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The Kids Are All Right: Why States Should Stop Violating the Rights of Transgender Kids

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The Kids are All Right: Why States Should Stop Violating the Rights of Transgender Kids

"I would like them to understand that we are people. We're human beings, and this is a human life. This is reality for us, and all we ask for is acceptance and validation for what we say that we are. It's a basic human right." – Model Andreja Pejic on what she would want the public to understand about transgender people.[1]

Transgender people, and transgender children more specifically, are under attack across the United States. In 2022, legislators in 22 states introduced at least 43 bills prohibiting transgender minors from obtaining gender-affirming care.[2] Continuing their crusade against healthcare, legislators in 31 states have already introduced 121 bills attacking the rights of transgender persons in the 2023 legislative session.[3] The movement to restrict access to gender-affirming care is not only detrimental to the health of transgender youth but also a violation of the Constitution. While polarization in Washington likely precludes any national efforts to codify protections for transgender Americans, the Executive branch and individual litigants possess potent tools to strike down state-based legislative attacks on their health and civil rights.

Background

Against the overwhelming body of evidence-based care guidelines established by leading medical organizations, state legislatures have acted to strip Americans of their fundamental constitutional rights by denying access to lifesaving, evidence-based gender-affirming care. Gender-affirming care "consists of an array of services that may include medical, surgical, mental

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[1] Katharine Zarrella, *Exclusive: Andreja Pejic Is in Her Own Skin for the Very First Time*. VOGUE MAGAZINE, July 2014, https://www.vogue.com/article/model-andreja-pejic-sex-reassignment-surgery.

[2] *Legislation Affecting LGBTQ Rights Across The Country*, 2023, ACLU. https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022 (last visited Apr. 20,2023).

[3] *Mapping attacks on LGBTQ rights in U.S. state legislatures*, ACLU, 2023, https://www.aclu.org/legislative-attacks-on-lgbtq-rights?impact=health&state= (last visited Apr. 20, 2023).

health, and non-medical services for transgender and nonbinary people."[4] Gender-affirming care is a combination of reversible and irreversible treatments that seek to assist gender-diverse individuals by providing a course of treatment that ranges from social transition to hormone treatments and surgical interventions.[5] Research shows that gender-affirming care significantly benefits the mental health of gender-diverse individuals.[6]

Professional Organization Guidelines

"Every major medical association recognizes the vital role of gender-affirming care in improving the physical health and mental well-being of transgender individuals." – Jack Resneck Jr., MD, President of the American Medical Association[7]

Major medical associations have developed evidence-based guidelines that persons with gender dysphoria[8]/gender incongruency (GD/GI) should receive gender-affirming care.[9] These evidence-based guidelines result from systematic reviews of the best available evidence by multiple experts in their fields.[10] The best evidence available has resulted in a complete alignment

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[4] *Gender-Affirming Care and Young People*, OFFICE FOR THE ASSISTANT SECRETARY FOR HEALTH (2023). https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf, (last visited Mar. 4, 2023).
[5] *Id.*
[6] A. E. Green, ET AL., (2021). *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*. 70 J. ADOLESCENT HEALTH, 4, https://doi.org/10.1016/j.jadohealth.2021.10.036
[7] Jack Resneck Jr., MD, *Everyone deserves quality medical care delivered without bias*, AMA, August 16, 2022, www.ama-assn.org/about/leadership/everyone-deserves-quality-medical-care-delivered-without-bias.
[8] Gender dysphoria is defined as the "distress and unease experienced if gender identity and designated gender are not completely congruent." Gender incongruence "is an umbrella term used when the gender identity and/or gender expression differs from what is typically associated with the gender. . . Not all individuals with gender incongruence have gender dysphoria or seek treatment." Wylie C. Hembree, ET AL., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3875, 1 November 2017, https://doi.org/10.1210/jc.2017-01658.
[9] *Id.*
[10] *Id.*

in support among major medical associations for gender-affirming care for minors. The Department of Health and Human Services looks specifically to The Endocrine Society ("ES"), the American Academy of Pediatrics ("AAP"), and the World Professional Association for Transgender Health ("WPATH") to inform best practices surrounding the standard of care for transgender persons.[11] There are four broad categories of gender-affirming care: (1) social affirmation; (2) puberty blockers; (3) hormone therapy; and (4) gender-affirming surgeries. Collectively, these procedures encompass a care spectrum that the evidence shows leads to better mental health and overall well-being outcomes for gender-diverse children and adolescents.

The first step of gender-affirming care is a social affirmation, a fully reversible process of adopting a gender-affirming name, pronouns, dress, and lifestyle.[12] Also known as a "social transition," social affirmation allows gender-diverse children and adolescents to live their truth by matching their outside persona to their inside feelings. While social affirmation is appropriate at any stage of development, it is generally the only care available to pre-pubertal children. Transgender children that socially transition show notably better mental health outcomes than children with gender dysphoria who do not.[13]

If a child socially transitions before puberty, the next step on the spectrum of care is treatment with puberty blockers. Puberty blockers are hormones that delay or pause pubertal development and are a reversible form of treatment.[14] Puberty blockers delay the development of

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[11] *Gender-Affirming Care and Young People*, HHS OFFICE OF POPULATION AFFAIRS, Mar. 2022, https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[12] *Id.*
[13] K.R. Olson, ET AL., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137(3) PEDIATRICS, 2016; https://publications.aap.org/pediatrics/article-abstract/137/3/e20153223/81409/Mental-Health-of-Transgender-Children-Who-Are?redirectedFrom=fulltext.
[14] *Id.*

secondary sexual characteristics of a child's biological sex, such as breast tissue, to minimize the incongruence between the child's gender and biological sex. Puberty blockers have been used to delay the onset of precocious puberty for forty years and are generally safe for patients.[15] Children who receive puberty blockers have lower odds of lifetime suicide ideation than those who wanted puberty blockers but did not receive them.[16]

The next treatment available in the gender transitioning process is hormone therapy. Hormone therapy is the partially reversible use of testosterone in those assigned female at birth and estrogen in those assigned male at birth to foster the development of gender-affirming secondary sexual characteristics.[17] Hormone therapy is a more significant intervention than puberty blockers, which delay natural puberty because hormone therapy stimulates the development of secondary sexual characteristics of the opposite biological sex.[18] The risks of hormone therapy include possible infertility, weight gain, long-term effects on bone density and growth spurts, and potential complication of future genital surgical procedures by stunting the development of male genitalia.[19]

