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Protecting Youth Access to Gender-Affirming Care: A Parental Rights Pathway

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INTRODUCTION

As of March 22, 2024, twenty-four states have enacted laws or policies that limit youth access to gender-affirming care.¹ This means that up to 38% of transgender youth live in a state that limits their access to medical care that is widely considered age-appropriate and medically necessary by the American medical establishment. Gender-affirming care supports the well-being of many transgender and nonbinary people who experience the symptoms of gender dysphoria, defined as psychological stress that results from having one's gender identity not match their sex assigned at birth.²

The laws and policies banning gender-affirming procedures vary from state to state. Almost all prohibit healthcare professionals from prescribing or administering gender-affirming hormones or puberty-blocking prescriptions to

minors or providing gender-affirming surgical care to minors for the purpose of transitioning genders or affirming a perception of the child's gender that is inconsistent with their biological sex.³ The penalties for violating the law also vary: some states make providing the prohibited care to minors a felony with possible prison time;⁴ some states allow a private right of action for minors or their families to sue healthcare providers who provide gender-affirming care;⁵ and in some states, parents who allow gender-affirming medical care can lose custody of their child.⁶ Whatever the specifics, the bans prevent children from receiving care, prevent parents from consenting to necessary care, and punish healthcare providers for following the standard of care.

These legislative attacks on gender-affirming care and gender non-conforming youth, a new focus in the culture war against LGBTQ people,

¹ KAISER FAM. FOUND., *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions* (last updated April 17, 2024), <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/>.

² Jack Turban, *What is Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria#section_4

³ It should be noted that most of the state laws do not ban the procedures for minors across the board, they are only banned if they are used as part of gender-affirming care. KAISER FAM. FOUND., *supra* note 1.

⁴ *See, e.g.*, H.B. 71, 67th Leg., 1st Reg. Sess. (Idaho 2023).
⁵ *See, e.g.*, S.B. 49, 236 & 164, 102nd Gen. Assemb., 1st Reg. Sess. (Mo. 2023).

⁶ *See, e.g.*, S.B. 254 (Fla. 2023).

are relentless and ongoing. Politicians have set their sights on trans youth, one of the most vulnerable groups of people. The stakes for these young people are high—some data indicates that 41% of LGBTQ+ young people seriously considered attempting suicide in the past year, including roughly half of transgender and nonbinary youth. One in five transgender and nonbinary young people attempted suicide in 2023.⁷ This constant onslaught of misinformed policies, which sends the message that trans kids do not deserve proper medical care or affirmation, only makes their mental health worse.

As more bills are enacted, trans youth and their families have taken to the courts to fight for the right to receive gender-affirming care. Lawsuits challenging laws or policies limiting youth access to gender-affirming care have been filed in at least sixteen states.⁸ Unfortunately, there is little legal precedent to support the idea that

This constant onslaught of misinformed policies, which sends the message that trans kids do not deserve proper medical care or affirmation, only makes their mental health worse.

minors have a right under the Constitution to receive medical care.⁹ This limits their ability to

fight back against state action that limits youth access to healthcare. However, in pursuing these bans, legislators also deprive parents of a fundamental right that has long been protected in this country—a parent’s right to decide how to raise their children.

The history and traditions of the United States and Supreme Court precedent support the idea that parents have a constitutional, fundamental right to make decisions regarding the “care, custody, and control” of their children. The parental right provides parents with a strong constitutional argument and a path through the court system to challenge restrictions to gender-affirming care for their children.

WHAT IS GENDER-AFFIRMING CARE: MYTHS AND FACTS

Policies that restrict youth access to gender-affirming procedures are often justified by misinformed views of what gender-affirming care is. Legislators make findings that the procedures are dangerous, experimental, and irreversible. They also argue that the procedures cause infertility, are done without a minor’s consent, and are not supported by studies. The public at large hears these arguments and then forms a warped view of gender-affirming care. To combat this lack of knowledge, below are some common myths about gender-affirming care and facts addressing those myths.

because they were viewed as incompetent due to their age. There has been a presumption that before a minor reaches the age of majority—typically 18—they lack the experience and judgment to make fully informed decisions. Any authority to consent to or refuse medical treatment typically remained with the minor’s parent or guardian. Because there has not been a history or tradition in the United States of minors having a right to receive healthcare, it means there is no fundamental right under the Constitution that would protect the right to receive healthcare.

