BRIDGING THE GAP: MODERNIZING CIVIL RIGHTS LAW THROUGH TRANSGENDER HEALTHCARE STATUTES

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ABSTRACT

The past few years have seen record-breaking numbers of anti-transgender bills introduced and passed in state legislatures, many of which restrict transgender healthcare. In light of these bills, the varying outcomes from trans rights litigation in the courts, and President Trump's anti-trans executive actions, it is worth reevaluating the state of trans healthcare protections. The majority of scholarship on trans rights discusses if and how sex discrimination doctrine can be leveraged to secure trans rights, including access to gender-affirming care. However, the complex and mosaic-like nature of sex discrimination doctrine leaves gaps within which judges holding anti-trans bias can insert their own agendas. This Note suggests a different path: rather than leaving trans rights up to the whims and biases of judges or letting the executive branch encroach upon the legislative branch's authority to regulate commerce and healthcare, Congress should pass new civil rights statutes establishing LGBTQ+ status as a basis for discrimination claims. In particular, Congress should pass a healthcare statute prohibiting discrimination on the basis of transgender or nonbinary status in the coverage and administration of healthcare services. Such a law would provide an additional or alternate cause of action in trans healthcare cases where judges misapply or fail to apply sex discrimination analysis.

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INTRODUCTION

For transgender people in the United States, daily life is becoming increasingly fraught with danger. The past decade has seen the growing recognition and visibility of transgender identity, the passage of state-level protections of trans rights, and historic victories for LGBTQ+ equality in both state and federal courts. However, the tide is now turning, and transgender people have become the center of a burgeoning culture war—they have been marked as a social contagion,[1] accused of grooming

1. *See* S. Baum, *Fact Check: Being Trans Is Not a Social Contagion, Despite Latest Submission To UN*, ERIN IN THE MORNING (July 18, 2025), https://www.erininthemorning.com/p/fact-check-being-

children,[2] scapegoated for violence,[3] and characterized as a domestic terrorist threat.[4]

Since 2020, the proliferation of anti-trans legislation at the state level has dramatically escalated, particularly in the area of trans healthcare.[5] The states have been even further emboldened by the Supreme Court's 2025 decision in *U.S. v. Skrmetti*,[6] which upheld a Tennessee law restricting gender-affirming care for trans minors. As the anti-trans moral panic reaches a fever pitch, the attack on trans healthcare has moved from the states to the federal level under President Trump's second administration.[7] This Note thus discusses the current war on trans rights, focusing on the stripping of access to trans healthcare.

This Note will use the terms "trans healthcare" and "gender-affirming care" ("GAC"), which "refers to health services that support a person in living in alignment with their gender identity when their gender identity differs from their sex assigned at birth."[8] These "treatments are considered evidence-based and typically follow standardized practice protocols"[9] and are widely supported by medical consensus.[10] Limiting such care can and will have disastrous consequences.[11]

trans-is-not-a-social [https://perma.cc/78PK-RR77] ("These sensationalized stories—which paint the rise in documented cases of trans youth as a sort of mass hysteria—use junk science and outdated myths about sex and gender as an excuse to hinder trans kids' access to life-saving care."); *see also* Jack L. Turban, Brett Dolotina, Dana King & Alex Keuroghlian, *Sex Assigned at Birth Ratio Among Transgender and Gender Diverse Adolescents in the United States*, 150 PEDIATRICS 49 (2022) (debunking the basis of social contagion theory).

2. *See* Melissa Gira Grant, *"Grooming" Is Republicans' Cruel New Buzzword for Targeting Trans Kids*, NEW REPUBLIC (Mar. 17, 2022), https://newrepublic.com/article/165761/republican-governors-grooming-crt-trans-rights [https://perma.cc/8QC2-XQCN].

3. *See* Odette Yousef, *Trump's Anti-Trans Effort Is an Agenda Cornerstone with Echoes in History*, NPR (Feb. 6, 2025, 10:27 AM), https://www.npr.org/2025/02/06/nx-s1-5288145/trump-anti-trans-executive-order [https://perma.cc/MT2T-VEGL].