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[15] Precocious puberty is puberty that begins much earlier than usual. *What are Puberty Blockers?*, CLEV. CLINIC, Jan. 10, 2022, https://health.clevelandclinic.org/what-are-puberty-blockers. Puberty blockers have some known side-effects, namely reduced bone density and potential sex-reassignment surgical complications due to underdeveloped male genitalia. *Id.*
[16] J.R. Turban, ET AL., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145(2) PEDIATRICS, Feb. 2020, https://doi.org/10.1542/peds.2019-1725.
[17] *Id.*
[18] Jason Rafferty, MD, ET AL., *Ensuring comprehensive care and support for transgender and gender-diverse children and adolescents*, 142 PEDIATRICS 4, T2 (2018) Am. Acad. Pediatrics, https://doi.org/10.1542/peds.2018-2162 (last visited Jan 16, 2023).
[19] *Pubertal blockers for transgender and gender-diverse youth,* MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 (last visited Apr 15, 2023).

Certain individuals may not desire hormone therapy due to future fertility and parenting concerns, and ES guidelines do not require hormone therapy for any transgender individual.[20]

Under the guidelines, adolescents are eligible for sex hormone treatments only if a mental health professional ("MHP"), the adolescent patient, and a pediatric endocrinologist or other clinician experienced in pubertal induction satisfy specific criteria.[21] First, the qualified MHP confirms the persistence of gender dysphoria, that any comorbidities that could interfere with the treatment are stable enough to begin treatment, and that the adolescent has sufficient mental capacity to understand, weigh the benefits and risks of, and give informed consent to the partly irreversible treatment.[22] The adolescent then must have been informed of the irreversible effects, given informed consent, and obtained the consent and support of their parents through the treatment process.[23] Finally, a pediatric endocrinologist must agree with the indication for sex hormone treatment and confirm that there are no medical contraindications to further hormone treatment.

ES guidelines do not permit using puberty blockers or hormone therapies before adolescents reach Tanner Stage G2/B2.[24] Tanner Staging, or Sexual Maturity Rating, is an objective classification of pubertal development based on observing key developmental milestones–G2 and B2 are the first pubertal signs in males and females, respectively.[25] Like social affirmation and

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[20] *Health Care for transgender and gender diverse individuals*. AM. COLL. OBSTETRICIANS GYNECOLOGISTS, https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals (last visited Apr 15, 2023).

[21] Turban at 3879.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 3870.

[25] M. Emmanuel, B.R. Bokor, *Tanner Stages*, STATPEARLS, 2022, https://www.ncbi.nlm.nih.gov/books/NBK470280/.

puberty blockers, receiving gender-affirming hormone therapies is strongly correlated with better mental health outcomes, such as lower rates of depression and suicidality.[26]

Still, practitioners take a measured approach to treating transgender patients. The ES guidelines authorize clinicians to initiate gender-affirming hormones only after a multidisciplinary team has determined that an individual has persistent gender dysphoria or gender incongruence and can provide informed consent.[27] The guidelines note that while most adolescents can provide the necessary consent at age 16, others may be able to provide informed consent at a younger age there may be compelling clinical reasons to begin the treatment earlier.[28] In those cases, a multidisciplinary team of experts should manage the treatment since little published research exists regarding treatment prior to age 13.5-14.[29] In all cases, the ES suggests clinical monitoring of pubertal development every three to six months with lab work every six to twelve months during sex hormone treatment.[30]

The final step in the process for some, but not all, transgender persons is a combination of some or all of three categories of irreversible gender-affirming surgeries: (1) "top" surgery to create a male-typical chest shape or enhance breasts; (2) "bottom" surgery on genitals or reproductive organs; and (3) other procedures, such as facial feminization or vocal cord surgery.[31] Because surgery is a permanent and consequential step, the ES guidelines do not recommend gender-affirming genital surgery unless the individual's mental health professional and endocrinologist

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[26] Diana M. Tordoff, ET AL., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, JAMA NETWORK OPEN, Feb. 25, 2022, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423.
[27] Hembree at 3870.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 3871.
[31] *Id.*

agree that the surgery is medically necessary and would benefit the patient's overall health and well-being.[32]

Further, unless hormone therapy is not desired or medically contraindicated, ES guidelines advise that surgery should follow at least one year of consistent hormone treatment.[33] The guidelines recommend referring a patient for surgery only after they have had a satisfactory social role change, are satisfied with the hormonal effects, and desire definitive surgical changes, but also suggest that the patient be at least 18 years old or the age of majority in their country.[34]

These four categories of gender-affirming care are not inevitable or universally applied to each child identifying as transgender or gender diverse. All major medical organizations call for an individualized and measured approach to providing care based on the coordination of a child's care team. For example, the ES guidelines, first published in 2009 and updated in 2017, stress the importance of a multidisciplinary team treating individuals impacted with Gender Dysphoria ("GD ") or Gender Incongruence ("GI").[35]

The American Association of Pediatrics (AAP) guidelines emphasize providing care that understands and appreciates a youth's gender experience in a gender-affirmative care model ("GACM").[36] AAP recommends Pubertal suppression to prevent the development of secondary sex characteristics and provide time for individuals up to age 16 to explore their gender identity and avail themselves of the opportunity to socially transition without irreversible effects.[37] While the AAP acknowledges the risks of puberty blockers, such as lower self-esteem from delaying

[32] Hembree at 3872.
[33] *Id.*
[34] *Id.*
[35] Hembree at 3869.
[36] Rafferty at 1.
[37] *Id.* at 5.

puberty beyond that of their peers and reduced genital size complicating further surgeries, it states that the available data shows "that pubertal suppression in children who identify as [transgender and gender diverse] generally leads to improved psychological functioning in adolescence and young adulthood."[38]

