# CONDUCT-AS-STATUS IN *SKRMETTI*'S GENDER-AFFIRMING CARE BANS

ROBERT BLAKE WATSON* & NEHA SRINIVASAN**

ABSTRACT

With its decision in *United States v. Skrmetti*, the Supreme Court has permitted government prohibitions on gender-affirming care for certain transgender individuals. Although these bans construe themselves as barring medical procedures in neutral, conduct-based terms, we contend that the laws discriminate on the basis of transgender status and sex. Drawing from equal protection jurisprudence—including decisions in *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*—we contextualize the gender-affirming care bans within the Court's history of rejecting efforts to mask status-based discrimination through ostensibly neutral restrictions on conduct. By underscoring that both cisgender and transgender individuals seek gender-affirming interventions, we reveal how these laws functionally target transgender adolescents alone.

Further, we highlight how these prohibitions on medical care inherently incorporate a sex-based classification system, wherein access to care depends on the alignment—or lack thereof—between an individual's sex assigned at birth and their gender expression. The use of such classifications triggers heightened scrutiny under the Equal Protection Clause. Beyond doctrinal concerns, we note the real-world implications of the Court's reasoning, particularly the potential mental health consequences for transgender individuals who are denied gender-affirming care. By permitting legislatures to obscure status-based exclusions behind conduct-based language, the Court has further eroded equal protection jurisprudence, with profound implications for the well-being and legal agency of transgender individuals.

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* Juris Doctorate, University of Pennsylvania Carey Law School. Neha and I would both like to thank Serena Mayeri, Katie Eyer, and Douglas NeJaime for their helpful feedback throughout the initial development of this Essay.

** Juris Doctorate, Yale Law School.

## INTRODUCTION

Facing an already-dire mental health crisis, transgender adolescents now confront state legislatures that have enacted sweeping prohibitions on gender-affirming care.[1] Gender-affirming care is broadly defined as "any single or combination of a number of social, psychological, behavioural or medical . . . interventions designed to support and affirm an individual's gender identity,"[2] but these bans have exclusively prevented *transgender* individuals from accessing such care. In the face of these laws, trans adolescents and their families have gone to the courts for relief.[3] With its decision in *United States v. Skrmetti*,[4] a case brought by transgender adolescents challenging Tennessee's ban on gender-affirming care, the Supreme Court has ruled that these prohibitions do not classify based on transgender status or sex and that the bans survive rational basis review.[5]

As a scholarly critique of the *Skrmetti* majority's reasoning, this Essay demonstrates that although state bans on gender-affirming care attempt to conceal themselves through conduct-based restrictions on certain "medical uses,"[6] they nonetheless facially discriminate on the basis of transgender status and sex. Part I explains how the Supreme Court has previously rejected legislatures' attempts to use a conduct-centered framework as a cover for status-based discrimination against LGBTQIA+ persons. Situating gender-affirming care bans within this familiar and flawed pattern, this Essay argues that the Supreme Court should have rejected the Tennessee legislature's use of conduct to discriminate on the basis of status. By illustrating that *both* cisgender and transgender individuals seek and receive gender-affirming care, Part II reveals how the bans

1. *Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 18, 2025), https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf (last visited July 11, 2025).

2. *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd.

3. *See, e.g.*, United States v. Skrmetti, 144 S. Ct. 2679 (2024); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210 (11th Cir. 2023); Brandt *ex rel* Brandt v. Rutledge, 47 F.4th 661, 667–68 (8th Cir. 2022); Doe v. Ladapo, 676 F. Supp. 3d 1205, 1209–10 (N.D. Fla. 2023); Koe v. Noggle, 688 F. Supp. 3d 1321, 1328 (N.D. Ga. 2023); K.C. v. Individual Members of Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802, 806 (S.D. Ind. 2023); Doe v. Thornbury, 679 F. Supp. 3d 576, 579 (W.D. Ky. 2023), *rev'd*, L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023); Poe v. Drummond, 697 F. Supp. 3d 1238, 1245 (N.D. Okla. 2023); Poe v. Labrador, 709 F. Supp. 3d 1169, 1178 (D. Idaho 2023), *appeal filed*, No. 24-142 (9th Cir. Jan. 9, 2024).