4. *See* Ken Klippenstein, *White House Eyes Transgender "Terrorist Movement,"* KEN KLIPPENSTEIN (Sep. 20, 2025), https://www.kenklippenstein.com/p/white-house-eyes-transgender-terrorism [https://perma.cc/U7GU-CW4V].

5. *See* discussion *infra* Section I.B.

6. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

7. *See* discussion *infra* Section I.C.

8. Elana Redfield, *Impact of Ban on Gender-Affirming Care on Transgender Minors*, UCLA SCH. L. WILLIAMS INST. (Jan. 2025), https://williamsinstitute.law.ucla.edu/publications/impact-gac-ban-eo [https://perma.cc/S4DC-EV5E].

9. *Id.*

10. *Fact Sheet: Evidence-Based Health Care for Transgender People and Youth*, GLAAD (Jan. 12, 2024), https://glaad.org/factsheet-evidence-based-healthcare-transgender-people-and-youth [https://perma.cc/MS9G-H96H].

11. Kevin B. O'Reilly, *Why Anti-Transgender Bills Are a Dangerous Intrusion on Medicine*, AM. MED. ASS'N (May 7, 2021), https://www.ama-assn.org/delivering-care/population-care/why-anti-transgender-bills-are-dangerous-intrusion-medicine [https://perma.cc/A6QL-RVN8].

Access to gender-affirming care is frequently litigated under sex discrimination doctrine, a strategy that has achieved great success. However, this success relies upon judges who apply sex discrimination doctrine in a principled manner. This Note suggests that, in light of the second Trump administration's actions, the varying results of GAC litigation, and the Supreme Court's troubling foray into the debate,[12] current law and sex discrimination doctrine are not enough to protect trans healthcare, and new strategies must be pursued.

This Note proceeds in three parts. Part I provides background on the sharp spike in anti-trans legislation in recent years and discusses how the overreach of executive power under President Trump's second administration has fanned the flames of a growing anti-trans movement in the United States. Part II examines the role of the judiciary in addressing trans rights, exploring how the courts have expanded these civil liberties through principled interpretations of current federal law and sex discrimination analysis. This Part then argues that, despite these victories, the viability of these arguments is narrowing, and the limits of sex discrimination doctrine cannot be overcome through reliance on the courts. Part III argues that, given the risks of leaving this issue up to the executive or judicial branch, Congress is best suited to protect gender-affirming care. This Part proposes that Congress pass new federal legislation to cement LGBTQ+ status as a basis of discrimination, specifically passing a healthcare statute prohibiting discrimination on the basis of transgender or nonbinary status. This Part will also discuss how Congress can tailor this statutory scheme to overcome to the implications of the Court's ruling in *Skrmetti*.

Given the current makeup of Congress, this Note does not pretend to suggest that such legislation will be passed in the foreseeable future. It does suggest, however, that the status quo is dangerous, unstable, and will cause irreparable damage to trans people, their loved ones, and anyone who pushes the boundaries of free expression. As this Note will demonstrate, Congress is the branch best suited for the action necessary to protect trans rights. If—and when—a Congress with the political will to protect trans rights emerges, the question is what path it will take to do so. This Note offers one such path.

12. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

I. ANTI-GENDER IDEOLOGY AND THE NEW SCOPE OF EXECUTIVE POWER

A. THE INTERNATIONAL GROWTH OF "ANTI-GENDER IDEOLOGY"

Opponents of trans rights often cite "gender ideology" as the catalyst for the increasing visibility of trans people in social and political life. This Note refers to the "social movements mobilizing opposition to what they call 'gender ideology,' 'gender theory' or 'genderism' "[13] as "anti-gender ideology movements." Such movements have gathered power over the past few decades, opposing various concepts that they view as undermining " 'traditional' " social units—including "the rights of LGBTQ+ people, 'reproductive rights, sexuality and gender-sensitive education in schools, and the very notion of gender.' "[14] Across the world, "the attack on 'gender ideology' is as much an attack on feminism, especially reproductive freedom, as it is on trans rights, gay marriage, and sex education."[15] The United States is materially implicated in the global anti-gender network, as "US-based anti-gender groups such as Alliance Defending Freedom, the Federalist Society, the Cato Institute, and the Heritage Foundation pump millions of dollars into global campaigns" against so-called gender ideology.[16]