Finally, the AAP guidelines recommend a treatment path for individuals with GD starting with social affirmation, a reversible step of adopting gender-affirming pronouns, name, and appearance.[39] AAP guidelines next suggest legal affirmation, a process of changing official records to reflect a person's gender and name in alignment with their identity on legal documents such as birth certificates and driver's licenses.[40] Next, AAP recommends moving to medical affirmation with hormone treatment, where the use of cross-sex hormones in adolescents who have initiated puberty promotes the development of secondary sex characteristics of the opposite biological sex.[41] Finally, AAP guidelines recommend surgical affirmation, such as hair distribution, chest or genitalia surgery, and the removal of internal organs like ovaries where needed.[42] While AAP guidelines state that current protocols typically reserve surgical intervention for adults, they recognize that surgery could be appropriate for adolescents case-by-case.[43]

In 2022, WPATH issued its Eighth version of Standards of Care for the Health of Transgender and Gender Diverse People ("SOC-8").[44] SOC-8 uses "the best available science and expert

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[38] *Id.*
[39] *Id.* at T2.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 6
[43] *Id.*
[44] Eli Coleman, ET AL., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L. J. TRANSGENDER HEALTH S3, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9553112/pdf/WIJT_23_2100644.pdf.

consensus in transgender health."[45] SOC-8 recommendations for care largely align with ES guidelines in requiring an individual to have satisfied diagnostic criteria for gender incongruence, a noted ability to provide informed consent, attainment of Tanner Stage 2 of puberty for pubertal suppression, and at least twelve months of gender-affirming therapy before initiation of gender-affirming surgery.[46] SOC-8 emphasizes a case-by-case analysis to determine the proper course of treatment, noting a lack of quality longitudinal studies but increased evidence on the benefits of beginning hormone therapy as early as age 14 to promote pubertal development more like the patient's peers and reduce the time spent on puberty blockers.[47] For pre-adolescent children, SOC-8 recommends a course of psychotherapy, consultation, and engagement with family members to discuss the benefits and risks of social transition.[48]

The body of evidence supporting the medical community standards leans overwhelmingly in favor of a measured, deliberate, and individualized care path that recognizes the benefits of appropriate social and medical interventions for the overall mental and physical well-being of children suffering from gender dysphoria.

States Restricting Gender-Affirming Care

As of this writing, at least fourteen states have enacted legislation restricting or eliminating access to gender-affirming care for minors. [49] A common theme in such state-based legislation is protecting children from experimental treatment or mutilation. Under such pretext, and leveraging

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[45] *Id.* at 3.
[46] *Id.* at 48. A notable distinction is the SOC-8 specifies an ICD-11 diagnosis of gender incongruence while the ES guidelines rely on the DSM-V.
[47] *Id.* at 65.
[48] *Id.* at 69.
[49] N.B., when preparing the outline for this paper, only four states had enacted such laws. That number grew to at least fourteen during the drafting of this paper. The information contained in this paper is intended to be accurate as of submission date.

the *parens patriae* power of the state, various actions have been taken to prevent or criminalize the attainment or provision of certain forms of gender-affirming care. What follows is a summary of notable enacted and proposed legislation.[50]

Alabama

In April 2022, Alabama enacted its Vulnerable Child Compassion and Protection Act (V-CAP).[51] Arguing that sex cannot be changed, gender-affirming care is harmful, and gender-affirming care is unproven, V-CAP makes it a Class C felony to prescribe puberty blockers to stop or delay normal puberty, provide cross-gender hormones or gender-affirming surgeries to minors.[52] V-CAP further prohibits nurses, teachers, guidance counselors, principals, or other officials at public and private schools from withholding information from a child's parents that a child may be transgender or from encouraging the child to withhold the same.[53] The District Court for the Northern District of Alabama enjoined V-CAP as a violation of parents' substantive due process rights to direct the care and custody of their child, pending appeal to the Eleventh Circuit.[54]

Arkansas

[50] In the flurry of legislation in this area, several states not detailed in this paper have passed similar laws. In Georgia, 2023 S.B. 140 prohibits these treatments, but allows for ongoing treatment to continue. In Idaho, 2023 H.B. 71 makes it a felony to administer these treatments to minors. Iowa's 2023 S.F. 538 prohibits these treatments as unprofessional conduct and imposes a statute of limitations of 20 years for minors, while carving out exceptions for speech. In West Virginia, 2023 H.B. 2007 bans surgery but permits puberty blockers for minors if certain diagnostic conditions are met and the dose is the lowest possible intended to mental health issues, but not meant to induce physiological changes.
[51] 2022 Al. SB 184.
[52] *Id.* § 2, 4.
[53] *Id.* § 5.
[54] Eknes-Tucker v. Marshall, No. 2:22-cv-184-LCB, 2022 U.S. Dist. LEXIS 87169 (M.D. Ala. May 13, 2022) *appeal filed* May 18, 2022 (No. 22-11707).

Arkansas pioneered prohibiting gender-affirming care under the guise of protecting children when it enacted its Save Adolescents from Experimentation (SAFE) Act in 2021.[55] Passing SAFE required Arkansas's Republican-controlled House to override a gubernatorial veto.[56] SAFE prohibits any healthcare professional from providing gender transition services to any individual under eighteen years of age[57] and prohibits the provision of public funds[58] or insurance for any gender transition procedures.[59] The law includes an extensive list of specific "gender transition procedures," including puberty blockers, hormone therapy, and surgeries related to both reproductive organs and secondary sexual characteristics.[60] That said, it explicitly permits the use of the same procedures and therapies for persons with a "medically verifiable disorder of sex development," which includes persons with 46 XX chromosomes with virilization.[61] The SAFE Act is temporarily enjoined as a violation of a transgender person's Equal Protection rights.[62]

This year, Arkansas passed the "Protecting Minors from Medical Malpractice Act of 2023," which restricts the provision of gender-transition procedures by creating a specific cause of action for harm caused by those procedures.[63] The Act establishes a three-step safe harbor for providers who follow a strict set of parameters requiring: (1) at least two years of continuous, invariable documentation of the transgender minor's gender being inconsistent with their biological sex; (2)