4. *See generally* United States v. Skrmetti, 605 U.S. __ (2025).

5. *Id.*

6. *Id.*

discriminate based on transgender status by prohibiting only transgender adolescents from accessing such care. Part II also uncovers how the bans discriminate on the basis of sex by demonstrating that medical providers in jurisdictions with bans must now engage in a two-step identification process—including identifying the adolescent's sex assigned at birth—to determine whether an adolescent can access "masculinizing" or "feminizing" care. Although the scope of access to gender-affirming care is a "hot topic," we must not forget the implications of the Supreme Court's *Skrmetti* decision. As Part III identifies, when transgender adolescents are unable to affirm their gender identity, they are more likely to engage in self-harm and suicidal behavior.[7] Transgender adolescents now worry that their state may be the next to prohibit medically necessary and lifesaving care offered to their cisgender peers. The Supreme Court's failure to recognize conduct as status in *Skrmetti* is not only a dire development in equal protection jurisprudence but may also yield dangerous consequences for many transgender adolescents.

## I. SITUATING GENDER-AFFIRMING CARE BANS WITHIN THE CONDUCT-AS-STATUS FRAMEWORK

State legislatures have historically used conduct-centered language as a cover for facial classifications that courts review under the Equal Protection Clause. Yet this practice has borne little fruit, as the Supreme Court has previously rejected the conduct-versus-status distinction and has held that discriminating against conduct that is closely correlated with being a member of a protected class is discrimination against the class itself.[8] The bans on gender-affirming care for transgender minors are no different; prohibiting a category of conduct that is undertaken exclusively by transgender minors is discrimination against transgender minors themselves.

Prior to its rejection, the conduct-versus-status distinction was first used to enable discrimination against LGBTQIA+ persons in *Bowers v. Hardwick*,[9] where the Court upheld a Georgia statute criminalizing sodomy.[10] The Court rectified its mistake by overruling *Bowers* seventeen years later in *Lawrence v. Texas*.[11] Unlike the Georgia statute at issue in *Bowers*, which did not *explicitly* single out individuals engaged in same-

7. *See 2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, THE TREVOR PROJECT (2024), https://www.thetrevorproject.org/survey-2024.

8. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating anti-sodomy laws for discriminating against sexual orientation status); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 669 (2010) (rejecting religious student organization's exclusion of gay students); United States v. Windsor, 570 U.S. 744, 775 (2013) (invalidating federal statute defining marriage as a legal union between one man and one woman); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (invalidating state statute defining marriage as a legal union between one man and one woman). The status-versus-conduct distinction appears in other legal doctrines as well. For example, in the Eighth Amendment context, the Supreme Court most recently grappled with the distinction between status and conduct in City of Grants Pass v. Johnson, 603 U.S. 520 (2024).

9. 478 U.S. 186 (1986).

10. *Id.* at 196.

11. 539 U.S. 558, 578 (2003).

sex intercourse, the Texas anti-sodomy law challenged in *Lawrence* imposed criminal consequences only upon "he [who] engages in deviate sexual intercourse with another individual *of the same sex*."[12] In striking down the Texas law, the Court recognized the illusory line between conduct and status: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[13] Ten years after *Lawrence*, in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*,[14] the Court reaffirmed its refusal to accept arguments that attempt to distinguish between conduct and status discrimination.[15]

