Gessen, *The L.G.B.T.Q.-Rights Movement Wins Its Biggest Supreme Court Victory*, NEW YORKER (June 15, 2020), https://www.newyorker.com/news/our-columnists/the-lgbtq-rights-movement-wins-its-biggest-supreme-court-victory [https://perma.cc/6A59-QFAA].

242. *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation . . . these principles are reflected in the Constitution, which promises equal protection of the laws.").

243. *See e.g.,* Katie Eyer, *Transgender Equality and* Geduldig *2.0,* 55 ARIZ. ST. L.J. 475, 492 (2023) ("In some cases, this has followed inexorably from the courts' determination that facial discrimination based on transgender status exists—since many circuits have, like the Supreme Court in *Bostock v. Clayton County*, concluded that anti-transgender discrimination is necessarily also sex discrimination."); *see also* Jon W. Davidson, *How the Impact of Bostock v. Clayton County on LGBTQ Rights Continues to Expand,* ACLU (June 15, 2022) https://www.aclu.org/news/civil-liberties/how-the-impact-of-bostock-v-clayton-county-on-lgbtq-rights-continues-to-expand [https://perma.cc/68JA-9EKP] ("Moreover, the ruling has had far-reaching effects beyond that long-sought breakthrough and its immediate impact on federal employment discrimination law . . . . Numerous courts have since followed the Supreme Court's compelling reasoning—which did not depend upon the particulars

of lower and state courts to find that LGBTQ discrimination is illegal *because* it is sex discrimination."[244]

Yet despite the vigor of the dissent and the very public characterization of *Bostock* as an extension of transgender rights, there has been no indication by the Court that it was misunderstood or mistaken. So far, there has been no indication that the majority of the Court believes that *Bostock* has been taken too far—quite the opposite. In 2023, Justice Gorsuch cited *Bostock to* emphasize the relationship between definitions of discrimination under Equal Protection and Federal Civil Rights Law.[245] So, while *Bostock* does not mention the words "Equal Protection" or cite *Virginia*, nothing in the opinion extended the holding beyond Title VII, and nothing explicitly excluded extension.[246]

Several courts have extended *Bostock*'s interpretation of "because of sex" to the Equal Protection Clause. For example, a district judge in the Eleventh Circuit, Judge Geraghty,[247] cited *Price Waterhouse v. Hopkins*, a Title VII sex discrimination case, in determining that the state bans were unconstitutional under the Equal Protection Clause.[248] Judge Geraghty of the Northern District of Georgia wrote her application of the *Bostock* standard was not just consistent with "Eleventh Circuit precedent" but actually compelled her conclusion.[249] A 2011 Eleventh Circuit opinion involving the firing of a transgender state employee based on gender stereotyping held that "discriminating against someone on the basis of [their] gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause."[250]

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of the federal employment discrimination law—to hold that other federal laws barring sex discrimination in other settings also protect against sexual orientation and gender identity discrimination.").

244. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1078 (2023) (citing further cases that identify LGBTQ discrimination as sex discrimination based on *Bostock*).

245. SFFA, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) ("The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications.").

246. Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR, (June 15, 2020),
https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/U96W-435G].

247. Koe v. Noggle, 688 F. Supp. 3d 1321, 1346–47 (N.D. Ga. 2023).

248. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (holding that a private employer who denied "an aggressive female employee" partnership based on gender stereotyping had a claim for sex discrimination under Title VII).

249. Koe v. Noggle, 688 F. Supp. 3d 1321, 1344 (N.D. Ga. 2023).

250. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Similarly, Judge Hinkle of the Northern District of Florida meticulously addressed and refuted all of the defendant's arguments in a gender-affirming care ban case.[251] Specifically, he wrote:

> Transgender and cisgender individuals are not treated the same. Cisgender individuals can be and routinely are treated with GnRH agonists, testosterone, or estrogen when they and their doctors deem it appropriate. Not so for transgender individuals—the challenged statute and rules prohibit it. To know whether treatment with any of these medications is legal, one must know whether the patient is transgender. And to know whether treatment with testosterone or estrogen is legal, one must know the patient's natal sex.[252]

Judge Hale, the district court judge that heard the case ultimately overturned by the Sixth Circuit, rejected "the Commonwealth['s] attempts to distinguish *Bostock*'s reasoning as limited to the Title VII context," writing that "the Sixth Circuit found nearly two decades ago that discrimination based on transgender status 'easily' constitutes sex discrimination for purposes of the Equal Protection Clause . . . and in any event, the analysis under Title VII and the Equal Protection Clause is the same."[253]

The Sixth and Eleventh Circuits overturned the lower courts' holdings that the *Bostock* definition of sex discrimination should be applied to the Bans and completely repudiated their past decisions equating the standard of sex discrimination for Title VII with the standard for violations of the Equal Protection Clause. Rejecting Judge Hale's interpretation of *Smith v. City of Salem*, a Sixth Circuit Case predating *Bostock*, the Sixth Circuit was forced to counter that although the precedent cited does "inconclusively *sa[y]* that claims under the Equal Protection Clause and Title VII involve the 'same elements,'" it is does not extend "beyond claims about discrimination over dress or appearance."[254] Distinguishing it

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251. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1226 (N.D. Fla. 2023) (finding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under Equal Protection and the Due Process Clause); *see also,* Ashton Hessee, *Florida District Court Judge Rules in Favor of Transgender Minors Receiving Hormone Therapy, Proclaiming That "Gender Identity Is Real"*, LGBT L. NOTES (July 2023).

252. *Doe*, 676 F. Supp. 3d at 1219.

253. Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) *(*citing Smith v. City of Salem, Ohio, 378 F.3d 566, 577 (6th Cir. 2004)).

254. L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 485–86 (6th Cir. 2023)

further, the Sixth Circuit noted without analysis that *Smith* "predate[s] *Bostock*," and involved a different form of behavior.[255]

In language that seems like a direct invitation for the Supreme Court to limit *Bostock* to Title VII cases, the Sixth Circuit further wrote that in *Bostock*, "the employers fired adult employees because their behavior did not match stereotypes of how adult men or women dress or behave."[256] However, "[i]n this case, the laws do not deny anyone general healthcare treatment based on any such stereotypes; they merely deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority."[257] It further distinguishes the two situations, concluding that "[a] concern about potentially irreversible medical procedures for a child is not a form of stereotyping."[258] The Eleventh Circuit was equally dismissive, writing that *Bostock* did not "deal[] with the Equal Protection Clause as applied to laws regulating medical treatments."[259]

Yet in rejecting the district court's application of *Bostock*'s intermediate scrutiny standard of review to gender-affirming care bans, the Sixth and Eleventh Circuits gave no reason for abandoning their prior precedents and did not even acknowledge that they were doing so. The Sixth Circuit baldly stated that *Bostock's* reasoning "applies only to Title VII."[260] Therefore, the district courts were improperly "exten[ding] . . . existing Supreme Court and Sixth Circuit precedent" in a manner "not justified in this setting."[261]

(citing Smith v. City of Salem 378 F.3d 566 (6th Cir. 2004)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

255. *Id.* at 485.