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[55] 2021 Ark. HB 1570.
[56] Devan Cole, *Arkansas becomes first state to outlaw gender-affirming treatment for Trans youth,* CNN POLITICS (Apr. 6, 2021), https://www.cnn.com/2021/04/06/politics/arkansas-transgender-health-care-veto-override/index.html.
[57] *Id.* §20-9-1502.
[58] *Id.* § 20-9-1503.
[59] *Id.* § 23-79-164.
[60] 2021 Ark. HB 1570 at § 3.
[61] *Id.* § 3(B)(1).
[62] Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. Aug. 2, 2021), *aff'd,* 47 F.4th 661 (8th Cir. Aug. 25, 2022).
[63] 2023 AR SB 199.

certification by at least two healthcare professionals, including one mental health professional certifying that the minor suffered from no other mental health concerns, such as an eating disorder or ADHD; and (3) voluntary informed consent at least 30 days before the first treatment and during every subsequent treatment.[64] Beyond these already challenging requirements, the Arkansas legislature has specifically defined what constitutes informed consent for the safe harbor and requires a verbatim recitation of anti-gender-affirming care talking points.[65] If a doctor fails to meet the specified conditions for treatment, minors and their representatives have a presumptive claim for up to fifteen years following the provision of treatment.[66] The multiple bills overlap in their prohibitions and will act to restrict care even if a party successfully litigates to have one or more laws enjoined.

Arizona

On March 31, 2023, Arizona's "Prohibition of Irreversible Gender Reassignment Surgery for Minors" takes effect. Drafted more narrowly than Alabama's and Arkansas's statutes, Arizona restricts only the provision of "irreversible gender reassignment surgery," statutorily defined to include fourteen specific surgical procedures such as a penectomy, hysterectomy, and mastectomy for a person under age eighteen.[67] As enacted, the Act contains no prohibitions on gender-affirming hormone therapies or puberty blockers, though an amended version has been introduced in the 2023 legislative session that would prohibit hormone therapies and puberty blockers effective March 31, 2024.[68]

Kentucky

[64] *Id.* § 16-114-403.
[65] *Id.*
[66] *Id.* § 16-114-402.
[67] 2022 AZ S.B.1138.
[68] 2023 AZ S.B. 1702.

Kentucky's legislature overrode a gubernatorial veto on March 29, 2023, to enact S.B. 150, which combines provisions related to parental rights in education and medical restrictions.[69] Kentucky's law prohibits schools from keeping any student information confidential, such as a student identifying as transgender, from a parent, except when a child may be the victim of abuse if such information is disclosed.[70] Kentucky goes further than most states in prohibiting some social transition by restricting school boards from recommending or requiring that faculty use pronouns that do not correspond to a student's biological sex.[71] The newly-enacted law further prohibits transgender students from accessing locker rooms that do not match their biological sex but permits schools to provide accommodations like using single-stall or faculty restrooms.[72]

As for medical interventions, Kentucky bans the gender-affirming use of puberty blockers, hormone therapies, and surgical interventions for transgender minors.[73] Any currently ongoing treatment may wind down in a reasonable amount of time, but outside of that exception, a provider is subject to license revocation for providing non-compliant gender-affirming care.[74] Any minor who receives treatment and later wishes to bring a civil action against their provider for damages arising from their treatment has until they reach the age of 30 to do so.[75]

Mississippi

On February 28, 2023, Governor Tate Reeves signed the "Regulate Experimental Adolescent Procedures" Act into law, bringing Mississippi into the group of states acting to

[69] 2023 KY S.B. 150.
[70] *Id.* §1(5)(a).
[71] *Id.* § 1(5)(b).
[72] *Id.* § 3(4)(a).
[73] *Id.* § 4.
[74] *Id.* § 4(4).
[75] *Id.* § 4(5)(d).

prohibit gender-affirming care for minors.[76] The Act restricts care for transgender children by: (1) prohibiting the expenditure of public funds on gender-transitioning care for minors; (2) defining that gender-affirming care for minors is excluded from the practice of medicine; (3) providing that insurance need not cover gender transition procedures for minors; and (4) declaring that acting contrary to the law is outside the scope of employment and a waiver of qualified immunity.[77]

South Dakota

In February 2023, South Dakota enacted a law that requires the revocation of a healthcare professional's license if a person is shown, by a preponderance of the evidence, to have provided gender-affirming care to a minor, including puberty blockers, hormone therapy, or surgical interventions.[78] The Act allows a patient who suffered an injury due to such care to commence an action at the age of 25 or three years after discovering an injury related to such care, whichever is later.[79]

Tennessee

The Tennessee Legislature's first action in 2023 prohibited access to gender-affirming care for minors.[80] Tennessee prohibits offering or administering any procedure enabling a minor to identify with or live as "a purported identity inconsistent with the minor's sex."[81] Tennessee extends the statute of limitations for a private right of action to age 48 or ten years after the minor's death if the minor dies.[82] On top of the private right of action, the state attorney general may bring an action within 20 years of a violation to enjoin the provider, disgorge profits, and recover a civil

[76] 2023 MS H.B. 1125.
[77] *Id.*
[78] 2023 SD H.B. 1080.
[79] *Id.*
[80] 2023 TN H.B. 0001, 2023 TN SB 0001, enacted on March 2, 2023.
[81] 2023 TN S.B. 0001 § 68-33-103
[82] *Id.* § 68-33-104.

penalty of $25,000 per violation. While the statute indemnifies minors for receiving care, protecting the child from criminal or civil penalties, it requires proceedings to revoke the practitioner's license.[83]

Along with HB 1080, Tennessee enacted a bill permitting parents to withhold consent to gender-affirming care on behalf of their children.[84] Additional pending legislation defines hormone therapy as "not a standard medical practice when the treatment is for the purpose of enabling a minor to identify with or live as a purported identity inconsistent with the minor's sex."[85] It is unclear why Tennessee continues to enact essentially redundant legislation, but one could surmise an intent to prohibit gender-affirming care for minors under any allowable avenue should one or more of the laws be struck down.