Once the Court determined that criminalizing sodomy cannot be a means to discriminate against LGBTQIA+ people, activists then began to focus their attention on challenging prohibitions against same-sex marriage. Proponents of same-sex marriage generally argued that bans against the practice were unconstitutional under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. In two key marriage equality cases, the Supreme Court relied on *Lawrence*'s logic to invalidate federal and state statutes restricting marriage, and the benefits that flow from it, to heterosexual unions.[16] Writing for the majority in *United States v. Windsor*,[17] Justice Kennedy struck down section three of the Defense of Marriage Act (DOMA), which amended the Dictionary Act to define marriage as "a legal union between one man and one woman as husband and wife."[18] The statute included no facial classifications and did not use the words "conduct" or "status"; Justice Kennedy nonetheless understood that withholding federal tax exemptions from gay individuals who choose to marry someone of their same sex constituted discrimination on the basis of sexual orientation status.[19] Similarly, in *Obergefell v. Hodges*,[20] Justice Kennedy again wrote for the majority when he invalidated state statutes defining marriage as a union between a man and a woman. Implicit in the Court's reasoning was the principle that discriminating on the basis of marital *conduct* exclusively engaged in by gay people resulted in

12. TEX. PENAL CODE ANN. § 21.06(a) (West 2003) (emphasis added).
13. *Lawrence*, 539 U.S. at 575.
14. 561 U.S. 661 (2010).
15. *Id.* at 689. Here, a religious student organization argued that excluding gay students from membership was permissible under the school's nondiscrimination policy because it discriminated "on the basis of a conjunction of conduct and the belief that the conduct is not wrong" as opposed to sexual orientation status. Relying on its holding in *Lawrence*, the Court held that "[o]ur decisions have declined to distinguish between status and conduct in this context."
16. *See* United States v. Windsor, 570 U.S. 744, 769 (2013); Obergefell v. Hodges, 576 U.S. 644, 667 (2015).
17. 570 U.S. 744, 775 (2013).
18. Defense of Marriage Act, Pub. L. 104–199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).
19. *Windsor*, 570 U.S. at 775.
20. 576 U.S. 644 (2015).

impermissible discrimination against LGBTQIA+ *status* in violation of the Fifth and Fourteenth Amendments' Equal Protection Clauses.[21]

Following the battle over same-sex marriage, anti-LGBTQIA+ activists and political actors have shifted their focus onto transgender adolescents.[22] Prior to 2023, only a handful of states had bans on gender-affirming health care on the books.[23] Since then, as of February of 2025, a staggering twenty-seven states have enacted sweeping prohibitions on gender-affirming care for transgender youth.[24] These laws broadly prohibit minors from taking part in medical care that has the purpose of affirming a gender identity that is "inconsistent" with one's sex assigned at birth.[25] As explained below, situating the bans on gender-affirming care for transgender minors within the conduct-as-status framework reveals that state legislatures have reverted to their impermissible historical practices. Prohibiting a category of conduct undertaken exclusively by transgender minors is discrimination against transgender minors themselves—it excludes boys who wish to receive feminizing care and girls who wish to receive masculinizing care.

## II. FACIALLY DISCRIMINATORY: THE BANS' TRANS- AND SEX-BASED EXCLUSIONS

Gender-affirming care bans use conduct as a means of discriminating on the basis of both transgender status and sex in violation of the Equal Protection Clause of the Fourteenth Amendment. For example, Tennessee's ban, which was the law at issue in *Skrmetti,* makes no express mention of transgender individuals, nor does it explicitly preclude boys or girls from engaging in any sort of care available to one sex but not the other:

> 68-33-103. Prohibitions.
>
> (a)(1) A healthcare provider shall not knowingly perform or offer to perform on a minor, or administer or offer to administer to a minor, a medical procedure if the performance or administration of the procedure is for the purpose of:
>
> (A) Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or

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21. *Id.* at 653–54, 674–75.

22. Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES, https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html (last updated Apr. 17, 2023).

23. *Healthcare Laws and Policies*, *supra* note 1; *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map (last visited Feb. 28, 2025); ARK. CODE ANN. § 20-9-1502 (2025), *invalidated by* Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023).

24. *Healthcare Laws and Policies*, *supra* note 1.

25. *See, e.g.*, KY. REV. STAT. ANN. § 311.372 (West 2025); ARK. CODE ANN. § 20-9-1502(a) (2025), *invalidated by* Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023); TENN. CODE ANN. § 68-33-101(b) (2025); OKLA. STAT. tit. 63, § 1-321 (2024).