⁷ *The Trevor Project’s 2023 U.S. National Survey on the Mental Health of LGBTQ Young People*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/survey-2023/> (last visited April 25, 2024).

⁸ KAISER FAM. FOUND., *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions* (last updated April 17, 2024), <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/>.

⁹ In the past, minors were not considered to be legally capable of making medical decisions for themselves

Myth	Fact
Gender-affirming care requires that children take hormones and get surgery.	Gender-affirming care is a broad term encompassing many different avenues to help align an individual’s outward physical traits with their gender identity. It consists of various services that may include medical, surgical, mental health, and non-medical interventions. ¹⁰ At its most basic level, it is about validating and supporting children and loving them for who they are as they explore their gender identity. There is no single objective or outcome with gender-affirming care because it is patient-led. Early interventions for pre-pubescent children do not involve hormonal or surgical interventions. Rather, recommendations for children focus on social support, assessments, consultation, and psychotherapy for gender-diverse children and their families.
Gender-affirming care is new and experimental.	Gender-affirming care and practices have existed since the first half of the 20 th century. The use of medical interventions to support gender-diverse patients started in Germany in the 1920s. ¹¹ The first medical textbook in the field in the United States was published in 1966. In the 1960s and 70s, at least nine academic institutions opened transgender programs to offer gender-affirming care. ¹² The use of puberty blockers to prevent gender-incongruent puberty in adolescents began in the Netherlands in 1998. ¹³ The Endocrine Society and the World Professional Association for Transgender Health first recommended use of puberty blockers for adolescents in their published guidelines in 2009. ¹⁴ The American Academy of Pediatrics, the American Medical Association, the American College of Obstetricians and Gynecologists, and the World Health Organization all support giving transgender adolescents access to the health care they need, including puberty blockers and other gender-affirming interventions. ¹⁵
Gender-affirming care harms minors.	Gender-affirming care has been shown to improve the mental health and well-being of gender-diverse children and adolescents. Gender-affirming care for young people can improve body satisfaction and self-esteem, which supports better mental health and social relationships. It has also been shown to correlate with a serious reduction in suicide attempts and decreased rates of depression and anxiety. ¹⁶ When a physical intervention is prescribed, it is coupled with education on the safe use of any medications and close surveillance for potential risks associated with that intervention. ¹⁷

¹⁰ HHS OFF. OF POPULATION AFFS., *Gender-Affirming Care and Young People*, (Mar. 2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

¹¹ Jeremi M. Carswell, et al., *The Evolution of Adolescent Gender Affirming Care: An Historical Perspective*, 29 HORM RES PAEDIATR 649, 651 (2022).

¹² Johns Hopkins Hospital, University of Minnesota, University of Washington, Northwestern/Cook County Health in Chicago, Stanford University, Cleveland Clinic, University of Colorado, Baptist Medical Center in Oklahoma City, and Washington University in St. Louis all opened transgender programs during this time. Carswell, et al., *supra* note 11 at 652.

¹³ Maria A T C van der Loos, et al., *Children and adolescents in the Amsterdam Cohort of Gender Dysphoria: trends in diagnostic- and treatment trajectories during the first 20 years of the Dutch Protocol*, 20 J. SEXUAL MED. 398, 398-99 (2023). See also Carswell et al., *supra* note 11, at 652.

¹⁴ Carswell, et al., *supra* note 11, at 653.

¹⁵ Alyson Sulaski Wyckoff, *AAP Reaffirms Gender-Affirming Care Policy, Authorizes Systematic Review of Evidence to Guide Update*, AM. ACAD. OF PEDIATRICS, Aug. 4, 2023.

¹⁶ Hassan Murad et al., *Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-Analysis of Quality of Life and Psychosocial Outcomes*, 72 CLINICAL ENDOCRINOLOGY 2, 214–331 (Feb. 2010); Yolanda Smith, et al., *Sex Reassignment: Outcomes and Predictors of Treatment for Adult and Adolescent Transsexuals*, 35 PSYCHOLOGICAL MED. 1, 89–99 (Jan. 2005) (finding that all transgender participants who started hormone treatments were no longer gender dysphoric and the vast majority functioned well psychologically, socially, and sexually).