Texas

They say, "everything is bigger in Texas," so it fits that Texas would go further than attempting to prohibit evidence-based care by seeking to characterize gender-affirming care as child abuse. In February 2022, Texas Attorney General Ken Paxton issued an opinion letter finding that gender-affirming care could constitute child abuse under existing Texas law.[86] Subsequently, Governor Greg Abbott ordered the Texas Department of Family and Protective Services to investigate healthcare professionals and parents of transgender children who had undergone gender-affirming care, including puberty blockers, hormone therapies, and surgical

[83] *Id.* § 68-33-106-07.
[84] 2023 TN S.B. 5.
[85] 2023 TN S.B. 1469, 2023 TN H.B. 1447.
[86] Kenneth Paxton, *Whether certain medical procedures performed on children constitute child abuse,* Opinion No. KP-0401, Feb. 18, 2022, https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2022/kp-0401.pdf.

interventions.[87] Several families have obtained an injunction prohibiting investigation or action against their choices regarding their rights to exercise care and control in the custody of their child as parents, though the litigants could not have the directive enjoined more broadly.[88]

In the current legislative session, Texas has at least seven bills advancing in the House and Senate.[89] This holistic suite of bills seeks to restrict gender-affirming care by: (1) making it illegal to sell a professional liability policy that includes coverage for gender-affirming care to minors;[90] (2) statutorily defining the provision of gender-affirming care by a healthcare professional or consenting to the same by a parent as child abuse;[91] (3) making it a second-degree felony to provide gender-affirming care to a minor;[92] (4) prohibiting gender-transitioning care under the Health and Safety Code;[93] and (5) defining sex-reassignment surgery on minors as genital mutilation.[94] The Texas Senate is advancing legislation that would attack gender-affirming care for all Texans, including adults, by holding medical providers strictly liable for a patient's "medical, mental health, and pharmaceutical costs . . . incurred for the life of the patient as a result of" a gender-modification procedure.[95]

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[87] Greg Abbott, *Letter from Greg Abbott, Governor of Texas, to Jamie Masters, Commissioner of Texas Dept. of Family and Protective Services to investigate and report "sex change" procedures as child abuse under Texas Law*, Feb. 22, 2002, https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.
[88] Abbott v. Doe, No. D-1-GN-22-00977, 2022 WL 628912 (Tex. Dist. Mar. 2, 2022), *appeal dismissed* No. 03-22-00107-CV, 2022 WL 710093, at *1 (Tex. App. Mar. 9, 2022); Masters v. Voe, NO. 03-22-00420-CV (2022 WL 4359561 (Tex. App. Sep. 20, 2022) (narrowing the lower court's broad injunction to only the parties involved in the suit).
[89] *Mapping attacks on LGBTQ rights in U.S. state legislatures*, ACLU (2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights?impact=health&state= (last visited Mar 4, 2023).
[90] 2023 TX H.B. 41.
[91] 2023 TX H.B. 42; 2023 TX H.B. 436.
[92] 2023 TX H.B. 122.
[93] 2023 TX H.B. 1532; 2023 TX S.B. 250.
[94] 2023 TX S.B. 249.
[95] 2023 TX S.B. 1029.

Utah

Rounding out the states successful in enacting transgender care restrictions is Utah, where a law enacted in February, 2023 placed a moratorium on beginning new courses of gender-affirming hormone treatments for a minor and prohibited gender-affirming surgical procedures on minors.[96] The Utah law further discourages doctors from engaging in ongoing care by providing a mechanism for a minor who has given informed consent to disaffirm their consent before age 25, exposing providers to increased potential malpractice claims.[97]

Collectively, these states are joined by over a dozen more in introducing similar legislation, often verbatim, to restrict access to gender-affirming care. Through a combination of measures designed to motivate medical professionals to avoid care, and criminalization of parents and providers, state legislators have placed significant burdens on families seeking medical care for their children in at least eight states, with designs on increasing that number.

States Protecting Access to Gender-Affirming Care

While most state actions on gender-affirming care for minors relate to restrictions and prohibitions, several states have acted to protect access to care. Illinois, for example, has enacted the Lawful Health Care Activity Act, which declares the treatment of gender dysphoria or the affirmation of an individual's gender identity to not be unlawful under the state's laws, including under theories of vicarious, joint, several, or conspiracy liability. [98] Washington enacted the Gender Affirming Treatment Act, which prohibits discrimination in health insurance operations and ensures access to medically necessary gender-affirming care.[99] California has proposed

[96] 2023 UT S.B. 16.
[97] *Id.* § 78B-3-427.
[98] *Id.*
[99] 2021 WA S.B. 5313.

extending sanctuary protection to persons fleeing prosecution in another state for gender-affirming care by prohibiting their extradition, investigation, or categorization as a "fugitive."[100]

State Bans on Gender-Affirming Care are Unlawful.

"Laws are unconstitutional which infringe on the rights of the community ...government should be disarmed of powers which trench upon those particular rights." – James Madison[101]

Constitutional Problems

When a state chooses to deny access to gender-affirming care to minors, the politicians are acting to frustrate and potentially violate the Constitutional rights of parents, patients, and doctors. Parents have a fundamental right under the due process clause of the 14th Amendment to control the care and custody of their children.[102] Transgender patients have a substantive due process liberty interest in bodily autonomy[103] and an equal protection right to be free from sex-based discrimination.[104] Doctor rights are also implicated when a state restricts content-based speech, such as recommending gender-affirming care, and implicates the doctor's First Amendment right to free speech.[105] Constitutional rights are far from absolute, and states can and have satisfied the scrutiny required to interfere with parental rights, bodily autonomy, equal protection, and free speech requirements in the past. Still, the specious arguments proffered in the legislative findings of the state bans, viewed against the body of evidence validated by leading medical societies, show that the state laws should not survive a rational basis review.

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[100] 2023 CA. S.B. 36.
[101] William T. Hutchinson, *The Papers of James Madison*, U. CHI. PRESS 1962, https://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.
[102] Troxel v. Granville, 530 U.S. 57, 57 (2000).
[103] Obergefell v. Hodges, 576 U.S. 644, 663, (2015).
[104] Reed v. Reed, 404 U.S. 71, 76, (1971).
[105] Nat' Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372 (2018).