256. *Id.*

257. *Id.*

258. *Id.* at 485 (noting further that "a case about potentially irreversible medical procedures available to children falls far outside Title VII's adult-centered employment bailiwick").

259. Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1228 (11th Cir. 2023) (distinguishing Glenn v. Brumby, 663 F.3d 1312, 1314, 1317 (11th Cir. 2011), a case before *Bostock* in which the Eleventh Circuit wrote that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination," finding in favor of a state employee dismissed on the basis that, according to their supervisor, their "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable").

260. Skrmetti, 83 F.4th at 484.

261. *Id.* at 488.

Judge White of the Sixth Circuit highlighted the lack of justification when she wrote in her dissent, "[t]o be sure, Title VII and the Equal Protection Clause are not identical . . . . But the majority does not explain why or how any difference in language requires different standards for determining whether a facial classification exists in the first instance."[262] She noted that the lack of explanation was especially puzzling since the Supreme Court often refers back and forth between federal anti-discrimination statutes and the equal protection analysis.[263]

If the Court accepts the Sixth and Eleventh Circuit Courts' invitations to narrow its opinion in *Bostock*, it will be consistent with a prediction made by Professor Kim Forde-Mazrui in 2022: "I suspect . . . that the Court will find a way to avoid" extending *Bostock* to "sex discrimination not involving sexual orientation and gender identity" because "it is inconsistent with politically conservative views."[264]

iii. Sex Discrimination Directly Based on Transgender Status

One of the *Skrmetti* plaintiffs' arguments is that the gender-affirming care bans discriminate against their children based on transgender status, and that such discrimination is sex discrimination on its face because transgender status is a quasi-protected class.[265] This is different from an argument based on *Bostock* that discrimination based on transgender status is sex discrimination.[266]

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262. *Id*. at 503 (White, J.) (dissenting).

263. *Id*.

264. Kim Forde-Mazrui, *Dobbs and the Future of Liberty and Equality*, 72 CLEV. ST. L. REV. 1, 21–22 (2023).

265. L.W. *ex. rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 689-690 (M.D. Tenn.) (quoting Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020)) ("'There is no binding precedent from the United States Supreme Court or the Sixth Circuit regarding whether transgender people are a quasi-suspect class.' . . . The overwhelming majority of courts to consider the question, however, have found that transgender individuals constitute a quasi-suspect class for the purposes of the Equal Protection Clause."), *rev'd and remanded,* 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

266. Bostock v. Clayton County, 590 U.S. 644, 662 (2020) ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."); *see also Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 ("[T]he Supreme Court held that Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on

Judge Richardson found that Tennessee's gender-affirming care ban was discriminatory on its face because "the law plainly proscribes treatment for gender dysphoria—and Defendants do not contest that only transgender individuals suffer from gender dysphoria."[267] Judge Hinkle also found Florida's statute discriminatory on its face and went further, writing that "[t]he statute and rules at issue were motivated in substantial part by the plainly illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities. This was purposeful discrimination against [transgender people]."[268]

The Sixth Circuit preemptively dismissed claims that the law was based on hatred because "a law premised only on animus toward the transgender community would not be limited to those 17 and under. The legislature plainly had other legitimate concerns in mind."[269]

Another basis for denying the existence of sex discrimination is based on Justice Alito's holding in *Dobbs* that "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"[270]

Judge Sarah Geraghty of the Northern District of Georgia confronted this issue directly and argued that abortion was different from the ban on gender-affirming care because it was not just "a medical procedure that only one sex can undergo" like abortion; rather, "prior to the passage of [the ban]" she noted that

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the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.").

267. *Skrmetti*, 679 F. Supp. 3d at 686–87 (quoting Fain v. Crouch, 618 F. Supp. 3d 313, 326 (S.D. W. Va. 2022)) ("To show that a law violates the Equal Protection Clause based on transgender status or sex, '[g]enerally, a plaintiff must show that [ ] [the] policy . . . had discriminatory intent. But such a showing is unnecessary when the policy tends to discriminate on its face.'").

268. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023) (holding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under the Due Process Clause).

269. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

270. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (quoting Geduldig v. Aiello, 417 U.S. 484, 496, n.20 (1974)).

"any child could—if medically indicated—receive hormone therapy with either estrogen or testosterone."[271]

iv. Narrowing Obergefell by Refusing to Identify LGBTQ+ Status as a Suspect Class

Plaintiffs also claim that gender-affirming care bans discriminate against their children not just because transgender-based discrimination is sex discrimination but also because transgender-based discrimination, on its own, warrants heightened scrutiny.[272] They base their claim on two arguments, one based on general principles and one on specific precedent. In general, they argue that a state should be required to provide a non-discriminatory justification if the group being treated differently is historically subject to discrimination.[273] Any group claiming discrimination has the opportunity to prove (1) "obvious, immutable, or distinguishing characteristics that define them as a discrete group," and that (2) the group is "a minority or politically powerless."[274]

One route to finding heightened scrutiny applicable to claims of discrimination against transgender individuals is by applying *Obergefell*, which held that laws prohibiting same-sex marriage were unconstitutional.[275] While the Court in *Obergefell*, as Professor Autumn L. Bernhardt explains, "did not use the magic words of 'suspect class,'" it did "expend[] a considerable amount of language and space describing gays and lesbians in terms of the four factors of the Suspect Class Doctrine."[276] This interpretation has always

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271. Koe v. Noggle, 688 F. Supp. 3d 1321, 1348 (N.D. Ga. 2023) (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (quoting Geduldig v. Aiello, 417 U.S. 484, 496, n.20 (1974))).

272. *See* L.W. *ex. rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 689 (M.D. Tenn. 2023) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985)) (discussing the four factors "to determine whether a class . . . is quasi-suspect" and therefore subject to intermediate scrutiny), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023*), cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* U.S. v. Skrmetti, 144 S. Ct. 2679 (2024).

273. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

274. *Id.*

275. Obergefell v. Hodges, 576 U.S. 644, 663–76 (2015) (holding that laws banning same-sex marriage were unconstitutional on both equal protection and due process grounds).

276. Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 11 (2016); *see also*, Ann E. Tweedy, *Bisexual Erasure, Marjorie Rowland, and the Evolution of LGBTQ Rights*, 46 HARV. J.L. & GENDER 265, 332-333 (2023) (citing *Obergefell*, 576

been a matter of dispute.[277] As the always even-handed Congressional Record Service cautions in its analysis of laws restricting access to bathrooms for transgender youth, while "intermediate scrutiny for sex-based classifications is well established, the Supreme Court has not addressed the proper standard of review for government classifications involving transgender individuals."[278]

The Sixth Circuit, however, took the Supreme Court's silence on the issue of suspect class status as rejection. It wrote, "If plaintiffs and the federal government were correct that the only material question in a heightened review case is whether a law contains a reference to sex or gender, the Court would have said so in invalidating bans on same-sex marriage in *Obergefell v. Hodges*. But it did not."[279] The Sixth Circuit noted that "[t]he Court, indeed, did not even apply heightened review to the laws."[280] Instead, it continued, the Supreme Court held only that state laws banning same-sex marriage infringed on the fundamental right to marry, not that they engaged in illegal classification.[281] Thus, in the Sixth Circuit's view, not only did the *Obergefell* Court decline to conclude that transgender individuals are a suspect class, but the Court could not have so concluded, because "transgender identity" is not "immutable" and because transgender people do not lack political power.[282]

U.S. at 672) ("[I]n *Obergefell v. Hodges*, decided a few years before *Bostock*, the Court relied on equal protection in conjunction with due process in the context of same-sex marriage, although it was unclear about what level of scrutiny it was applying in its equal protection analysis.").

277. Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 [https://perma.cc/LTW3-N7U2] ("One of the greatest controversies regarding the Equal Protection Clause today is whether the Court should find that sexual orientation is a suspect classification. In its recent same-sex marriage opinion, *Obergefell v. Hodges* (2015), the Court suggested that discrimination against gays and lesbians can violate the Equal Protection Clause. But the Court did not decide what level of scrutiny should apply, leaving this question for another day.").

278. Jared P. Cole, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: EQUAL PROTECTION CHALLENGES DIVIDE APPELLATE COURTS 3 CONG. RSCH. SERV. (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10902 [https://perma.cc/6KL7-KA9Z].

279. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023) (citing Obergefell v. Hodges, 576 U.S. 644 (2015)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

280. *Id.* at 484.

281. *Id.*

282. *Id.* at 487.

Here, again, Judge White disagreed, finding that because the bans draw a line based on gender nonconformity, which includes transgender status, they "trigger heightened scrutiny."[283] In her dissent, Judge White again called out the Sixth Circuit's interpretation of silence as rejection. She wrote that "[t]rue, the Court did not specify in *Obergefell* the appropriate degree of judicial scrutiny. But the Court's silence [on identifying a suspect class] is just that—silence."[284] She continued, "[w]e should be wary of reading much (if anything) into the Court's resolution of the issues presented there without discussion of the applicable level of scrutiny."[285] The relevant fact, she argued, is that "[t]he Court held that laws prohibiting same-sex marriage were unconstitutional under the Equal Protection Clause all the same."[286] The Fourth Circuit also disagreed, holding that "transgender people constitute at least a quasi-suspect class."[287] Now that the U.S. Supreme Court has granted certiorari, it will be able to resolve the dispute among the courts which have considered this issue and definitively exclude transgender or any LGBTQ+ status from the protection granted by being given status as a quasi-protected class.

C. Expanding Deference to States in Applying the Rational Relationship Test

Once the Sixth and Eleventh Circuits rejected all of the plaintiffs' arguments that the law warranted heightened scrutiny, they were left, as the Sixth Circuit explained, with the burden of proving "that *no set of circumstances* exists under which the [statute] would be valid."[288] This standard of review is from the Supreme Court's 1934 decision in *Nebbia v. People of New York*.[289]

283. *Id.* at 498 (White, J., dissenting).

284. *Id.* at 502 (White, J., dissenting).

285. *Id.*

286. *Id*. at 502–03.

287. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020) ("[W]e conclude that heightened scrutiny applies because transgender people constitute at least a quasi-suspect class."), *as amended* (Aug. 28, 2020); *see also* Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023) (holding, before its withdrawal subsequent to the Supreme Court's order in Labrador v. Poe *ex. rel.* Poe, 144 S.Ct. 921 (2024), that Idaho's ban was likely unconstitutional because discrimination against transgender individuals warranted heightened scrutiny), *opinion withdrawn*, 99 F.4th 1127 (9th Cir. 2024).

288. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) (emphasis in original) (quoting United States v. Hansen, 599 U.S. 762 (2023)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

289. Nebbia v. People of New York, 291 U.S. 502 (1934).

In *Nebbia*, the Court held that to comply with due process, a state law "shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[290] This is usually called "rational basis review."[291] Since *Nebbia*, the Supreme Court has addressed two different aspects of this test: first, what a legitimate state interest is, and second, what it means for a state law to be rationally related to such an interest.[292] As the Sixth Circuit explained, "plaintiffs must rule out every potentially valid application" of the statute "before we may declare a law facially invalid."[293] Ultimately, the Sixth Circuit concluded that "[p]lenty of rational bases exist for these laws," pointing to the evidence offered by the states of Kentucky and Tennessee suggesting that gender-affirming care treatment holds unique health risks.[294] Though this evidence was disputed by the law's challengers, the court held that this was a matter of disagreeing with "the States' assessment of the risks and the right response to those risks," rather than something that might undermine a rational basis for the law.[295]

D. Narrowing the Rights of Parents: Due Process Analysis

The petition for certiorari filed by the United States only addresses the failure to apply intermediate scrutiny to the aspects of the law that classify based on sex and gender.[296] However, both the Sixth and Eleventh Circuits addressed and rejected claims by the parent plaintiffs that the laws should be evaluated under the strict scrutiny standard because they infringe on their rights as parents to direct the medical care of their children.[297] In line with

290. *Id.* at 525.

291. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 24 (Gorsuch, J., concurring) ("Rational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right.").

292. *See generally* Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 492–98 (2017) (describing rational basis review in depth).

293. *Skrmetti*, 83 F.4th at 489–90; *see also* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023) (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022)) ("Because the Due Process Clause does not guarantee the described right, state regulation of the use of puberty blockers and cross-sex hormone treatment for minors would be subject only to rational basis review.").

294. *Skrmetti*, 83 F.4th at 489.

295. *Id.*

296. Petition for Writ of Certiorari, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440.

297. *See e.g.,* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th

United States v. Carolene Products Co., the parents argued that these laws violate the Fourteenth Amendment's protection against state actions that deprive individuals of their "life, liberty or property" without due process of law.[298] The protection is heightened if the deprivation interferes with certain fundamental rights and liberty interests.[299] This heightened scrutiny is, like that applied to laws that classify based on race, also called "strict scrutiny."[300] Therefore, if a plaintiff "demonstrate[s] infringement of [a fundamental right] . . . the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law."[301]

The Alliance Defending Freedom's (ADF) position opposing parental rights seems inconsistent with its "goal . . . to persuade the Supreme Court to establish 'parental rights' as a constitutional principle" in a case where "the Court could say, 'Parental rights are fundamental rights.'"[302] ADF describes the basis for its support of gender-affirming care bans and other laws that target transgender children as supporting the rights of parents.[303] ADF is campaigning

Cir. 2023); Poe *ex. rel.* Poe v. Labrador, No. 1:23-CV-00269-BLW, 2024 WL 170678 (D. Idaho Jan. 16, 2024).

298. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

299. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1220 (11th Cir. 2023) (quoting Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 815 (11th Cir. 2004)) ("Laws that burden the exercise of a fundamental right require strict scrutiny and are sustained only if narrowly tailored to further a compelling government interest.").

300. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022); *see also* Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 524 (2021) ("A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests.").

301. *Kennedy*, 597 U.S. at 524 (holding a high school football coach not allowed to pray with his team at games was deprived of his rights to free speech and free exercise of religion).

302. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/4PSR-3XQS] (quoting Kristen Waggoner).