Trans people constitute a tiny minority; in the U.S., only one percent of the population identifies as trans.[17] Given the small number of trans people, why is gender such a galvanizing force? Judith Butler argues that " 'gender' absorbs an array of fears and becomes a catchall phantasm for the contemporary Right," creating a moral panic and manifesting as an existential threat.[18] After all, the "very existence of transgender and non-binary individuals poses a threat to the traditional (fixed, binary, hierarchical) gender order."[19] The panic over trans people becomes a funnel for "a broader backlash against LGBTQ equality and an assault on many of

13. Kate Walton, *Opposition to Gender Equality Around the World Is Connected, Well Funded and Spreading. Here's What You Need to Know About the Anti-Gender Movement*, CNN (2024), https://www.cnn.com/interactive/asequals/anti-gender-equality-threat-explained-as-equals-intl-cmd [https://perma.cc/7FL2-QGLS].

14. *Id.*

15. JUDITH BUTLER, WHO'S AFRAID OF GENDER? 67 (2024).

16. Susan Stryker, *Gender and Anti-Gender: Complex Legacies of US Global Power and Influence*, GATE (Mar. 26, 2024), https://gate.ngo/knowledge-portal/article/gender-and-anti-gender-legacies [https://perma.cc/Q95R-6RD4].

17. Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCH. L. WILLIAMS INST. (Aug. 2025), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states [https://perma.cc/5BN9-Z7R9].

18. Butler, *supra* note 15, at 6.

19. Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 57 (2022).

the feminist gains wrought by the women's movement since the 1960s and '70s."[20] Such reactionary sentiment is not new—"backlash politics and jurisprudence have emerged as a response to the gains of different marginalized social groups at various points in time, including women, people of color, and sexual and gender minorities."[21]

The trans rights issue has become a way for conservative lawmakers to rile up their base, "perform opposition to the 'woke left' and ensure evangelical voters show up to vote,"[22] especially now that the question of same-sex marriage and gay relationships has largely faded as a hot button political issue.[23] For example, many state bills banning trans girls from women's sports "are the product of national right-wing strategists, having found that this particular issue has traction to elect and empower Republicans in electoral politics."[24]

Anti-gender ideology is not, however, limited to traditional conservatives. The moral panic has been fueled by both mainstream conservative and liberal media outlets, which have "reinforced the anti-trans movement's unscientific 'child protection' claims, sensationalized them, and profited from the resulting panic."[25] A re-fashioned narrative of sexual deviancy—echoing decades of anti-LGBTQ+ propaganda—has emerged,[26] often obscured under a politically neutral veneer of protecting children's health and women's safety. In recent years, "a relatively small but vocal group of self-proclaimed 'gender-critical feminists' (who are sometimes called trans-exclusionary radical feminists, or 'TERFs' for short) eschew transgender legal rights that they perceive as potentially threatening to the rights of cisgender women."[27] The debate between the faction of gender-

20. *Id.* at 56–57.

21. Jordan Blair Woods, *The New Sexual Deviancy*, 113 GEO. L.J. 911, 915 (2025).

22. Nicole Narea & Fabiola Cineas, *The GOP's Coordinated National Campaign Against Trans Rights, Explained*, VOX (Apr. 6, 2023, 12:50 PM PDT), https://www.vox.com/politics/23631262/trans-bills-republican-state-legislatures [https://perma.cc/F98J-FPPV].

23. Kate Sosin, *How Did Trans People Become a GOP Target? Experts Say It's All About Keeping Evangelicals Voting*, THE 19TH (May 17, 2022, 1:15 PM), https://19thnews.org/2022/05/white-evangelical-voters-gop-anti-trans-bills [https://perma.cc/NM86-U6WN].