Parents

State laws banning gender-affirming care for transgender minors violate parents' fundamental rights to direct their children's medical care. Subject to accepted medical standards, the due process clause of the Fourteenth Amendment protects parents' longstanding fundamental right to control the care of their children.[106] The right "to make decisions concerning the care, custody, and control of their children" is one of the oldest recognized by the Supreme Court.[107] State interference with a parent's fundamental right to direct a child's medical care is subject to strict scrutiny.[108] A law subjected to strict scrutiny fails unless it advances "only 'interests of the highest order' and is narrowly tailored to achieve those interests."[109]

Alabama's statute, among the first in the country to attack the provision of gender-affirming care to transgender kids, was also among the first to be found constitutionally defective. The Alabama Middle District Court enjoined V-CAP because it interfered with the fundamental right of parents to choose medical care, and the state "failed to produce evidence showing that transitioning medications jeopardize the health and safety of minors suffering from gender dysphoria."[110] On these facts, V-CAP failed to satisfy the narrow tailoring to the state's legitimate compelling interest of protecting the health and safety of children.[111]

Even so, tension exists between the state and parents, and courts have long recognized the state's prerogative to intervene and ensure a child's well-being under the *parens patriae* power.[112]

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[106] Eknes-Tucker at 7.
[107] Troxel v. Granville, 540 U.S. 57, 65-66 (2000).
[108] *Id.* at 80, (Thomas J., concurring).
[109] Fulton v. City of Phila., Pa, 141 S. Ct. 1868, 1881 (2021), *quoting* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993).
[110] Eknes-Tucker at 26.
[111] *Id.*
[112] Schall v. Martin, 467 U.S. 254, 265 (1984).

The state is empowered to intervene in parental autonomy "when parental decisions jeopardize the health or safety of a child.[113] This tactic is precisely the method that Florida, after twice failing to enact legislation banning gender-affirming care for transgender kids, has used to limit access to care. The state's Board of Medicine, appointed entirely by Governor Ron DeSantis, voted 6-3 (with five members absent) to adopt a standard of care prohibiting access to gender-affirming care.[114] The chair of the Board, a radiation oncologist, cited "a pressing need for additional, high-quality clinical research" in his support for the Board's action in November 2022.[115] But that research will not occur in Florida, as the DeSantis administration requested and received an amendment to the Board of Medicine's policy that eliminated an exception for research in February 2023.[116]

States have a compelling interest in protecting citizens from harm, including potentially harmful medical care.[117] Courts have upheld state laws that prohibit assisted suicide[118], as well as restrictions on access to experimental drugs.[119] Florida's restrictions on parental rights should fail under strict scrutiny, just like Alabama's restrictions were enjoined in *Eknes-Tucker v. Marshall*. The law would fail strict scrutiny because the state's actions are not narrowly tailored to protect children from potentially harmful medical care. Outright bans on gender-affirming care are, at the same time, over-inclusive and under-inclusive and therefore fail strict scrutiny. In *Eknes-Tucker*,

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[113] Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990).
[114] Azeen Ghorayshi, *Florida Restricts Doctors From Providing Gender Treatments to Minors*, THE NEW YORK TIMES, Nov. 4, 2022, https://www.nytimes.com/2022/11/04/health/florida-gender-care-minors-medical-board.html.
[115] *Id.*
[116] Mike Schneider, *Florida doctors' board tightens ban on gender-affirming care,* ABC NEWS, Feb. 10, 2023, https://abcnews.go.com/Health/wireStory/florida-doctors-board-tightens-ban-gender-affirming-care-97046392.
[117] Globe Newspaper co. v. Super. Ct. for Norfolk Cty., 457 U.S. 596, 607 (1982).
[118] See Wash. v. Glucksberg, 521 U.S. 702 (1997).
[119] *See* Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695 (D.C. 2007).

the court cited the state's argument that more research on gender-affirming care was needed and found that the law was not narrowly tailored. If there are conditions under which gender-affirming care can be provided safely, such as under the multidisciplinary approach used by the APA, ES, and WPATH, then a blanket ban must fail for being over-inclusive.

On the other hand, statutes like Arkansas's SAFE Act permit the same treatments prohibited for transgender kids to be used on cisgender kids. If puberty blockers or hormone treatments are unsafe enough to justify a blanket ban, the law would be underinclusive by banning access only for transgender children and not cisgender children. While a state could argue that the risks of harm by permitting precocious puberty justify the use in cisgender children, the risk of harm in permitting a child to develop secondary sexual characteristics that conflict with their gender identity is at least a comparable harm that justifies the use of puberty blockers or hormone therapy for transgender minors. Further, blanket bans should fail under a strict scrutiny review because less restrictive means exist, such as permitting minors to access treatment case-by-case or in a research environment. The laws are, therefore, overinclusive and violate a parent's long-recognized fundamental right to determine the care and custody of their child.

Children

Transgender children themselves have a claim to constitutional protection from state actions to restrict their access to gender-affirming care rooted in the right to equal protection from sex-based discrimination. Under the Fourteenth Amendment, no state may "deny to any person within its jurisdiction the equal protection of the laws."[120] Laws that treat people differently because of their sex establish a classification subject to equal protection scrutiny. [121] To survive an

[120] U.S. CONST. AMEND. XIV.
[121] Reed v. Reed, 404 U.S. 71, 75 (1971).

equal protection challenge, a gender-based classification must "serve important governmental objectives and must be substantially related to achievement of those objectives."[122]

Discrimination based on gender nonconformity should be considered sex-based discrimination under the Supreme Court's existing jurisprudence. In a Title VII context, the Court has been clear that gender-based discrimination is sex-based discrimination.[123] In *PriceWaterhouse v. Hopkins*, the Court found gender stereotyping to be sex-based discrimination when a female employee who was a candidate to make partner at the prestigious firm had her opportunity thwarted, in part because she acted "macho" and male partners thought she should have walked, talked, and dressed more femininely.[124] The Court recognized that gender stereotypes – how a "man" or a "woman" should appear to society – discriminated based on sex by forcing persons with certain biological characteristics to act in one manner while permitting people with a different set of biological characteristics to act in another. Male employees at Price Waterhouse Coopers who acted "macho" were treated differently than female employees who did the same.