303. *See, e.g., ADF to 10th Circuit: OK Law Protects Children from Harmful, Unnecessary Medical Intervention*, ALL. DEFENDING FREEDOM (Dec. 18, 2023), https://adflegal.org/press-release/adf-10th-circuit-ok-law-protects-children-harmful-unnecessary-medical-intervention [https://perma.cc/D7PK-MBRE] ("Oklahoma is right to protect children from risky drug interventions that may permanently harm them without any proven long-term benefit."); *Michigan School District Treats Girl as Boy behind Parents' Backs*, ALL. DEFENDING FREEDOM (Dec. 18, 2023), https://adflegal.org/press-release/michigan-school-district-treats-girl-boy-behind-parents-backs [https://perma.cc/HJF8-6JGC].

for a "fundamental constitutional right" for parents' "moral duty to guide the upbringing, education, and health care of their children."[304]

It is difficult to predict whether the Supreme Court will have the opportunity to address the parental rights issue in reviewing the Tennessee law or if that will be left to another opportunity. By not seeking certiorari on the parental rights issue, the holdings of the Sixth and Eleventh Circuits may remain, such that the parental right, whatever its contours, does not include access to gender-affirming care.

The lower courts, however, recognized the fundamental rights of parents. Judge Richardson of Tennessee agreed that parents had the right to direct their children's medical care, the gender-affirming care bans violated it, and the state lacked a sufficiently compelling reason to justify their action.[305] In support of his conclusion, he cited Sixth Circuit precedent holding that parents "possess a fundamental right to make decisions concerning the medical care of their children."[306] He also cited two Supreme Court cases, *Troxel v. Granville*[307] and *Parham v. J.R*[308] for the principle that a parent has a right "to make decisions regarding the 'care, custody, and control of their children.'"[309] Judge White of the Sixth Circuit later described this as one of "the oldest of the fundamental liberty interests recognized by the Supreme Court."[310] Judge Liles C. Burke of Alabama reached a similar result, noting that "[e]ncompassed within this right is the more specific right to direct

304. *Parental Rights*, ALL. DEFENDING FREEDOM, https://adflegal.org/issues/parental-rights/ [https://perma.cc/5EWZ-URCM] (containing links to resources and analysis on Supreme Court cases discussing parental rights).

305. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 684 (M.D. Tenn. 2023) (citing Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396 (6th Cir. 2019)) ("The Court therefore agrees with Plaintiffs that under binding Sixth Circuit precedent, parents have a fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children."), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

306. *Id.*

307. 530 U.S. 57, 65–66 (2000).

308. 442 U.S. 584, 604 (1979).

309. *Skrmetti*, 679 F. Supp. 3d at 683.

310. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023) (White, J., dissenting) (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

a child's medical care."[311] "Accordingly," he concluded, "parents 'retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.'"[312]

In rejecting the parents' arguments that the laws violated their fundamental rights, the Sixth Circuit followed a line of argument advanced by the state of Kentucky in defending its gender-affirming care ban.[313] While not denying that parents have fundamental rights related to making decisions about their children, Kentucky argued that this right did not extend "to obtain[ing] a medical treatment reasonably prohibited by the State."[314] This argument was reflected in the Sixth Circuit's opinion when it emphasized that the parent plaintiffs were claiming "*a constitutional right to obtain reasonably banned treatments for their children*."[315] This right was not reflected by a "'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children."[316]

Similarly, the Eleventh Circuit held that "plaintiffs have not presented any authority that supports the existence of a constitutional right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[317] It continued that, in contrast to recognized parental rights, "[n]o Supreme Court case extends [parental rights] to a general right to receive new medical or experimental drug treatments."[318] Making an analogy to a case in which a dying woman's family sought access to a drug not yet approved by the FDA, the Sixth Circuit concluded that "[o]ther courts have drawn the same sensible line . . . reject[ing] arguments that the Constitution provides an

311. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1144 (M.D. Ala. 2022) (citing Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990)) (recognizing "the right of parents to generally make decisions concerning the treatment to be given to their children"), *vacated sub nom*. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).

312. *Id.* (citing Parham v. J.R. 442 U.S. 584, 604 (1979)).

313. *Skrmetti*, 83 F.4th at 476.

314. The Commonwealth of Kentucky's Reply Brief at *5, L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023), (Aug. 17, 2023) (No. 23-5609), 2023 WL 5500631.

315. *Skrmetti,* 83 F. 4th at 475 (emphasis in original).

316. *Id.* at 473.

317. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210 (11th Cir. 2023).

318. *Id.* (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)).

affirmative right of access to particular medical treatments reasonably prohibited by the Government."[319]

Having saddled plaintiffs with this impossible-to-defend burden—the right to harm their children—both the Sixth and Eleventh Circuit Courts of Appeal held that that the plaintiffs had failed to satisfy it. The Sixth Circuit acknowledged that the "[p]arents, it is true, have a substantive due process right 'to make decisions concerning the care, custody, and control of their children,'" but concluded that those rights do not extend "to a general right to receive new medical or experimental drug treatments."[320]

The Sixth Circuit then went beyond the scope of the question before it by writing that the Supreme Court intended to limit parental rights to "narrow fields, such as education and visitation rights."[321] The court explained that even if plaintiffs could meet the criteria for establishing a new fundamental right, it is likely that right would still be outweighed by two of the government's "abiding interest[s]:"[322] "preserving the welfare of children"[323] and "protecting the integrity and ethics of the medical profession."[324] The existence of these "interests gives States broad power, even broad power to 'limit parental freedom,' particularly in an area of new medical treatment."[325] Without Constitutional protection, a parent has no more right to demand that their child receive gender-affirming care than they would have to demand that their child receive an alternative cancer treatment.[326]

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319. L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 418 (citing Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

320. *Id.* at 417 (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)).

321. *Id.*

322. *Id.* at 417.

323. *Id.* (citing Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 419 (6th Cir. 2019); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022)).

324. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

325. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)); *see* Parham v. J.R., 442 U.S. 584, 606 (1979).

326. Kavitha V. Neerukonda, *Choosing Alternative Treatments for Children*, 13 VIRTUAL MENTOR 369 (2011), http://dx.doi.org/10.1001/virtualmentor.2011.13.6.hlaw1-1106 [https://perma.cc/FYQ8-KNMM]; Mariah Taylor, *Court Orders Cancer Treatment for 5-Year-Old, but Parents Want Alternative Treatments*, BECKER'S HOSP. REV. (Feb. 9, 2023), https://www.beckershospitalreview.com/oncology/court-orders-cancer-treatment-for-5-year-old-but-parents-want-alternative-treatments.html [https://perma.cc/FTP3-NNZR].