> (B) Treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.[26]

Instead, Tennessee's ban, like many other bans across the country, uses conduct-centered language focusing on certain medical uses as a mechanism of masking its trans- and sex-based exclusions.[27]

*A. Conduct-Based Restrictions as Trans-Based Discrimination*

Acknowledging that gender-affirming care is broadly utilized by both cisgender and transgender individuals reveals that state gender-affirming care laws do not ban gender-affirming care in the broadest sense of the term. Leading authorities on health care have appropriately defined "gender-affirming care" as being used by *anyone* who wishes to affirm their gender identity. For example, the World Health Organization (WHO) defines "gender-affirmative health care" as "any single or combination of a number of social, psychological, behavioural or medical . . . interventions designed to support and affirm an individual's gender identity."[28] Furthermore, by tracing historical shifts in gender-affirming medical practices since the 1950s, scholars have shown that cisgender individuals, rather than transgender individuals, are the predominant users of gender-affirming health care.[29] For example, cisgender adults and adolescents regularly take part in gender-affirming care related to breast modification, hormonal therapy, and hair growth, removal, and transplantation.[30]

By prohibiting gender-affirming care only when it has the purpose of affirming a gender identity that is "inconsistent" with one's sex assigned at birth, the bans narrowly circumscribe prohibited conduct to exclusively ban *transgender* individuals from engaging in procedures similar to those used by their cisgender peers.[31] For example, Tennessee's ban on gender-affirming care prohibits all medical procedures for adolescents that have the purpose of "enabling 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*."[32] The statute's narrow and exclusive application to conduct that has the purpose of affirming an "asserted" or "purported" identity that is "inconsistent" or "discordan[t]" with an individual "minor's sex"

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26. TENN. CODE ANN. § 68-33-103 (2025).

27. *See, e.g.*, KY. REV. STAT. ANN. § 311.372 (West 2025); ARK. CODE ANN. § 20-9-1502(a), (b) (2025), *invalidated by* Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023); OKLA. STAT. tit. 63, § 1-321(H) (2024).

28. *Gender Incongruence and Transgender Health in the ICD*, *supra* note 2.

29. Theodore E. Schall & Jacob D. Moses, *Gender-Affirming Care for Cisgender People*, 53 HASTINGS CTR. REP. 15, 16, 20 (2023).

30. *Gender-Affirming Care for Cisgender People: Q&A with Theodore Schall and Jacob Moses*, HASTINGS CTR. FOR BIOETHICS (June 14, 2023), https://www.thehastingscenter.org/news/gender-affirming-care-for-cisgender-people-qa-with-theodore-schall-and-jacob-moses/#:~:text=Recognizing%20this%20bias%20is%20the,replacement%20therapy%2C%20and%20hair%20removal.

31. *See* Schall & Moses, *supra* note 29, at 15–16, 21–22.

32. TENN. CODE ANN. § 68-33-101 (2025) (emphasis added).

definitionally applies *only* to adolescents who are transgender.[33] The Tennessee law's classification based on certain "medical uses" is therefore inherently a classification based on transgender status.[34]

State bans on gender-affirming care rely on the same ostensibly conduct-based schemes to discriminate on the basis of LGBTQIA+ status. Rather than explicitly stating that they are prohibiting transgender minors from accessing all gender-affirming medical care, states mask this desired effect by framing their laws as banning anyone from seeking medical care that affirms a gender identity that is "inconsistent" with one's sex assigned at birth. Yet this suspiciously circumscribed conduct is behavior that only a transgender individual would engage in.[35] Because the laws prohibit only transgender individuals from engaging in gender-affirming care, they discriminate on the basis of transgender status.[36]