More recently, though the holding was narrowly confined to a Title VII context, the Supreme Court explicitly held that transgender discrimination is sex-based discrimination.[125] In writing for the majority, Justice Gorsuch asserted that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[126] Noting that sex was a but-for cause of discrimination based on gender stereotypes, the

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[122] Craig v. Boren, 429 U.S. 190, 197 (1976).
[123] Bostock v. Clayton Cty., 140 S.Ct. 1731, 1741 (2020); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989).
[124] Price Waterhouse at 235.
[125] Bostock at 1741.
[126] *Id.*

Court ruled that an employer who fired an employee for being gay or transgender violated the sex-based discrimination protections of Title VII.[127]

Even though Justice Gorsuch was careful to narrowly limit the holding in *Bostock* to Title VII, his words noting that it is impossible to discriminate against a person for being transgender without discriminating based on sex must supersede the Title VII environment. As laid out in *Price Waterhouse Coopers* and explicitly stated in *Bostock*, sex-based discrimination includes discrimination where gender stereotypes are applied to biological sex, and so discrimination against transgender persons cannot logically be said to be anything but sex-based discrimination and subject to heightened scrutiny when challenged as an equal protection violation.

Even if the Court were to vitiate its prior plain language understanding that transgender discrimination was sex-based discrimination, laws discriminating against transgender children should still be held to heightened scrutiny under a quasi-suspect class framework. Heightened scrutiny is appropriate when laws target discrete and insular minorities.[128] Discrete and insular minorities are groups defined by an immutable characteristic that defines them as a class, a history of discrimination based on that characteristic, the lack of relation between that characteristic and the group's ability to contribute to society, and a lack of political power.[129]

An immutable characteristic is not one that can never change; it refers to a trait that arises from the circumstances of one's birth[130] or is so deeply ingrained in a person's identity that it would be reprehensible to penalize someone for refusing to change it.[131] The American Psychological

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[127] *Id.* at 1754.
[128] United States v. Carolene Products Co., 304 U.S. 144, Fn. 4 (1938).
[129] Lyng v. Castillo, 477 U.S. 635,638 (1986), City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).
[130] Frontiero v. Richardson, 411 U.S. 677, 688 (1973).
[131] Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989).

Association acknowledges that most individuals develop their gender identity in young toddlerhood, well before sexual orientation is discovered.[132] For transgender people, like cisgender people, their gender identity being established at a young age is both an innate aspect of their being and a fundamental component of their identity. Punishing them on these grounds would be abhorrent.

The onslaught of legislation that denies transgender individuals from accessing healthcare, bathrooms, locker rooms, and sports teams highlights both the open and hostile discrimination based on their gender identity and their political powerlessness. Because gender identity is an immutable characteristic and the open and hostile discrimination targeting them, the politically powerless classification of transgender people fits the criteria for heightened scrutiny as a quasi-suspect class.[133]

Moreover, state laws should fail to survive heightened scrutiny because they are not rationally tied to important government objectives. The 8th Circuit found a likelihood of success in a challenge to Arkansas's SAFE Act prohibiting access to gender-affirming care for minors under an equal protection theory.[134] Like Alabama, Arkansas relied on its interest in protecting children from experimental medical care and regulating the profession of medicine.[135] Even so, Arkansas's argument failed to persuade the court at the issuance of a preliminary injunction because the specific treatments denied to transgender children, such as puberty blockers, were

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[132] *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, AM. PSYCHOL. ASS'N., 70 AM. PSYCHOLOGIST 832, 835-36 (2015), https://www.apa.org/practice/guidelines/transgender.pdf.
[133] Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 611 (4th Cir. 2020) *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).
[134] Brandt v. Rutledge, 47 F.4th 661, 671 (8th Cir. 2022).
[135] Brandt v. Rutledge at 670.

permitted for cisgender children, and a genuine health concern would prohibit puberty blockers to children regardless of gender.[136]

As the court in *Brandt* correctly found, denying access to puberty blockers to transgender kids while permitting them for cisgender kids is sex-based discrimination. The state is not arguing that females cannot have puberty blockers, nor are they arguing that males cannot have puberty blockers. The state instead argues that biological females who identify as boys or biological males who identify as girls cannot have puberty blockers. Proponents of bans on gender-affirming care might argue that puberty blockers are still available for the treatment of precocious puberty regardless of sex and that the laws prohibit a sex-neutral use of puberty blockers for gender transition. Such an argument would necessarily fail, as these statutes abound in distinctions based on biological sex and gender and are not facially nondiscriminatory. As Justice Gorsuch noted in *Bostock*, it is impossible to make this discrimination without reference to sex, so it can only be sex-based discrimination.

Alabama and other states that contradict medical consensus cannot be said to have even a rational relation between banning gender-affirming care and their legitimate governmental interests of protecting children and regulating medical care because the overwhelming body of evidence shows that the care being prohibited causes further harm to said children. Because denying evidence-based care undermines the government's interests and the discrimination is based on gender, affected transgender children should prevail on their equal protection claims to state laws banning access to gender-affirming care where the law permits cisgender children to receive the same care.

Doctors

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[136] Brandt v. Rutledge, 551 F.Supp.3d 882, 891 (2021), *aff'd,* 47 F.4th 661 (8th Cir. 2022).

Doctors' rights, too, are implicated when states act to restrict access to gender-affirming care for transgender kids in the form of mandatory disclosures of controversial statements. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[137] Laws restricting content-based speech generally face strict scrutiny and are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve a compelling government interest.[138] Still, it is essential to note the difference between speech and professional conduct, which incidentally involves speech.[139] Laws compelling or restricting doctors' speech have been struck down on free speech grounds.[140] On the other hand, laws regulating professional conduct to which speech is merely incidental or limited to "uncontroversial information" have been upheld.[141] The closer the speech is tied to the regulation and provision of a medical procedure, such as informed consent requirements, the more likely a law incidentally involving speech will be upheld. Justice Thomas, writing for the Court in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, found that a "government-scripted, speaker-based disclosure requirement that is wholly disconnected from [the State's] informational interest" was unconstitutional when California required unlicensed pregnancy crisis centers to provide pregnant women with a disclosure that the provider was not a licensed medical provider.[142] Justice Thomas

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[137] U.S. CONST. AMEND. I.
[138] Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015).
[139] *See* Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).
[140] Wollschlaeger v. Florida, 848 F.3d 1293 (11th Cir. 2017) (finding a state law that prohibited a doctor from asking about the presence of firearms in the home of a patient unconstitutional); Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) (striking a federal policy that threatened doctors with revocation of prescription abilities if they recommended medicinal marijuana).
[141] Zauderer at 651.
[142] NIFLA at 2377.