¹⁷ Simona Martin et al., *Criminalization of Gender-Affirming Care— Interfering with Essential Treatment for Transgender Children and Adolescents*, 385 NEW ENG. J. MED. 579 (2021).

Myth	Fact
Every trans person needs or wants gender-affirming care.	Gender-affirming care is used to alleviate the symptoms of gender dysphoria, a clinical condition and diagnosis that refers to the “psychological stress that results from an incongruence between one’s sex assigned at birth and one’s gender identity.” ¹⁸ If a trans person does not experience gender dysphoria, then they probably will not seek gender-affirming care.
Gender-affirming procedures are irreversible.	Only some gender-affirming interventions, such as surgical procedures and providing cross-sex hormones, are irreversible. Irreversible procedures are almost exclusively reserved for adults. Surgical interventions are occasionally pursued during adolescence on a case-by-case basis, considering the necessity and benefit to the adolescent’s overall health. ¹⁹ The decision for an adolescent to pursue an irreversible procedure will not proceed without multidisciplinary input from medical, mental health, and surgical providers, as well as from the adolescent and family. ²⁰ Other interventions that adolescents receive, like puberty blockers, are fully reversible. ²¹ Puberty suppression does carry some potential risks regarding self-esteem, bone metabolism, and fertility. ²² According to the World Professional Association for Transgender Health (WPATH) standards of care, any child younger than adolescence (anybody who has not started puberty) does not receive any permanent or physical intervention. ²³
Gender-affirming procedures cause sterilization and involve genital mutilation.	The only gender-affirming care that can cause sterilization is genital surgery. These surgeries are not recommended to be carried out until the child has reached the legal age of majority and has lived continuously for at least twelve months in the gender role that aligns with their gender identity. ²⁴
Children are being pressured or coerced by medical practitioners to transition.	Gender-affirming care for minors is patient-driven healthcare that involves the young person, their parents, and a team of medical providers. ²⁵ No one part of that care team would be able to push an intervention or treatment with which the parents and child were not on board. The goal is not to transition; the goal is to support the young person and affirm them as they explore their identity.

¹⁸ Turban, *supra* note 2.

¹⁹ Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 AM. ACAD. PEDIATRICS, 1, 7 (2018).

²⁰ *See id.*

²¹ Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, PEDIATRICS, Feb. 2020, at 1, 2.

²² “Delaying puberty beyond one’s peers can also be stressful and can lead to lower self-esteem and increased risk taking. Some experts believe that genital underdevelopment may limit some potential reconstructive options. Research on long-term risks, particularly in terms of bone metabolism and fertility, is currently limited and provides varied results.” Rafferty et al., *supra* note 19, at 5 (footnotes omitted).

²³ *See* WORLD PRO. ASS’N FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSGENDER AND GENDER DIVERSE PEOPLE 69 (8th Version 2022). The WPATH guidelines for prepubescent children do not include any recommendation that children receive hormonal or surgical interventions; the recommendations for children focus on social support, assessments, consultation, and psychotherapy for gender diverse children as well as their families. The guidelines recommend that health care professionals consider pubertal hormone suppression only after a qualifying adolescent first exhibits physical changes of puberty. Such pubertal suppression is fully reversible and serves to provide more time for the adolescent to explore their gender identity, and it prevents children who have been persistent in their gender identity from experiencing significant distress from the development of secondary sex characteristics that do not align with their identity.

²⁴ Martin et al., *supra* note 17.

²⁵ *Id.*

CURRENT COURT CHALLENGES UTILIZING THE PARENTAL RIGHT

The parental right at both a state and federal level is providing trans youth and their families a viable path to defend against overreaching state policies that limit their access to necessary healthcare. Currently, there is litigation in 17 states (Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Missouri, Montana, North Carolina, North Dakota, Nebraska, Oklahoma, Tennessee, and Texas) challenging state laws and policies that restrict

or limit youth access to gender-affirming care. In every case except for one (the case in Nebraska), the challengers have raised the fundamental right of parental autonomy to argue that their state's gender-affirming care ban violates their due process rights either under the Fourteenth Amendment of the United States Constitution or under their state constitution.