Judge White of the Sixth Circuit's dissenting opinion clarifies how different this Sixth Circuit opinion was from earlier decisions. She described the gender-affirming care bans in Tennessee and Kentucky as statutes that "infringe on [parents'] fundamental right to control medical choices for their children, a right deeply rooted in this nation's history and protected as a matter of Supreme Court and binding circuit precedent."[327] Therefore, the statutes "violate the Due Process Clause because they prohibit Parent Plaintiffs from deciding whether their children may access medical care that the states leave available to adults."[328] Summarizing her objections, Judge White wrote that the majority was giving states the authority to "simply deem a treatment harmful to children without support in reality and thereby deprive parents of the right to make medical decisions on their children's behalf."[329] This, she argued, "is tantamount to saying [parents have] no fundamental right" to take care of their children.[330]

Similarly, Judge Hinkle in the Northern District of Florida criticized such a mischaracterization of the plaintiffs' parents claims:

> The defendants say a parent's right to control a child's medical treatment does not give the parent a right to insist on treatment that is properly prohibited on other grounds. Quite so. If the state could properly prohibit the treatments at issue as unsafe, parents would have no right to override the state's decision. But as set out above, there is no rational basis, let alone a basis that would survive heightened scrutiny, for prohibiting these treatments in appropriate circumstances.[331]

The Eleventh Circuit went further than the Sixth Circuit by questioning the existence of any parental right associated with a prescription medication. It wrote that "the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition."[332] The court wrote that "*Parham* does not at all suggest that parents have a fundamental right to direct a particular medical treatment for their child that is prohibited by state law."[333] It noted further that "*Parham* therefore offers no support for the Parent Plaintiffs' substantive due process

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327. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 506 (6th Cir. 2023) (White, J., dissenting), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

328. *Id.* at 507.

329. *Id.* at 511.

330. *Id.*

331. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023).

332. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1220 (11th Cir. 2023).

333. *Id.* at 1223.

claim."[334] Even more notable, the Eleventh Circuit cited *Troxel* for the negative proposition that "none of the binding decisions regarding substantive due process establishes that there is a fundamental right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[335]

Taken together, the opinions of the Sixth and Eleventh Circuit substantially limit what has been the longstanding interpretation of lower courts that *Parnham* and *Troxel* provide parents with a "fundamental right to control medical choices for their children" that is "a right deeply rooted in this nation's history and protected as a matter of Supreme Court . . . precedent."[336]

IV. The Petition for Certiorari and Its Potential Ramifications

What makes review of a now granted certiorari petition relevant is that it highlights the gulf between the Sixth Circuit's legal holdings and those made in similar circumstances by the Supreme Court.

The Solicitor General's petition challenged the Sixth Circuit's decision allowing the enforcement of a Tennessee law that

> prohibits healthcare providers from 'prescribing . . . any puberty blocker or hormone' if that treatment is provided 'for the purpose' of '[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or 'treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.'[337]

The petition noted that the law does not, however, prevent providers from prescribing drugs to children for other medical purposes.[338] Further, although the petition challenges only

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334. *Id*.

335. *Id.* at 1124 ("Instead, some of these cases recognize, at a high level of generality, that there is a fundamental right to make decisions concerning the 'upbringing' and 'care, custody, and control' of one's children.").

336. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023) (White, J., dissenting), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); *see, e.g.,* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court."); *see generally* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1152–55 (2024) (discussing parents' rights in relation to the care of their children).

337. Petition for Writ of Certiorari at *8–9, United States. v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440 (citing Tenn. Code Ann. §§ 68-33-102(5)(B), 68-33-103(a)(1) (2023)).

338. *Id.* at *9 ("[P]rohibition applies only when a covered treatment is prescribed

Tennessee's law, it notes that this is one of a series of almost identical laws being challenged all over the country.[339] Again, while only the Sixth Circuit's decision to reverse the stay is before the Court, the certiorari petition acknowledges a nearly identical decision by the Eleventh Circuit, which also reversed a stay issued by an Alabama federal district court.[340]

On November 6, 2023, the Solicitor General, on behalf of the intervening party, the United States of America, filed a petition for certiorari to review the decision of the Sixth Circuit Court of Appeals reversing a stay entered on June 28, 2023, by Judge Eli Richardson.[341] The petition asks the Court "to review the judgment of the United States Court of Appeals for the Sixth Circuit" in the case of *L.W. by and through Williams v. Skrmetti* which reversed a district court's decision to stay "Tennessee officials' enforcement of the law."[342] The question presented was:

> Whether Tennessee Senate Bill 1 (SB1), which 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' violates the Equal Protection Clause of the Fourteenth Amendment.[343]

This petition marked the end of a legal process that began on April 20, 2023, with the filing of a complaint in the Federal District Court for the Western District of Kentucky seeking a stay of Tennessee's gender-affirming care ban and ended with an order by

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to allow individuals to live in conformity with a gender identity other than their sex assigned at birth, the law does not restrict the provision of puberty blockers or hormones for any other purpose.").

339. *Id.*

340. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023) (overturning district court order to stay Alabama's gender-affirming care ban); *see also* Perry, *supra* note 85 (criticizing lower court stays of gender-affirming care bans).

341. Petition for Writ of Certiorari at *4–6, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440; *see also* L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 470 (6th Cir. 2023) ("Kentucky appealed and moved for a stay of the injunction. The district court granted the stay, and we declined to lift it . . . . We consolidated the appeals, expedited them, and agreed to resolve them by the end of September 2023.") (citations omitted), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Adriel Bettelheim, *DOJ Asks Supreme Court to Review Tennessee's Ban on Gender-affirming Care,* AXIOS (Nov. 6, 2023), https://www.axios.com/2023/11/07/biden-doj-supreme-court-trans-care-tennessee [https://perma.cc/DBX8-RK9X] (summarizing the petition for certiorari).

342. Petition for Writ of Certiorari at *1–2, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440.

343. *Id.*

the Sixth Circuit Court of Appeals on September 28, 2023, holding that plaintiffs had failed to meet their burden of proof.[344]

There is no public explanation for the six month delay between when the petition for certiorari was filed and when it was granted. It is, however, possible to track its history during that time period, as it was put on the agenda for the Court's review but rescheduled at least three times.[345]

Over the course of the term, while the Court delayed considering the Solicitor General's petition for certiorari, it made two decisions that strongly signaled the likelihood that it will directly uphold the opinion of the Sixth Circuit. The first was on December 12, 2023, when it denied certiorari in *Tingley v. Ferguson* and effectively upheld the State of Washington's right to ban conversion therapy.[346] Although three justices filed dissenting statements, all concerned First Amendment issues raised by ADF on behalf of the licensed family therapist they were representing.[347]

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344. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); *see* Doe 1 v. Thornbury, 679 F. Supp 3d 576 (W.D. Ky. June 28, 2023), *rev'd and remanded sub nom*. L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom*. Doe v. Kentucky, 144 S. Ct. 389 (2023); Doe 1 v. Thornbury, 75 F.4th 655 (6th Cir. 2023).

345. Personal Communication with Chris Geidner, legal journalist, (April 19, 2024); *see also The Secret Supreme Court: Late Nights, Courtesy Votes And The Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021), https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html [https://perma.cc/R2NP-G6VJ] (accounting the process of reviewing petitions for certiorari according to Justice Breyer) ("'What happens,' Breyer told CNN, 'is it's highly professional. People go around the table. They discuss the question in the case . . . the chief justice and Justice (Clarence) Thomas and me and so forth around . . . . People say what they think. And they say it politely, and they say it professionally.'"). *But see*, Kenneth Jost, *The Justices' Secretive and Evolving Conference,* CASETEXT: THOMSON REUTERS (Oct. 23, 2015), https://casetext.com/analysis/the-justices-secretive-and-evolving-conference [https://perma.cc/F64G-ZPNE] (criticizing the system) ("[M]ost of the Court's real work is done behind the scenes: reading briefs, researching cases, and drafting and circulating opinions. In addition, the justices' only collective face-to-face meetings to discuss and vote on cases are conducted in super secrecy, with no staff present, no leaks, and no accounts disclosed until long afterward if ever.").