### *B. Conduct Restrictions as Sex-Based Discrimination*

Gender-affirming care bans also use conduct to discriminate on the basis of sex, warranting heightened scrutiny under equal protection analysis.[37] To comply with the bans, doctors must now engage in a two-step identifying procedure that reveals the sex-based discrimination inherent in the bans. When an adolescent approaches a health care provider to access care for gender-affirming purposes, the provider must identify (1) the purpose (i.e. "medical use") of the care sought (i.e., to "masculinize" or "feminize" the individual's physical presentation); and (2) the individual's sex assigned at birth (to determine whether it is consistent with the masculinizing or feminizing care that they seek).[38] This two-step identifying

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33. *Id.*; *see, e.g.*, *Understanding Transgender People, Gender Identity and Gender Expression*, AM. PSYCH. ASS'N, https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression (last updated July 8, 2024); *Transgender*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020); *Transgender and Nonbinary Identities*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender.

34. *See generally* United States v. Skrmetti, 605 U.S. __ (2025).

35. While scholars have compellingly argued that transgender status should be a suspect classification, the Court currently applies rational basis review to classifications based on transgender status. *See, e.g.*, James Casey Edwards, *Justifying the Margins: Granting Suspect Classification to Trans* Individuals in the U.S. Judicial System*, 55 UIC L. REV. 403, 405 (2022); *see also* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1430 (2023); Kevin M. Barry, Brian Farrell, Jennifer L. Levi, & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551 (2016). *See generally* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742–43 (2014) (discussing the development of equal protection jurisprudence and suspect classifications).

36. Supreme Court precedent prior to *Skrmetti* supports our conclusion that the laws, despite purporting to prohibit conduct as to everyone, in fact discriminate on the basis of transgender status. *See supra* Part I.

37. *See* Craig v. Boren, 429 U.S. 190, 197–200 (1976) (establishing that sex-based classifications receive heightened scrutiny).

38. When a cisgender or transgender person engages in gender-affirming care, the practical effect of the care is to "masculinize" or "feminize" the person's physical appearance either *away from* the socially constructed import of their sex assigned at birth or *toward* their preferred gender identity. At first glance, the two-step process may not appear to apply to some gender-affirming care such as puberty blockers. However, the ultimate goal of taking puberty blockers is to *prevent* masculinization or feminization that would occur due to puberty. Thus, a doctor must still determine (1) the purpose

procedure shows that, when determining who gets access to "masculinizing" or "feminizing" medical care in a state with a gender-affirming care ban, sex must always play a role.

The Supreme Court's reasoning in *Bostock v. Clayton County*[39]—that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"—should also be applicable to gender-affirming care bans.[40] With a few modifications to the Court's reasoning in *Bostock*, the facial sex discrimination becomes readily apparent:

> [T]ake a~~n employer~~ *law that prohibits feminizing medical care for* ~~who fires~~ a transgender person who was identified as a male at birth but who now identifies as a female. If the *law permits feminizing care for* ~~employer retains~~ an otherwise identical *minor* ~~employee~~ who was identified as female at birth, the *law* ~~employer~~ intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in a~~n employee~~ *minor* identified as female at birth. Again, the individual ~~employee's~~ *minor's* sex plays an unmistakable and impermissible role in the *ban* ~~discharge decision~~.[41]

For an adolescent who desires masculinizing or feminizing medical care to affirm their gender identity in a gender-affirming care ban state, there is only one characteristic that determines access: sex. Under Tennessee's ban, while an adolescent assigned male at birth would be permitted access to medical care that is offered to "masculinize" physical appearances, an adolescent assigned female at birth would not.[42] While an adolescent assigned female at birth would be permitted to "feminize" her physical characteristics through any available medical care, a minor assigned male at birth would not.[43] Because the bans use sex as the determinant by which individuals may access gender-affirming care, they discriminate on the basis of sex.

Applying the identifying procedure described above and the Supreme Court's reasoning in *Bostock* suggests that the use of conduct-centered language to restrict only transgender individuals is designed to punish them for their gender nonconformity. In doing so, bans on gender-affirming care discriminate on the basis of both transgender status and sex in violation of the Equal Protection Clause. The impact of this impermissible conduct-as-status legislative framework could not be more dire.