24. Brake, *supra* note 19, at 45.

25. Simone Unwalla, *Profiting from Moral Panic: How Profit-Driven Media Outlets Empowered the Anti-Trans Movement*, THE FLAW (Jan. 21, 2024), https://theflaw.org/articles/profiting-from-moral-panic [https://perma.cc/48L2-HT9S]. *See also* Serena Sonoma, *The New York Times' Inaccurate Coverage of Transgender People Is Being Weaponized Against the Transgender Community*, GLAAD (Apr. 19, 2023), https://glaad.org/new-york-times-inaccurate-coverage-transgender-people-being-weaponized-against-transgender [https://perma.cc/9T9T-RHSR].

26. Woods, *supra* note 21, at 911 (explaining how "sexual deviance concepts are grounded in dated sociological and psychological theories of deviance and propagate harmful stereotypes of LGBTQ+ people as deviants, sinners, mentally ill, sexual predators, and dangers to children").

27. Henry F. Fradella, *The Imperative of Rejecting "Gender-Critical" Feminism in the Law*, 30 WM. & MARY J. RACE, GENDER & SOC. JUST. 269, 270 (2024). *See also* Viv Smythe, *I'm Credited With*

critical feminists and the majority of feminists—who see trans rights as a necessary component of the feminist project[28]—goes back decades, to "the height of the second-wave feminist movement."[29] With the increasing visibility of trans people and the rising prominence of high-profile trans-exclusionary feminists like author J.K. Rowling,[30] the debate "has become a matter of intense public conflict."[31]

A deep dive into the extent of the debate between gender-critical feminists and gender-inclusive feminists is beyond the scope of this Note. Nonetheless, this debate is vital to acknowledge because it has significant political and legal consequences that have contributed to the rise in anti-trans sentiment and policy.[32] Gender-critical feminists center biology as the sole determinant of sex and believe that "as a result, transgender women are really men 'who should not be allowed to use women's facilities' " because they will assault cis women in these facilities.[33] Such narratives feed into the "bathroom predator myth," perpetuating the false claim that trans women are a threat to cisgender women in sex-segregated spaces like public restrooms.[34] This myth echoes the "fears of sexual predation" that have been historically invoked to paint gays, Black men, and Jewish people as violent threats to women and children.[35] Moreover, it belies the reality that there is "no evidence of increased harms to people who are not transgender when transgender people are allowed to use restrooms and other gendered facilities

Having Coined the Word "Terf". Here's How It Happened, THE GUARDIAN (Nov. 28, 2018, 6:37 EST), https://www.theguardian.com/commentisfree/2018/nov/29/im-credited-with-having-coined-the-acronym-terf-heres-how-it-happened [https://perma.cc/JNR8-EDTH].

28. *See, e.g.*, Sally Hines, *Trans and Feminist Rights Have Been Falsely Cast in Opposition*, THE ECONOMIST (July 13, 2018), https://www.economist.com/open-future/2018/07/13/trans-and-feminist-rights-have-been-falsely-cast-in-opposition [https://web.archive.org/web/20250727013207/https://www.economist.com/open-future/2018/07/13/trans-and-feminist-rights-have-been-falsely-cast-in-opposition].

29. Samantha Schmidt, *Women's Issues Are Different from Trans Women's Issues, Feminist Author Says, Sparking Criticism*, WASH. POST (Mar. 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/13/womens-issues-are-different-from-trans-womens-issues-feminist-author-says-sparking-criticism [https://perma.cc/CQJ2-7G9E] ("In one example from 1973, at the West Coast Lesbian Conference, in Los Angeles, the group split over a scheduled performance by the folk singer Beth Elliott, who is what was then called a 'transsexual.' ").

30. *See* Clare Mulroy, *J.K. Rowling Celebrated UK Supreme Court Ruling with a Cigar. Backlash Was Swift.*, USA TODAY (Apr. 18, 2025, 4:31 PM), https://www.usatoday.com/story/entertainment/celebrities/2025/04/18/jk-rowling-anti-trans-controversy/83161361007 [https://perma.cc/5NLT-R67N].