346. Tingley v. Ferguson, 144 S. Ct. 33 (2023); *see also*, Amy Howe, *Justices Won't Hear "Conversion Therapy"* Case, SCOTUSBLOG, https://www.scotusblog.com/2023/12/justices-wont-hear-conversion-therapy-case/ [https://perma.cc/6DLM-RF5R] (summarizing the denial of certiorari for *Tingley v. Ferguson*).

347. *See* Arthur S. Leonard, *Supreme Court Avoids Ruling on Conversion Therapy Bans* , LGBT L. NOTES (Dec. 11, 2023), at 3 ("Justice Thomas's dissenting opinion channels ADF's petition for Tingley and focuses more on gender identity and transition than on sexual orientation, which has traditionally been the main focus of both the conversion practice and the laws banning it.").

Nothing in those statements suggested a weakening of the Court's commitment to upholding a state's plenary power to pass laws related to health and safety. Second, on April 15, 2024, the Court denied an application for a stay which effectively reversed the Ninth Circuit and allowed Idaho to enforce its law against all but the two individual plaintiffs who had won a temporary stay for the state's ban on gender-affirming care.[348]

While there is seemingly no direct relationship between *Tingley*, which involved a challenge to Washington's law banning conversion therapy, and *Skrmetti*, which concerns Tennessee's law banning gender-affirming care, ADF was counsel of record in *Tingley* and filed amicus briefs in *Skrmetti*.[349] In *Tingley*, ADF represented the plaintiff challenging Washington's conversion therapy ban, but in *Skrmetti*, they supported the interests of the State of Tennessee seeking to uphold the constitutionality of laws banning gender-affirming care.[350] In *Tingley*, the Court denied ADF's petition for certiorari on behalf of a therapist challenging Washington State's ban on conversion therapy.[351] Although the upholding of that law was, in isolation, a victory for the same stakeholders opposing gender-affirming care bans, in general, it is not good news. The language of the dissenters contains language hostile to those treating transgender youth.[352]

Now that *Skrmetti* will be taken up for review, the resulting opinion is very likely to result in the same kind of sudden reduction of rights as *Dobbs*, but on a much broader scale. This is not only

348. Labrador v. Poe *ex. rel.* Poe, 144 S. Ct. 921(2024); *see also*, Ian Millhiser, *The Supreme Court's Confusing New Anti-Trans Decision, Explained*, VOX (Apr. 15, 2024), https://www.vox.com/scotus/2024/4/15/24131456/supreme-court-transgender-health-care-labrador-poe [https://perma.cc/SP6T-JZA9] (summarizing the Court's denial of the application for stay in *Labrador v. Poe*).

349. Tingley v. Ferguson, 557 F. Supp. 3d 1131, 1134 (W.D. Wash. 2021); Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents, United States v. Skrmetti, No. 23-477, (U.S. Oct. 15, 2024), 2024 WL 4546386; Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants and for Reversal, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600), 2023 WL 4901836.

350. *Tingley*, 557 F. Supp. 3d at 1134 (involving Attorneys David A. Cortman and Kristen K. Waggoner from Alliance Defending Freedom serving as counsel); L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (involving Attorneys John J. Bursch and Jacob P. Warner from Alliance Defending Freedom serving as counsel).

351. Tingley v. Ferguson, 144 S. Ct. 33 (2023).

352. *Id.* at 34 (Thomas, J., dissenting) ("Under SB 5722, licensed counselors can speak with minors about gender dysphoria, but only if they convey the state-approved message of encouraging minors to explore their gender identities. Expressing any other message is forbidden—even if the counselor's clients ask for help to accept their biological sex. That is viewpoint-based and content-based discrimination in its purest form.").

because of the Court likely finding the Bans constitutional, but because if they do so based on the arguments made by ADF on the states' behalf and adopted by the Sixth and Eleventh Circuits, the way will be cleared for even more sweeping laws designed to promote a retrogressive social agenda.

As with abortion, ADF is not hiding its agenda for the future. In addition to laws banning gender-affirming care, states have been actively signaling their intent to limit access to contraception[353] and to limit parents' control over embryos created through IVF.[354] Additionally, very public statements by ADF and others who share its views on issues such as making it more difficult to obtain no-fault divorces, reducing restrictions on marriage among close relatives, and limiting access to medication to prevent HIV suggest that translating these social goals into binding legislation may not be far behind.[355]

The current speaker of the House of Representatives, Mike Johnson, was previously a lawyer for ADF and has been quite open about his commitment to their agenda in relation to establishing an "eighteenth-century" form of marriage.[356] That includes a prohibition against no-fault divorce.[357] As ADF explains, their agenda is to defend what they describe as "[t]he timeless truth of God's design for male and female."[358]

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353. Michael Ollove, *Some States Already Are Targeting Birth Control*, STATELINE (May 19, 2022), https://stateline.org/2022/05/19/some-states-already-are-targeting-birth-control/ [https://perma.cc/DUY7-W74F]; *see also*, *Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (2016), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/7MQT-PJKD].

354. Caleb Taylor, *Alabama Supreme Court Rules IVF Embryos Ae Protected under Wrongful Death of a Minor Act*, 1819 NEWS (Feb. 16, 2024), https://1819news.com/news/item/alabama-supreme-court-rules-ivf-embryos-are-protected-under-wrongful-death-of-a-minor-act [https://perma.cc/8GGH-HXYE].

355. *State Laws About Prescribing May Limit Access to HIV Pre-exposure Prophylaxis*, WOLTERS KLUWER (Jan. 21, 2022), https://www.wolterskluwer.com/en/news/state-laws-about-prescribing-may-limit-access-to-hiv-pre-exposure-prophylaxis [https://perma.cc/T2N4-S4XA].

356. Marci A. Hamilton, *Mike Johnson, Theocrat: the House Speaker and a Plot Against America*, THE GUARDIAN (Nov. 4, 2023), https://www.theguardian.com/us-news/2023/nov/04/mike-johnson-theocrat-house-speaker-christian-trump [https://perma.cc/CB8F-EG42].

357. Katie Herchenroeder, *The Most Powerful Man in the House Doesn't Like Divorce*, MOTHER JONES (Oct. 26, 2023), https://www.motherjones.com/politics/2023/10/speaker-mike-johnson-divorce-covenant-marriage/ [https://perma.cc/DD5V-B6RT].

358. Kristen Waggoner, *Gender Ideology Imperils Freedom*, WORLD (Aug. 15, 2023), https://wng.org/opinions/gender-ideology-imperils-freedom-1692099057 [https://perma.cc/6RA2-PC9A].