considered California's justification that pregnant women know when they receive licensed care to be purely hypothetical.[143]

A First Amendment claim was raised in *Eknes-Tucker v. Marshall*, and even though the court did enjoin the Alabama statute, the court did so on other grounds, finding that the V-CAP prohibited conduct and not speech.[144] Contrast V-CAP, which prohibited care provision, with Arkansas's SB199 discussed earlier, passed by the legislature, and delivered to the governor. SB199 would require physicians to use a verbatim script to obtain informed consent that "treatment may significantly increase the likelihood that . . . discordance will worsen" and that "Sweden, Finland, and the United Kingdom have conducted systematic reviews of the evidence and concluded that there is no evidence that the potential benefits . . . outweigh the known or assumed risks."[145] The statements in SB199's required disclosure contradict the accepted medical consensus. Interfering in physician-patient communications like this, where the state requires a verbatim disclosure of only downside risks, harms the practice of medicine by restricting the information that patients and providers can share.[146]

Even with the Court's wavering between conduct and speech in a professional environment, doctors should argue that the compelled speech in bills like Arkansas's SB 199 exceed informed consent regulations and compels content-based speech on controversial issues.

Solutions Outside of Constitutional Litigation

Aside from the state efforts to provide sanctuaries and protection for gender-affirming care, there are potential federal solutions outside constitutional litigation. Several bodies of federal law

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[143] *Id.*
[144] Eknes-Tucker at 35.
[145] 2023 Ark. SB 199 at 16-114-403.
[146] Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 896 (2019).

protect against discrimination based on sex and gender. To this end, the Department of Justice issued a warning to state Attorneys General that gender-affirming care bans run the risk of violating federal protections against discrimination.[147] The Department highlighted protections available to transgender persons under several federal statutes, including Section 1557 of the Affordable Care Act.[148] Finally, Congress could act to specifically protect access to evidence-based care for transgender kids.

Section 1557 of the Affordable Care Act

Section 1557 of the Affordable Care Act was the first national legislation to prohibit sex discrimination in healthcare and prohibited categorical refusal to provide medical treatment based on one's gender identity by any entity that receives federal funding.[149] The path to implementation, however, has been marked by ideological differences and changes in executive administrations.

In 2016, HHS issued regulations interpreting § 1557 to include discrimination based on sex assigned at birth and gender identity because "on the basis of sex," as included in the statute, included sex stereotyping, and cited the discrimination in *Price Waterhouse Coopers v. Hopkins* as an example of sex stereotyping.[150] These regulations were challenged and enjoined in a North Texas courtroom because the incorporated definitions from Title IX had a "binary" definition of sex, which did not include HHS's notions of gender identity.[151] A new administration took power three weeks after the decision was issued, and HHS did not appeal the case.[152] The Trump

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[147] Kristen Clarke, *Letter from Kristen Clarke, Assistant Attorney General, U.S. Civil Rights Division, to State Attorneys General*. (Mar. 31, 2022) (on file with DOJ), https://www.justice.gov/opa/press-release/file/1489066/download (a reminder of the federal protections against discrimination applicable to persons seeking gender-affirming care).
[148] *Id.*
[149] 42 U.S.C. § 18116.
[150] *Nondiscrimination in Health Programs and Activities*, HHS, 81 FR 31375-01, May 18, 2016.
[151] Franciscan Alliance, Inc. v. Burwell, 227 F.Supp.3d 660 (N.D. Tex. 2016).
[152] Walker v. Azar, 380 F.Supp.3d 417, 421-22 (E.D.N.Y. Aug. 17, 2020).

Administration then issued its own rules, asserting that "sex," as defined in Title IX, included neither sexual orientation nor gender identity.[153] Noting that *Bostock* gave rise to an occasion to pause and assess the effect of such a major decision, the District Court for the Eastern District of New York enjoined the 2020 proposal's definition of "sex," which excluded gender identity and sex stereotyping.

The nondiscrimination provisions of the Affordable Care Act have been fertile grounds for litigation challenging the treatment of transgender persons in a healthcare environment. Courts have upheld § 1557 violations in cases when: (1) transgender patients were treated with hostility and asked demeaning questions;[154] (2) Medicaid denied treatment for gender-affirming care;[155] and (3) gender-affirming care was denied to incarcerated persons.[156]

Because Medicaid is a jointly funded program between the federal and state governments, state laws that discriminate based on sex by denying medically necessary gender-affirming care can and should be challenged as a violation of §1557.

Legislative Remedies

With agencies fighting out regulatory battles in courts against ideologically opposed state attorneys general and amici, Congress could act to protect transgender Americans by amending the 1964 Civil Rights Act to include explicit protections against transgender discrimination. The Equality Act of 2021 would have amended the Civil Rights Act and prohibited discrimination based on sex, gender identity, and sexual orientation.[157] With 224 co-sponsors, the bill passed the

[153] *Id.* at 423, 429.
[154] Rumble v. Fairview Health Servs., No. 14-CV-2037/SRN/FLN, 2015 WL1197415 (D. Minn. Mar. 16, 2015).
[155] Cruz v. Zucker, 116 F.Supp.3d 334 (S.D.N.Y. 2015).
[156] Fields v. Smith, 654 F.3d 550 (7th Cir. 2011), *cert. denied* Smith v. Fields,566 U.S. 904 (2012).
[157] 2021 U.S. H.R.5.

House and had White House support but ultimately did not receive a floor vote in the Senate. Unfortunately, the legislative composition has changed since 2021, and the currently composed House is unlikely to protect the rights of Americans who do not conform to heteronormative standards, so this option is likely off the table until at least early 2025, when Congress could again change control.

Conclusion

The road ahead for transgender kids and their families is not likely to get any smoother. The pace with which state legislatures are introducing and passing laws intentionally designed to restrict access to medical care in direct contradiction to the best evidence provided by leading medical associations is accelerating and likely to continue. Victims of these laws, the kids and families, and doctors dealing with gender incongruence and gender dysphoria will need allies in legal aid and nonprofit organizations to take their battles to courts to enforce their substantive due process rights to direct the medical care of their children, to be free from discrimination based on sex, and to engage in speech without being criminally sanctioned.