Below is a chart with basic information about court challenges utilizing the parental right under the United States Constitution.

State	Law/Policy	Current Status of State Law	Reached an Appellate Court?	Case Name
AL	AL SB 184	In effect	Yes	Eknes-Tucker v. Ivey. (aka Boe v Marshall) (U.S. District Court M.D. of Alabama)
AR	AR HB 1570	Permanently blocked	Yes	Brandt et al v. Rutledge et al (U.S. District Court E.D. Arkansas)
FL	FL CS/SB 254	Permanently blocked, in part	No	Doe v. Ladapo (U.S. District Court N.D. Florida)
GA	GA SB 140	In effect	No	Koe et al v. Noggle et al (U.S. District Court N.D. of Georgia)
ID	HB 71	In effect	Yes	Poe v. Labrador (U.S. District Court S.D. Idaho)
IN	IN SA 538	In effect	Yes	K.C. v. Medical Licensing Board of Indiana (U.S. District Court S.D. Indiana)
KY	KY SB 150	In effect	Yes	Doe v. Thornbury (U.S. District Court W.D. Kentucky)
NC	NC HB 808	In effect	No	Voe v. Mansfield (U.S. District Court M.D. North Carolina)
OK	OK SB 613	In effect	Yes	Poe et.al. v. Drummond et.al. (U.S. District Court N.D. Oklahoma)
TN	TN SB 1	In effect	Yes	L. W. et al v. Skrmetti et al (U.S. District Court M.D. Tennessee)

Source: Kaiser Family Foundation, <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/> (current as of: 6/24/24)

The outcomes of these cases have varied, and many challenges have not received a full trial. Most courts have only considered the

probability of success on the merits of the challengers' constitutional arguments, and they have not yet considered the actual merits of their

arguments. This is because the plaintiffs challenging the bans have requested preliminary injunctions, which are orders that a judge can issue early in a lawsuit to stop a state from continuing its allegedly harmful actions or to preserve the status quo before a final judgment. A preliminary injunction is considered by a judge before the parties have fully litigated any issues. To be granted an injunction—and thus stop the ban from going into effect—the plaintiffs must demonstrate, among other factors, that they are substantially likely to succeed on the merits of their claim.

There is essentially a split between federal circuit courts regarding constitutional challenges to gender-affirming care bans. Judges in the Eighth and Ninth Circuits have supported the challengers and blocked gender-affirming care bans in Idaho and Arkansas based on Fourteenth Amendment Due Process and Equal Protection Clause arguments. However, the Sixth and Eleventh Circuits have upheld bans in Tennessee and Alabama. Judges in the Eighth and Ninth Circuits framed the parental right broadly to support a robust due process right of parents to make decisions about their children—including the right to make medical decisions for their children.²⁶ The Sixth and Eleventh Circuits framed the parental right narrowly and brushed Supreme Court precedent aside to conclude that parents did not have a substantive due process

right to treat their children with “transitioning medications.”²⁷

With the split in decisions and various appeals to the Supreme Court,²⁸ the Court granted the petition for certiorari in the Tennessee case on June 24, 2024 but appears to only consider the violation of equal protection.²⁹ This means that the Supreme Court will hear the case during the 2024-2025 docket, but the question of the parental right may remain unresolved.

THE PARENTAL RIGHT IN A CONSTITUTIONAL CHALLENGE

THE PARENTAL RIGHT IS AN IMPLIED FUNDAMENTAL RIGHT

The Fourteenth Amendment of the United States Constitution protects against the State taking a person’s life, liberty, or property without the due process of law. A crucially important function of the Amendment is to protect individuals from state actions that infringe on the fundamental principles of liberty and justice. The Supreme Court has interpreted the Due Process Clause to include a substantive component that prevents states from infringing on certain individual fundamental rights that are not specifically enumerated in the Constitution. A right that is not mentioned or enumerated in the Constitution will often be considered an implied right.

²⁶ *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022); *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065 (D. Idaho Dec. 26, 2023).

²⁷ *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1224 (11th Cir. 2023); *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023).