The Alliance Defending Freedom is "the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life."[359] It was developed in 1994 by a "a group of 35 Christian leaders, who led various churches and ministries across the United States" and "were growing more and more concerned about the future of religious freedom in the United States."[360] Among them were Dr. James Dobson who had already founded Focus on the Family.[361]

In addition to its work in the courts, "ADF's Center for Public Policy [supports] laws that protect religious freedom, free speech, the sanctity of life, marriage and family, and parental rights." [362] It does this by "provid[ing] legal analysis, valuable resources, and expert testimony on our nation's most pressing First Amendment legislation in state legislatures across the country."[363]

In a 2021 blog post, Focus on the Family advises that the source of unhappiness in marriage is confusion about the roles that each spouse should play and that, therefore, happiness depends on adopting the injunction that, "Wives, submit to your husbands, as to the Lord. For the husband is the head of the wife even as Christ is the head of the church, his body, and is himself its Savior. Now as the church submits to Christ, so also wives should submit in everything to their husbands."[364] Using the language of "parental rights," ADF asserts parents' "God-given duty to care for, raise, and educate their children" and protect them from being "manipulated and told they can adopt a different gender identity."[365]

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359. *Who We Are*, ALL. DEFENDING FREEDOM, *supra* note 30. *See also Alliance Defending Freedom*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/A28P-CDJB].

360. Scott Blakeman, *A Vision for Freedom Series (Part 1): The Roots of Alliance Defending Freedom*, CHURCH & MINISTRY ALLIANCE (Apr. 21, 2022), https://www.adfchurchalliance.org/post/the-roots-of-alliance-defending-freedom [https://perma.cc/TM84-FR2S].

361. *Id.*

362. *Who We Are*, ALL. DEFENDING FREEDOM, *supra* note 30.

363. Natalie Allen, *State Legislatures Are at the Front Lines of Securing Generational Wins*, ALL. DEFENDING FREEDOM (Sept. 14, 2022), https://web.archive.org/web/20240405031936/https://adflegal.org/article/state-legislatures-are-front-lines-securing-generational-wins.

364. Heather Drabinsky, *Healthy Gender Roles In Marriage*, FOCUS ON THE FAMILY (May 3, 2021), https://www.focusonthefamily.com/marriage/healthy-gender-roles-in-marriage/ [https://perma.cc/SPJ9-UXN9].

365. *Stand For Parental Rights*, ALL. DEFENDING FREEDOM, https://adflegal.org/support/defending-parental-rights/ [https://perma.cc/9AYM-DXPB].

There is considerable reason to worry that this power to shape society through access to health care could quickly impact the economic independence of people able to conceive children.[366] ADF and others are clear that they hope to limit access to contraception.[367] This is not just an issue for young people. The consequences of losing access to all forms of contraception are, if anything, even greater for people able to conceive children well into middle age.[368]

Finally, if *Bostock* is restricted to Title VII of the Civil Rights Act and *Obergefell* is either reversed or narrowed, there will be nothing preventing states from passing even more intrusive laws involving health care.[369] Members of ADF's coalition are highly critical of psychiatric drugs.[370] Another target may be drugs to

366. *See* Paul Krugman, *An Economics Nobel for Showing How Much Women Matter: Paul Krugman*, NEW YORK TIMES (Oct. 12, 2023), https://www.nytimes.com/2023/10/12/opinion/columnists/claudia-goldin-nobel-prize.html (last visited Jan. 31, 2025) (interviewing the 2023 winner of the Noble Prize in Economics, Claudia Goldman, who directly links access to contraception with a dramatic shift in women's progress towards equality because they could "be more serious in college, plan for an independent future, and form their identities *before* marriage and family"); *see also*, Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 136 (2023) (citing Ric Segall, *The Year Originalism Became a Four-Letter Word*, DORF ON LAW (Dec. 12, 2022), http://www.dorfonlaw.org/2022/12/the-year-originalism-became-four-letter.html [https://perma.cc/76T7-3BKN]) ("[M]any people may presently believe that *Dobbs*' tolerance for the legal return of male-dominant sex-based hierarchies will remain limited to the abortion setting, based on the theory that no rational Supreme Court would ever endorse eliminating Fourteenth Amendment sex equality rights across the board, and especially not quickly out of the post-*Dobbs* gate.").

367. Lisa Marshall, *Post-Roe, Contraception Could Be Next*, CU BOULDER TODAY (Oct. 9, 2023), https://www.colorado.edu/today/2023/10/09/post-roe-contraception-could-be-next [https://perma.cc/UQL8-D2YF] ("We are seeing abortion and contraception restricted and stigmatized in tandem again now."); *see also* Kat Tenbarge, *Conservative Influencers Push Anti-Birth Control Message*, NBC NEWS (July 1, 2023), https://www.nbcnews.com/tech/internet/birth-control-side-effects-influencers-danger-rcna90492 [https://perma.cc/K2QM-75D2] ("Major conservative influencers on social media platforms such as Twitter and Rumble have coalesced in recent months around talking points that connect birth control with a variety of negative health outcomes.").

368. Judith A. Berg & Nancy Fugate Woods, *Overturning Roe v. Wade: Consequences for Midlife Women's Health and Well-Being*, 9 WOMEN'S MIDLIFE HEALTH, at 2 (2023), http://dx.doi.org/10.1186/s40695-022-00085-8 (last visited Jan. 31, 2025) ("With the loss of *Roe v. Wade*, women of reproductive potential (menarche to menopause) in states that restrict or completely ban abortion likely will face critical access issues.").

369. *See supra* Part III.B.

370. Jeremy Pierre, *Psychiatric Medication and the Image of God*, THE GOSPEL COALITION (Sept. 24, 2012), https://www.thegospelcoalition.org/article/psychiatric-medication-and-the-image-of-god/ [https://perma.cc/PCP7-49QT] (making the Christian case against psychiatric medication).

prevent HIV.[371] One community health director made this connection directly, saying:

> We must be increasing access to life-saving medications like PrEP, not using it as the latest political wedge to attack LGBTQ people in the South. Whether it's access to abortion, trans-affirming care, birth control, or PrEP, we are seeing dangerous action from activist courts intervening in Americans' healthcare decisions—and we must push back.[372]

A frightening corollary to bans on accessing medical treatment is the recission of rights to refuse it. Bioethicist Rebecca Dresser warned recently that one of the direct results of the Supreme Court's attack on rights connected to personal privacy is the right to refuse medical care for our children or us.[373] In sum, by deeming any activity unknown in 1865 as outside the scope of constitutional protection, states can be free to overrule parents on any medical decision, from vaccination to contraception to psychiatric medication.[374]

Conclusion

As demonstrated throughout this article, having granted certiorari to review the Sixth Circuit's opinion, the Supreme Court is well on its way to further enhancing states' plenary power to achieve discriminatory social goals. Although the specific gender-

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371. Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022); *see, e.g.*, Adam Polaski, *Judge Rules Against Federal Mandate for Coverage of HIV Prevention Medication PrEP, Signaling New Attack on LGBTQ Health in the South*, CAMPAIGN FOR S. EQUAL. (Sept. 7, 2022), https://southernequality.org/judge-rules-against-federal-mandate-for-coverage-of-hiv-prevention-medication-prep-signaling-new-attack-on-lgbtq-health-in-the-south/ [https://perma.cc/Y4MQ-MN7F]; Meredithe McNamara, Dini Harsono, E. Jennifer Edelman, Aliza Norwood, Samantha V. Hill, A. David Paltiel, Gregg Gonsalves & Anne Alstott, *Braidwood Misreads the Science: the PrEP Mandate Promotes Public Health for the Entire Community* (Feb. 13, 2023), https://law.yale.edu/sites/default/files/documents/pdf/prep_report_final_feb_13_2023_rev.pdf [https://perma.cc/8APQ-LBCF]; *PrEP and Mifepristone Rulings: What's The Deal?*, AIDS UNITED (Apr. 17, 2023), https://aidsunited.org/prep-and-mifepristone-rulings-whats-the-deal/ [https://perma.cc/7U8J-NTV9] ("A number of courts have released decisions in the first months of 2023 that attack evidence-based health care.").