31. Butler, *supra* note 15, at 134–35.

32. Fradella, *supra* note 27, at 284.

33. *Id.* at 275.

34. Julia Serano, *Transgender People, Bathrooms, and Sexual Predators: What the Data Say*, MEDIUM (June 7, 2021) https://juliaserano.medium.com/transgender-people-bathrooms-and-sexual-predators-what-the-data-say-2f31ae2a7c06 [https://perma.cc/X8YL-XDVS].

35. *Id.*

according to their gender identity," but "it is a consistent finding across studies and over time that transgender people report . . . experiencing verbal harassment and physical assault from others in these spaces."[36]

These myths also harm gender non-conforming cisgender women who are "harassed in bathrooms because of anti-transgender hysteria,"[37] as in the case of eighteen-year-old Gerika Mudra, a cisgender girl who was followed into a restaurant by a server who accused her of being a man.[38] Mudra felt compelled "to prove to the server that she is a woman, so she unzipped her hoodie to show she has breasts."[39] Gender-critical feminists seem to overlook these incidents, which exemplify how trans people and feminists share common concerns and principles such as the right to bodily autonomy and expression outside of traditional gender norms.[40] Gender-critical feminism feeds into the anti-gender movements pushed by the Right by calling such principles into question. This rhetoric provides fodder for right-wing critiques of "gender ideology," which push similar narratives of a spectral threat to women and children's safety as a shield for limiting both transgender and cisgender people's right to self-determination.

This phenomenon is not merely rhetoric. The growth of gender critical feminism and anti-gender ideology reflect shifting public opinion in the United States. Within just the past four years, "Americans have become more supportive of laws that limit protections for trans people—and less supportive of laws aimed at safeguarding them."[41] This sentiment is reflected in the recent wave of anti-trans legislation passed at the state level.

36. Jody L. Herman, Andrew R. Flores & Elana Redfield, *Safety and Privacy in Public Restrooms and Other Gendered Facilities*, UCLA SCH. L. WILLIAMS INST. (Feb. 2025), https://williamsinstitute.law.ucla.edu/publications/safety-in-restrooms-and-facilites [https://perma.cc/KH5L-H4FQ].

37. Serano, *supra* note 34.

38. Jo Yurcaba, *Minnesota Teen Says Server Forced Her to Prove Her Gender in Restaurant Bathroom*, NBC NEWS (Aug. 12, 2025, 1:52 PM), https://www.nbcnews.com/nbc-out/out-news/minnesota-teen-says-server-forced-prove-gender-restaurant-bathroom-rcna224562 [https://perma.cc/ZLW8-2R9J].

39. *Id.*

40. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1083 (2023) ("Radical feminists and queer theorists have long argued that biological justifications for sex difference and sex discrimination are sex stereotypes because culture always shapes our understanding of biological categories.").

41. *Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, PEW RSCH. CTR. (Feb. 26, 2025), https://www.pewresearch.org/short-reads/2025/02/26/americans-have-grown-more-supportive-of-restrictions-for-trans-people-in-recent-years [https://perma.cc/MM27-E7HB].

B. TRANS RIGHTS AT THE STATE LEVEL

Several hundred anti-trans laws have been proposed in states across the country in recent years. Journalists in 2022 noted that "[s]chools [had] emerged as the front line for anti-trans legislation," with several states successfully passing bans on trans children in sports, parental disclosure laws, and curriculum restrictions.[42] Bathroom bills, which were thought to have lost steam after North Carolina's failed 2016 attempt to ban trans people from public restrooms that do not correspond with the sex listed on their birth certificate, have made a comeback.[43] In the years since, states have restricted discussion of gender and personal pronouns in schools,[44] prohibited or placed significant restrictions on the ability to change gender markers on ID documents,[45] and passed restraints on free expression through drag bans.[46]

The rate of these attacks is accelerating. The ACLU tracked 616 anti-LGBTQ+ bills in 2025,[47] up from 533 in 2024,[48] and 510 in 2023.[49] Other advocates focusing specifically on anti-trans legislation have found that 2025 was the sixth consecutive record-breaking year in anti-trans bills considered across the country, with trans healthcare becoming an increasingly targeted category.[50] The majority of anti-trans bills do not become law, but "each year, Republicans introduce more and more bills. And each year, those bills become broader and more extreme, as politicians look for new ways to enforce a binary definition of gender—and that escalation is turning up in the bills that do pass."[51]

42. Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022, 5:00 AM ET), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports [https://perma.cc/RWT2-28TQ].