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of taking the puberty blockers and (2) the person's sex assigned at birth to see if it is discordant with the purpose. Therefore, the two-step process still applies. *See* TENN. CODE ANN. § 68-33-103 (2025).

39. 590 U.S. 644 (2020).

40. *Id.* at 660.

41. *Id.* The crossed-out language represents fact-specific language from *Bostock* and the italicized language represents the facts that we have added to demonstrate the application of *Bostock*'s reasoning to bans on gender-affirming care.

42. *See* TENN. CODE ANN. §§ 68-33-101 to -104 (2025).

43. *See id.*

### *C. Doctrinal Implications*

Establishing a facial classification, whether it be on the basis of transgender status, sex, or both, ensures that bans on gender-affirming care are evaluated appropriately under equal protection doctrine. Step one of equal protection analysis requires a finding that the government action, in this case a statute, facially discriminates against a group. Upon a finding of facial discrimination, courts apply the appropriate level of scrutiny to review the government action. Absent a finding of facial discrimination, plaintiffs seeking to advance to the scrutiny analysis must first prove discriminatory intent per the test set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[44] The *Arlington Heights* analysis allows courts to consider circumstantial and direct evidence of whether invidious discriminatory purpose was a motivating factor in the governmental action. Such factors include the historical background of the decision, the sequence of events leading to the action, procedural abnormalities, and legislative or administrative history.[45] However, the discriminatory intent test is notoriously difficult to satisfy; in the modern age, legislatures acting on improper motives are unlikely to externally evidence as much. As a result, plaintiffs are often left with no further recourse within equal protection.[46] Governments seeking to force transgender plaintiffs into the *Arlington Heights* corner are incentivized to argue that they discriminate on the basis of conduct as opposed to status. However, the statutes' discrimination against conduct that is inextricably linked with transgender status overcomes this insidious maneuver, allowing courts to apply the relevant level of scrutiny under Equal Protection Clause doctrine.[47]

## III. LIVES ON THE LINE

Before the advent of statewide prohibitions on gender-affirming medical care, queer and transgender adolescents already faced an alarming mental health crisis.[48] But instead of addressing the growing mental health challenges facing queer and transgender youth, state legislatures have worsened conditions by broadly prohibiting access to gender-affirming

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44. *See* 429 U.S. 252, 264–66 (1977).

45. *Id.* at 266–68.

46. *See generally* Stephen Rinehart, *Proving Intentional Discrimination in Equal Protection Cases: The Growing Burden of Proof in the Supreme Court*, 10 N.Y.U. REV. L. & SOC. CHANGE 435, 435–36 (1980) (discussing the evolution of Supreme Court jurisprudence with respect to the requirement that a plaintiff prove discriminatory intent in the face of challenging neutral state action on equal protection grounds).

47. This Essay does not fully illustrate the unconstitutionality of the bans under the Fourteenth Amendment, which would require showing that the classification on the basis of transgender status, or sex, fails to satisfy the applicable standard of review. Rather, our work focuses on the first step of Equal Protection Clause analysis: the existence of facial classifications.

48. *See 2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, *supra* note 7.

medical care.[49] The consequences of these bans are serious; it is well documented that when transgender adolescents are unable to affirm their gender identity, their mental health suffers. A 2024 Trevor Project survey revealed that 46% of transgender and nonbinary youth seriously considered attempting suicide in the year preceding the survey, with 12% of LGBTQIA+ youth actually attempting suicide.[50] Among transgender and nonbinary youth, 71% reported symptoms of anxiety and 59% reported symptoms of depression in that same timeframe.[51] LGBTQIA+ advocates and parents of transgender individuals rightfully worry that these recent bans will worsen mental health and increase the rate of suicide among transgender adolescents.[52]

Ironically, many states attempt to justify gender-affirming care bans by citing risks of the care to adolescents.[53] But it is the bans themselves that harm transgender adolescents the most. While cisgender adolescents are permitted to receive gender-affirming care, transgender minors are denied access to all gender-affirming interventions, even when considered medically necessary.[54] By using conduct to preclude transgender adolescents from accessing potentially-lifesaving care that remains available to their cisgender peers, the bans single out an already-vulnerable class of people and worsen a preexisting crisis.