²⁸ The plaintiffs from the Tennessee case, *L.W. v. Skrmetti*, have petitioned the Supreme Court to take their case based on the Sixth Circuit’s reversal of a preliminary injunction, presenting the questions of whether the ban violates their 14th Amendment rights to due process and equal protection. https://lambdalegal.org/wp-content/uploads/2023/11/No.-__-Petition-For-A-Writ-Of-Certiorari.pdf. Additionally, the Biden administration filed a petition requesting the Supreme Court take the case,

presenting the question as to whether the Tennessee ban violates the 14th Amendment equal protection clause. https://www.supremecourt.gov/DocketPDF/23/23-477/288875/20231106135238432_U.S.%20v.%20Skrmetti%20-%20Pet.pdf. The plaintiffs in the Kentucky case, *Doe v. Thornbury*, have also petitioned the Supreme Court for review of the Sixth Circuit’s reversal of a preliminary injunction. https://www.aclu-ky.org/sites/default/files/field_documents/doe_v._kentucky_-_cert_petition_1_0.pdf.

²⁹ Amy Howe, *Supreme Court takes up challenge to ban on gender-affirming care*, SCOTUS BLOG (June 24, 2024, 10:03 AM), <https://www.scotusblog.com/2024/06/supreme-court-takes-up-challenge-to-ban-on-gender-affirming-care/>.

Parents challenging the gender-affirming care bans have asserted that their right is an implied right protected by the Due Process Clause. The Ninth Circuit in *Poe v. Labrador* laid out the two-step analysis to determine if an implied right is protected: “First, the Court must carefully describe the asserted fundamental liberty interest. Second, the Court must decide whether that interest is objectively, deeply rooted in this nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”³⁰

The parents in the case framed their right as “the fundamental right of parents to make decisions concerning the care, custody, and control of their children,” specifically including a parent’s “right to seek and follow medical advice to protect the health and wellbeing of their minor children.”³¹ The court then reframed the right and asked “whether parents’ fundamental right to care for their children includes the right to choose a particular medical treatment, in consultation with their healthcare provider, that is generally available and accepted in the medical community.”³² The court in *Poe* had no difficulty concluding that such a right is deeply rooted in our nation’s history and traditions and implicit in our concept of liberty.³³

The Supreme Court has described a parent’s right to direct the “care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by this Court.”³⁴ The Court first established the constitutional basis for parental rights to be protected in *Meyers v. Nebraska* over 100 years

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ago in 1923.³⁵ The Court declared that the liberty the Fourteenth Amendment protects included the right to “establish a home and bring up children.” The opinion connected the right of parents to raise children as part of the ordered liberty in the United States by equating it to a “[privilege] long recognized at common law as essential to the orderly pursuit of happiness by free men.”³⁶

As for a parent’s more narrow right to seek out a specific medical treatment for their child, the Supreme Court addressed that right in *Parham v. J.R.*³⁷ In *Parham* the Court rejected the idea that there would need to be a formal, pre-admission hearing to protect the rights of the child before being committed to a state mental institution because parents have “broad parental authority over minor children” and are presumed to be acting in the best interest of their children.³⁸ Children are not able to make “sound judgments concerning . . . their need for medical care or treatment,” so parents not only have the right to make medical decisions, but they have a *duty* to “recognize symptoms of illness and to seek and follow medical advice.”³⁹ The Court concluded that parents’ fundamental right to direct their children’s upbringing encompassed the right to seek a particular form of medical treatment for their children, subject to a physician’s

³⁰ *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *15 (D. Idaho Dec. 26, 2023).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

³⁵ 262 U.S. 390 (1923).

³⁶ *Meyer*, 262 U.S. at 399.

³⁷ *Parham v. J.R.*, 442 U.S. 584, (1979).

³⁸ *Id.* at 602–03.

³⁹ *Id.*

independent examination and medical judgment.⁴⁰

The court in *Poe* relied heavily on the *Parham* case to conclude that the parents had a fundamental right to seek a specific form of medical treatment for their children, which would include the gender-affirming medical care banned by the Idaho bill in question.⁴¹ The district court specifically rejected the Sixth and Eleventh Circuit’s treatment of the parental right, stating that the courts had framed the asserted right far too narrowly and then incorrectly brushed *Parham* aside.⁴² The Eleventh Circuit framed the fundamental right as the right to “treat [one’s] children with transitioning medications subject to medically accepted standards.”⁴³ The Sixth Circuit framed the right as the “right to obtain reasonably banned treatments for their children.”⁴⁴