43. *Id.*

44. Adeel Hassan, *States Passed a Record Number of Transgender Laws. Here's What They Say.*, N.Y. TIMES (Mar. 21, 2024), https://www.nytimes.com/2023/06/27/us/transgender-laws-states.html [https://perma.cc/CT48-FYXY].

45. Nakajima & Jin, *supra* note 42.

46. *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGIS. TRACKER (2025), https://translegislation.com/learn [https://perma.cc/HJ8F-XHQU].

47. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2025*, ACLU (Sep. 19, 2025), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2025 [https://web.archive.org/web/20250313040005/https://wp.api.aclu.org/legislative-attacks-on-lgbtq-rights-2025].

48. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU (Dec. 6, 2024), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://web.archive.org/web/20251007022023/https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024].

49. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, ACLU (Dec. 21, 2023), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023 [https://web.archive.org/web/20250824040747/https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023].

50. *2025 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER (2025), https://translegislation.com/bills/2025 [https://perma.cc/N99G-WX83]; TRANS LEGIS. TRACKER, *supra* note 46.

51. Orion Rummler, *As Anti-Trans Laws Get More Extreme, Here's Where State Laws Stand in 2025*, THE 19TH (May 28, 2025, 3:10 AM), https://19thnews.org/2025/05/anti-trans-extreme-state-laws-2025 [https://perma.cc/PW6F-L5JP].

One of the main targets of these bills has been gender-affirming care. In 2024, state legislators introduced 189 bills targeting these services, a slight increase from 2023 (in which there were "more bills targeting gender-affirming healthcare . . . than the last 5 years combined").[52] Most of these bills are targeted towards transgender and nonbinary minors. As of August 2025, "27 states have enacted laws/policies limiting youth access to GAC."[53] As a result, "40% of trans youth (ages 13–17) live in a state that has enacted a law/policy limiting access to GAC."[54]

These bills "are devastating. They force trans kids and their families to leave entire states and regions of the country. They exacerbate trans kids' already alarmingly high suicide rates by withholding necessary medical interventions from them."[55] Researchers have found that these bills have inflicted severe psychological harm on trans youth. In states where anti-trans laws were passed, trans and nonbinary young people "experienced statistically significant increases in both the number of past-year suicide attempts and the reporting [of] at least [one] past-year suicide attempt, especially [one] and [two] years after anti-transgender law enactment."[56]

These bills do not stop at children—a troubling development is the shift towards limiting this healthcare for adults.[57] The primary means of doing so is through bills that block the use of state Medicaid funds for coverage of gender-affirming care services.[58] By the beginning of 2025, "[t]en states — Arizona, Florida, Idaho, Kentucky, Missouri, Nebraska, Ohio, South Carolina, Tennessee and Texas—[had] enacted policies that explicitly prohibit Medicaid coverage of gender-affirming care for all ages."[59]

These state bills have already sowed chaos and confusion among transgender and nonbinary people as well as their families. Under the second

52. TRANS LEGIS. TRACKER, *supra* note 46.

53. Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KAISER FAM. FOUND. (Aug. 12, 2025), https://www.kff.org/lgbtq/gender-affirming-care-policy-tracker [https://perma.cc/6NCN-8MLN].

54. *Id.*

55. Courtney Cahill, *How Extreme Anti-Trans Laws Will Backfire for Conservatives*, SLATE (Apr. 30, 2021, 2:45 PM), https://slate.com/news-and-politics/2021/04/anti-transgender-laws-backfire-jane-crow.html [https://perma.cc/RBV3-U6TA].