## CONCLUSION

Dozens of states have now passed sweeping bans on gender-affirming care. Noticeably absent from the text of all except two bans is any reference to the class of people they intend to target: *transgender* adolescents.[55] Instead, the bans frame themselves as prohibiting a narrow range

49. Daniel Breen, *First in the Nation Gender-Affirming Care Ban Struck Down in Arkansas*, NPR, https://www.npr.org/2023/06/20/1183344228/arkansas-2021-gender-affirming-care-ban-transgender-blocked (last updated June 20, 2023).

50. *See 2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, *supra* note 7.

51. *Id.*

52. Kacie M. Kidd, Gina M. Sequeira, Taylor Paglisotti, Sabra L. Katz-Wise, Traci M. Kazmerski, Amy Hillier, Elizabeth Miller, & Nadia Dowshen, *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. ADOLESCENT HEALTH 1082, 1082 (2021).

53. *See, e.g.*, S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 71, 67th Leg., Reg. Sess. (Idaho 2023); S.B. 16, 2023 Gen. Sess., Gen. Sess. (Utah 2023); H.B. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

54. *See* S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); S.B. 480, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S.B. 16, 2023 Gen. Sess., Gen. Sess. (Utah 2023).

55. *See, e.g.*, S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 1138, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); S.B. 254, 2023 Leg., Reg. Sess. (Fla. 2023); S.B. 140, 2023–2024 Gen. Assemb., Reg. Sess. (Ga. 2023); S.B. 480, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S. File 538, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); S.B. 63, 2025–2026 Leg., Reg. Sess. (Kan. 2025); S.B. 150, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); H.B. 463, 2023 Leg., Reg. Sess. (La. 2023); H.B. 1125, 2023 Leg., Reg. Sess. (Miss. 2023) (mentioning "transgender . . . surgeries" only once in a footer that is not a part of the text of the bill); S.B. 49, 102nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023); S.B. 0099, 68th Leg., Reg. Sess. (Mont. 2023); Legis. B. 574, 108th Leg., 1st Sess. (Neb. 2023); H.B. 619, 2024 Leg., Reg. Sess. (N.H. 2024); H.B. 808, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); H.B. 1254, 68th Leg. Assemb., Reg. Sess. (N.D. 2023); H.B.

of conduct that, suspiciously, only transgender individuals engage in. Through its *Skrmetti* decision, the Supreme Court now permits states to target LGBTQIA+ individuals through purportedly conduct-based bans.[56]

The gender-affirming care bans' focus on conduct—when they really target status—was previously a tested and rejected method of discrimination. Over the course of nearly three decades, the Supreme Court had correctly refused to disaggregate LGBTQIA+ conduct from LGBTQIA+ status. However, the Court has now taken a significant step backwards in equal protection jurisprudence by failing to do so now. In *Skrmetti*, the Court and proponents of the bans ignore the obvious: allowing states to discriminate on the basis of conduct that is exclusive to transgender individuals is an invitation to discriminate against transgender people in all spheres of life. And when it comes to trans adolescents, the stakes could not be higher.

68, 135th Gen. Assemb., Reg. Sess. (Ohio 2024); S.B. 613, 2023 Leg., Reg. Sess. (Okla. 2023); H.B. 4624, 125th Gen. Assemb., Reg. Sess. (S.C. 2024); H.B. 1080, 98th Leg., Reg. Sess. (S.D. 2023); H.B. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); S.B. 14, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 2007, 2023 Leg., Reg. Sess. (W. Va. 2023); S. File 99, 67th Leg., Budget Sess. (Wyo. 2024). Only Idaho and Utah mention the word "transgender" in the text of their bills. *See, e.g.*, H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023); S.B. 16, 2023 Gen. Sess., Gen. Sess. (Utah 2023).

56. *See generally* United States v. Skrmetti, 605 U.S. __ (2025).