These descriptions of the parental right are narrower because they focus on the right to consent to “transitioning medications” or “banned treatments” rather than the broader idea that parents have the right to care for their children, which includes the right to choose a particular medical treatment that is generally available and accepted in the medical community. When the right is framed so narrowly as to focus on whether there is a history and tradition of a particular medical treatment being protected, the entirety of modern medicine falls outside the scope of a parent’s right to control their children’s health care. No modern medical treatment could be shown to fit that criterion, and there would be no constitutionally protected right for a parent to

seek out critical 20th and 21st Century medical innovations without state interference.⁴⁵ As the court in *Poe* pointed out, that framing of the parental right “renders the Fourteenth Amendment largely meaningless,”⁴⁶ which is a goal of many conservative judges.

How the parental right is framed can have a significant impact on the outcome of a gender-affirming ban challenge. If it is framed narrowly, with a focus on whether there is a history and tradition of that specific course of treatment being protected, then a court can avoid subjecting a law that infringes on parental autonomy to a heightened level of scrutiny. This allows judges to give states more deference to pass laws that infringe on the fundamental right of parents. However, if a court frames the right as a robust fundamental interest, in line with precedent, then a court must analyze the law under the most stringent level of scrutiny—strict scrutiny.

GENDER-AFFIRMING CARE BANS CANNOT SURVIVE STRICT SCRUTINY

Courts typically apply one of three levels of scrutiny to Fourteenth Amendment claims: rational basis review, intermediate scrutiny, or strict scrutiny. A court decides the level of scrutiny based on the nature of the right that has been violated. When a state restricts an individual’s fundamental right, the policy must withstand strict scrutiny, which requires that the government action serve a compelling purpose and that it is the least restrictive means of doing achieving that purpose.⁴⁷

⁴⁰ *Id.* at 604.

⁴¹ *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *17 (D. Idaho Dec. 26, 2023).

⁴² *Id.*

⁴³ *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1224 (11th Cir. 2023).

⁴⁴ *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023).

⁴⁵ *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *17 (D. Idaho Dec. 26, 2023).

⁴⁶ *Id.*

⁴⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Because the parental right is one of the oldest fundamental rights recognized by the Supreme Court, laws that infringe on that right should consistently receive a strict scrutiny analysis. This did not happen in the cases brought in front of the Sixth and Eleventh Circuits because they held that the right asserted was not fundamental. Under strict scrutiny, a state's policy will receive almost no deference from a court. Accordingly, most laws subjected to strict scrutiny fail and are deemed unconstitutional.

The courts in *Poe* and in the Arkansas case of *Brandt v. Rutledge* followed the strict scrutiny framework to find that the bans could not withstand any form of heightened scrutiny, not just strict scrutiny. In both cases, the courts held that the states did not meet their burden of showing that they had a compelling state interest or that the policies were narrowly tailored to serve that interest. The stated purpose of both laws was to protect vulnerable children from the dangers of unproven medical and surgical treatments, which generally would be a compelling or important interest. However, both courts found that the asserted state objective was merely pretextual,⁴⁸ which means that the reason

offered for the state action was false. Rather, the actual purpose of the policies was motivated by animus towards transgender people.

The bills were pretextual because they allowed the same treatments for cisgender minors that were deemed unsafe and thus banned for transgender minors only. The banned medications and procedures that are used in gender-affirming medical care (such as puberty blockers, hormones, and surgeries) are also used to treat cisgender adolescents for other purposes.⁴⁹ However, the states did not ban the procedures for *all* purposes— they allowed children to have these treatments, but only so long as they were not used as gender-affirming medical care. As the court in *Brandt* put it: “If the State's health concerns were genuine, the State would prohibit these procedures for all patients under 18 regardless of gender identity. The State's goal in passing Act 626 was not to ban a treatment. It was to ban an outcome that the State deems undesirable.”⁵⁰ Accordingly, both states failed to show that they had a compelling state interest that was narrowly tailored.

⁴⁸ *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 893 (E.D. Ark. 2021), *aff'd sub nom. Brandt by & through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022); *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *14 (D. Idaho Dec. 26, 2023).