56. Wilson Y. Lee, J. Nicholas Hobbs, Steven Hobaica, Jonah P. DeChants, Myeshia N. Price & Ronita Nath, *State-Level Anti-Transgender Laws Increase Past-Year Suicide Attempts Among Transgender and Non-Binary Young People in the USA*, 8 NATURE HUM. BEHAV. 2096, 2100 (Nov. 2024).

57. Nada Hassanein, *Here's How State Lawmakers Are Taking Aim at Transgender Adults' Health Care*, STATELINE (Feb. 14, 2025, 5:00 AM), https://stateline.org/2025/02/14/heres-how-state-lawmakers-are-taking-aim-at-transgender-adults-health-care [https://web.archive.org/web/20250814163306/https://stateline.org/2025/02/14/heres-how-state-lawmakers-are-taking-aim-at-transgender-adults-health-care].

58. *Id.*

59. *Id.*

Trump administration, such chaos and confusion have now moved beyond the state level to the federal.

C. THE EXECUTIVE BRANCH AND FEDERAL INTERVENTION

Legal scholars and journalists have already noted that President Trump's actions in his second administration have generated questions about the bounds of executive power. The President has issued "numerous executive orders that pushed at the generally understood limits of presidential power, fired numerous officials and dismantled an agency in clear violation of statutory limits, and frozen spending authorized by Congress without clear authority."[60]

Among the spate of executive orders, several are directly aimed at erasing trans people from public life. Echoing the anti-gender ideology movement, the executive orders repeatedly invoke "gender ideology" as an enemy to be conquered.[61] Executive Order 14168 declares that it is now "the policy of the United States to recognize two sexes, male and female."[62] In line with this reasoning, this Order forces incarcerated trans women to be housed in men's prisons,[63] exposing them to severe risk of sexual assault and abuse.[64] In addition, the Order prevents trans people from changing the gender marker on their identification documents,[65] increasing the likelihood of harassment, denial of services, and assault for trans people whose ID lists a name or gender that does not match their gender presentation,[66] and creating complications for intersex Americans.[67] Such policies effectively

60. Maggie Haberman, Charlie Savage & Jonathan Swan, *Trump Suggests No Laws Are Broken if He's "Saving His Country"*, N.Y. TIMES (Feb. 15, 2025) https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html [https://web.archive.org/web/20251108084039/https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html].

61. *See, e.g.*, Exec. Order No. 14168, 90 Fed. Reg. 8615, 8615–16 (Jan. 20, 2025).

62. *Id.*

63. *Id.* at 8616.

64. Ash Olli Kulak, *Locked Away in SEG "For Their Own Protection": How Congress Gave Federal Corrections the Discretion to House Transgender (Trans) Inmates in Gender-Inappropriate Facilities and Solitary Confinement*, 6 IND. J.L. & SOC. EQUAL. 300, 314 (2018) ("One common tactic among men's prison facilities is 'V-coding,' or placing transgender women in cells with aggressive cisgender male inmates as a form of social control. V-coding is so common that it has become 'a central part of a transwoman's sentence.' "). *See also* Nora Neus, *Trans Women Are Still Incarcerated with Men and It's Putting Their Lives at Risk*, CNN (June 23, 2021, 2:54 PM EDT) https://www.cnn.com/2021/06/23/us/trans-women-incarceration/index.html [https://perma.cc/6EFV-WQBN].

65. Exec. Order No. 14168, 90 Fed. Reg. at 8616.

66. Jody L. Herman & Kathryn K. O'Neill, *Gender Marker Changes on State ID Documents: State-Level Policy Impacts*, UCLA SCH. L. WILLIAMS INST. (June 2021), https://williamsinstitute.law.ucla.edu/publications/gender-marker-policies [https://perma.cc/8TNF-AET2].