372. Polaski, *supra* note 371 (quoting Ivy Hill, Community Health Program Director of the Campaign for Southern Equality).

373. Rebecca Dresser, Cruzan *after* Dobbs*: What Remains of the Constitutional Right to Refuse Treatment?*, 53 HASTINGS CTR. REP. (Apr. 24, 2023), at 9 http://dx.doi.org/10.1002/hast.1469 (last visited Feb. 24, 2025).

374. *See, e.g.*, Don Sapatkin, *Idaho Bill Would Criminalize Giving an mRNA Vaccine: "It Feels like an Attack on Our Profession,"* MANAGED HEALTHCARE EXEC. (Mar. 27, 2023), https://www.managedhealthcareexecutive.com/view/idaho-bill-would-criminalize-giving-an-mrna-vaccine-it-feels-like-an-attack-on-our-profession-[https://perma.cc/FU4A-CD49].

affirming care ban under review is limited to restrictions on gender-affirming care for minors, many states are already considering expanding existing laws or passing new ones to incorporate adults.[375] If the Supreme Court adopts the reasoning of the Sixth Circuit and upholds bans on gender-affirming care for minors, it will have significant implications for many areas of constitutional doctrine:

1. **Substantive Due Process and Bodily Autonomy:**
   - **Right to Privacy Narrowed:** The Court could curtail the long-standing understanding of a fundamental right to privacy and bodily autonomy. This would weaken protections for personal decisions around issues like contraception, abortion, and end-of-life care.
   - **State Interference Legitimized:** Laws infringing on the personal medical choices of individuals and their families would gain more legitimacy, setting a precedent for expanded state control over private matters.
2. **Equal Protection Under the Law:**
   - **Transgender Youth Targeted:** Upholding such bans would signal that transgender individuals are not afforded the same equal protection of the laws as cisgender individuals. It could lead to further discriminatory laws based on sexual orientation and gender identity.
   - **Medical Consensus Disregarded:** The Court would lower even further states' obligations to credit widely recognized medical and scientific consensus on any health-related issue.
3. **Federalism and States' Rights:**
   - **Increased State Power:** The ruling would enhance states' abilities to regulate medical care and personal decisions typically left to individuals and medical professionals.
4. **Potential Broader Implications:**
   - **Weakened Precedent:** Such a ruling could jeopardize broader protections for LGBTQ+

375. *See* Maya Goldman, *States Are Limiting Gender-Affirming Care For Adults, Too*, AXIOS (Jan. 10, 2024), https://www.axios.com/2024/01/10/trans-care-adults-red-states [https://perma.cc/S4VC-G6B7].

individuals based on precedent from landmark cases like *Obergefell v. Hodges* (same-sex marriage).

- **Emboldened Discriminatory Legislation:** The decision could inspire other states to enact laws restricting healthcare and rights for LGBTQ+ people and other marginalized groups.

Any one of these changes would be enough to fundamentally alter the current framework of laws providing protection for everyone against discriminatory state and federal laws. Taken together, these changes will profoundly shift the balance of power between individuals and the state, prioritizing legislative control over personal autonomy and undermining decades of civil rights progress.

Appendix

Chart of Cases

Case Name	Violation of Due Process	Standard of Review	Current Status
Koe v. Noggle, (N.D. Ga. Aug. 20, 2023)[376]	Yes	Intermediate Scrutiny	Stayed based on Eleventh Circuit
Doe 1 v. Thornbury (W.D. Ky. 2023)[377]	Yes	Intermediate Scrutiny	Reversed by Sixth Circuit
Brandt v. Rutledge (E.D. Ark.)[378]	Yes	Intermediate Scrutiny	Upheld by Eighth Circuit
Doe v. Ladapo (N.D. Fla.)[379]	Yes	Intermediate Scrutiny & Rational-Basis Scrutiny	Pending[380]
Poe by and through Poe v. Labrador (D. Idaho)[381]	Yes	Intermediate Scrutiny	Ongoing
Eknes-Tucker v. Marshall	Yes	Intermediate Scrutiny	Vacated by 11th Circuit

376. Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023).

377. Doe 1 v. Thornbury, 679 F.Supp.3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

378. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

379. Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023).

380. *Doe v. Ladapo*, GLAD LEGAL ADVOC. & DEF., https://www.glad.org/cases/doe-v-ladapo/.

381. Poe *ex rel.* Poe v. Labrador, 709 F.Supp.3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024).

(M.D. Ala.)[382]			
L.W. by and through Williams v. Skrmetti (M.D. Tenn.)[383]	Yes	Intermediate & Strict Scrutiny	Reversed by Sixth Circuit; certiorari granted *sub nom. United States v. Skrmetti*
K.C. v. Individual Members of Med. Licensing Board of Indiana (S.D. Indiana)[384]	N/A	Intermediate Scrutiny	Reversed by Seventh Circuit

Experience of District Court Judges Applying Intermediate Scrutiny and Finding Gender-Affirming Care Bans Violate Equal Protection

District Court	**Date**	**Judge**	**Years on the Bench**	**Graduated Law School**
District of Idaho (9th Cir.)[385]	12/26/2023	B. Lynn Winmill	29	1977

382. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).

383. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

384. K. C. v. Individual Members of Med. Licensing Bd. of Indiana, 677 F. Supp. 3d 802 (S.D. Ind. 2023), *rev'd and remanded*, No. 23-2366, 2024 WL 4762732 (7th Cir. Nov. 13, 2024).

385. Poe *ex rel.* Poe v. Labrador, 709 F.Supp.3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024).

Northern District of Georgia (5th Cir.)[386]	8/20/2023	Sarah E. Geraghty	1	1999
M.D. Tennessee (6th Cir.)[387]	6/28/2023	Eli Richardson	5	1992
W.D. Kentucky (6th Cir.)[388]	6/28/2023	David J. Hale	9	1992
Arkansas (8th Cir.)[389]	6/20/2023	James M. Moody Jr.	9	1989
S.D. Indiana (7th Cir.)[390]	6/16/2023	James Patrick Hanlon	5	1996
N.D. Florida (11th Cir.)[391]	6/06/2023	Robert Hinkle	7	1976
M.D. Alabama (5th Cir.)[392]	5/13/2022	Liles C. Burke	5	1994

386. Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023).

387. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

388. Doe 1 v. Thornbury, 679 F.Supp.3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

389. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

390. K. C. v. Individual Members of Med. Licensing Bd. of Indiana, 677 F. Supp. 3d 802 (S.D. Ind. 2023), *rev'd and remanded*, No. 23-2366, 2024 WL 4762732 (7th Cir. Nov. 13, 2024).

391. Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023).

392. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).