⁴⁹ Puberty blockers have been used for decades to treat cisgendered children who either are going through puberty too early or going through puberty very quickly— conditions often referred to as “precocious puberty.” In fact, puberty blockers are approved by the FDA to treat children for precocious puberty. Hannah Smothers, *Hm, No One Had a Problem With Puberty Blockers When Only Cis Kids Took Them*, VICE (May 28, 2021, 6:44 AM), <https://www.vice.com/en/article/epnzjk/no-one-had-a-problem-with-puberty-blockers-when-only-cis-kids-took-them>. Young boys may also suffer from a condition called gynecomastia, an increase in the amount of breast gland tissue in boys or men often caused by an imbalance of estrogen and testosterone. *Enlarged breasts in men (gynecomastia)*, MAYO CLINIC (Oct. 26, 2023), [https://www.mayoclinic.org/diseases-](https://www.mayoclinic.org/diseases-conditions/gynecomastia/symptoms-causes/syc-20351793#:~:text=Gynecomastia%20(guy%2Dnuh%2Dko h,estrogen%20and%20testosterone%20causes%20it)

[conditions/gynecomastia/symptoms-causes/syc-20351793#:~:text=Gynecomastia%20\(guy%2Dnuh%2Dko h,estrogen%20and%20testosterone%20causes%20it](https://www.mayoclinic.org/diseases-conditions/gynecomastia/symptoms-causes/syc-20351793#:~:text=Gynecomastia%20(guy%2Dnuh%2Dko h,estrogen%20and%20testosterone%20causes%20it). While the condition often will go away on its own, teenage boys may receive surgery to remove the extra breast tissue to avoid mental health concerns due to changes in how the chest looks. *Id.* Cisgender teens are also allowed to receive cosmetic surgery for any reason—there are no specific laws in the United States that prevent teenagers from getting cosmetic surgery—but parental consent is required. *Cosmetic Surgery in Teens: Information for Parents*, HEALTHY CHILDREN.ORG (Last updated Aug. 31, 2015), <https://www.healthychildren.org/English/ages-stages/gradeschool/puberty/Pages/Cosmetic-Surgery-in-Teens-Information-for-Parents.aspx#:~:text=There%20are%20no%20specific%20l aws,under%20the%20age%20of%2018>.

⁵⁰ *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021), *aff'd sub nom. Brandt by & through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022).

A further reason why gender-affirming care bans cannot survive a strict scrutiny challenge—or any constitutional challenge—is that banning the procedures harms rather than protects young people. As the court in *Poe* found:

“[T]he weight of the evidence shows not only that gender-affirming medical care delivered in accordance with WPATH and Endocrine Society guidelines is helpful and necessary for some adolescents, but also that withholding such care is harmful. As plaintiffs’ experts have explained, allowing gender dysphoric youth to go untreated can increase the risk of anxiety, depression, self-harm, and suicidality. Seen in that light, HB 71 undermines, rather than serves, the asserted goal of protecting children.⁵¹

Following this perspective, a ban on gender-affirming care could not pass the lowest level of constitutional scrutiny, rational basis, because it is not rational to ban care that helps young people when the asserted goal is to protect them. It is simply illogical and speaks to the true animus behind these bans. Even if there are risks associated with a treatment—a fact that is true of nearly every medical treatment—or even if some medical practitioners disagree that a treatment should be used, it should not be up to the state to decide what necessary and generally accepted medical treatments a parent can consent to on behalf of their child. Such legislation is

impermissible overreach by a state into the private life of a family.

OTHER AVENUES TO PROTECT GENDER-AFFIRMING CARE

While there is a strong argument that gender-affirming care bans cannot be constitutional under the Due Process Clause of the Fourteenth Amendment, it is possible that the United States Supreme Court will not treat this argument favorably. As the cases in the Sixth and Eleventh Circuits have shown, courts can come out on the other side of the issue by finding that a parent’s right to seek out “banned treatments” or “transitioning treatments” is not a fundamental right. Additionally, cases like *Dobbs v. Jackson Women’s Health Organization* indicate that a majority of the Supreme Court is comfortable doing away with implied substantive due process rights that were previously thought to be protected. There, the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* and held that the Due Process Clause does not protect a right to abortion because it is not mentioned in the Constitution and the right is neither deeply rooted in the nation’s history nor an essential component of “ordered liberty.”

Although precedent has held that the parental right is deeply rooted in the nation’s history and essential to ordered liberty, it is currently impossible to say whether the parental right will meet the same fate as the right to an abortion. However, there are other avenues that policymakers and advocates can pursue to protect youth access to gender-affirming care outside of the court system.

⁵¹ *Poe by & through Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *14 (D. Idaho Dec. 26, 2023).

Proposed Solution	How It Could Work
<p>Educate the public about what gender-affirming care is and who gender-diverse people are</p>	<p>An education campaign to introduce gender-affirming care and gender minority groups to the populous could help combat bans. There is a strong argument to be made that gender-affirming care is not permanent, it does not cause sterilization, and that withholding it harms young people. If people knew more about gender-affirming care and the people who need it, they may understand that bans are not actually about caring for children, but rather it is a cultural agenda aimed at harming a minority group. Storytelling, empathy, and appeals to humanity can be strong tools to sway public opinion and turn the tides against legislators pushing for this legislation. These tools can all be utilized within a public education campaign.</p>
<p>Invest in research and medical training on gender minority groups and their healthcare needs</p>	<p>A near-universal justification for restricting gender-affirming care is that there is not enough research or proof that the care is not harming children in the long term. The answer to such fears is not to outright ban it. If we simply ban the care, we will never learn about the long-term effects and safety. Rather, the answer can be to make it a priority to learn more about the treatments and long-term effects. With more information, it is possible to create standards, policies, and professions that promote scientific evidence and best practices.</p>
<p>Regulate rather than restrict</p>	<p>Another common justification for the bans is that children are being coerced into transitioning by healthcare providers who are not following best practices. If this is the fear, then the answer is to regulate how this care is being provided rather than to prohibit it. This could provide clarity to families and healthcare providers so that they do not fear prosecution from ambiguous legislation and fearmongering. Best practices for gender-affirming care already do not recommend any permanent interventions before an individual is 18 unless very specific criteria are met. This solution could focus on enacting best practices while allowing space for well-regulated exceptions.</p>
<p>Enact sanctuary laws</p>	<p>In addition to banning care, many antitransgender policies include legal penalties for parents and healthcare professionals who enable youths to seek gender-affirming services. State and local governments could combat this by implementing policies that offer sanctuary to youth and families who seek gender-affirming care. Twelve states and at least four cities have already adopted sanctuary policies. These policies allow transgender youths from outside states to access care within the sanctuary jurisdiction. They also shield transgender youths, their families, and their healthcare professionals from potential legal sanctions in their state of residence.</p>
<p>Expand HIPAA (Health Insurance Portability and Accountability Act) Protections</p>	<p>HIPAA is a federal law that requires the creation of national standards to protect sensitive patient health information from being disclosed. It is possible to expand protections under HIPAA to explicitly prohibit healthcare professionals and plans from releasing gender-affirming care records. This could ensure that personal health information is not used against families in criminal or child abuse investigations in states that have imposed penalties against providing gender-affirming care. Such expansion could also help protect medical</p>

	providers who offer care that is lawful in the state in which they practice from investigations about families traveling out of state to receive care. ⁵²
Enact new federal or state anti-discrimination laws	The Equality Act, which was reintroduced in Congress on June 21, 2023, prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. While the bill has not been passed yet, it could provide an avenue to protect access to gender-affirming care. Individual states could expand anti-discrimination laws to specifically protect gender-diverse people as well.
Codify access to gender-affirming care nationally	It is possible to pursue new federal legislation codifying access to gender-affirming care. This legislation could provide a statutory right to everyone in the country to receive gender-affirming care. The act could be enforced by providing a private right of action to healthcare providers and patients, which would allow individuals to sue a state if that state tried to block them from accessing gender-affirming treatments.

⁵² For more information about expanding HIPAA rules to explicitly protect gender-affirming care see *Re: Proposed Rule at 88 Fed. Reg. 23,506, RIN Number 0945-AA20 titled "HIPAA Privacy Rule To Support Reproductive Health Care Privacy"*, ACLU (June 16, 2023), <https://www.aclu.org/wp-content/uploads/2023/06/ACLU-Comment-on-HIPAA-Privacy-Rule-NPRM-06.16.pdf>.