67. Jaclyn Diaz, *Trump's Passport Policy Leaves Trans, Intersex Americans in the Lurch*, NPR (Feb. 21, 2025) https://www.npr.org/2025/02/21/nx-s1-5300880/trump-passport-policy-trans-gender-intersex-nonbinary [https://perma.cc/V8KV-RPGW].

remove trans, nonbinary, and intersex people from legal recognition. The President has also furthered attempts to remove trans people from public life through executive orders banning trans people from the military[68] and prohibiting participation of trans women in women's sports.[69]

Of particular significance to this Note is Executive Order 14187, which bans gender-affirming care for trans youth under the age of nineteen.[70] The order characterizes gender-affirming care as "maiming" children,[71] resulting in "chemical and surgical mutilation" through puberty blockers, hormone therapy, and surgical procedures.[72] Through this Order, the President promotes false claims[73] that trans people who receive gender-affirming care will be "trapped with lifelong medical complications, a losing war with their own bodies, and, tragically, sterilization."[74]

The President's authority to issue this order has not been established, and there are serious constitutional questions raised by his attempt to usurp Congress's commerce powers[75] to threaten to cut off federal funding to medical institutions that study and provide gender-affirming care.[76] Nevertheless, some medical institutions have already begun cutting off treatment for trans youth, even if they are located in "sanctuary states" for gender-affirming care.[77] This preemptive compliance "with Trump's executive order stand[s] in direct contradiction to state healthcare policies designed to protect access to care. This is a textbook case of institutions surrendering before a fight even begins, bowing to political pressure despite the lack of any immediate enforcement mechanism."[78]

68. Exec. Order No. 14183, 90 Fed. Reg. 8757, 8757 (Jan. 27, 2025).
69. Exec. Order No. 14201, 90 Fed. Reg. 9279, 9279–80 (Feb. 5, 2025).
70. Exec. Order No. 14187, 90 Fed. Reg. 8771, 8771 (Jan. 28, 2025).
71. *Id.*
72. *Id.*
73. *See* Meredithe McNamara, Christina Lepore, Anne Alstott, Rebecca Kamody, Laura Kuper, Nathalie Szilagyi, Susan Boulware & Christy Olezeski, *Scientific Misinformation and Gender Affirming Care: Tools for Providers on the Front Lines*, 71 J. ADOLESCENT HEALTH 251, 252 (2022).
74. Exec. Order No. 14187, 90 Fed. Reg. at 8771.
75. U.S. CONST. art. I, § 8, cl. 3.
76. *Id.* at § 4. *See also* Francesca Paris & Charlie Savage, *Is That Legal? A Guide to Trump's Big Moves So Far*, N.Y. TIMES: THE UPSHOT (Feb. 20, 2025), https://www.nytimes.com/2025/02/20/upshot/trump-executive-orders-legality.html [https://web.archive.org/web/20250930172023/https://www.nytimes.com/2025/02/20/upshot/trump-executive-orders-legality.html].
77. Anna Betts, *US Hospitals Suspend Healthcare for Transgender Youth After Trump Order*, THE GUARDIAN (Feb. 3, 2025), https://www.theguardian.com/us-news/2025/feb/03/trans-youth-healthcare-hospitals-trump [https://perma.cc/347D-C5VF]; Mira Lazine, *Handful of Hospitals Complying with Trump's Illegal Order to Stop Trans Care Under 19 Years of Age*, ERIN IN THE MORNING (Feb. 2, 2025) https://www.erininthemorning.com/p/handful-of-hospitals-complying-with [https://perma.cc/H2ZK-ANMZ].
78. Lazine, *supra* note 77.

Despite the disappointing acquiescence of these institutions, legal advocates have not hesitated to push back against this executive overreach—hundreds of lawsuits have already been filed challenging the Trump administration's executive orders throughout his second term,[79] including suits challenging Executive Order 14187. Soon after the Order was issued, attorneys general of three states (Washington, Minnesota, and Oregon), joined by three doctors who provide gender-affirming care within these states, sued for declaratory and injunctive relief.[80] The lawsuit alleges violations of the Tenth Amendment and the Fifth Amendment's Equal Protection Clause, arguing that the Order discriminates on the bases of transgender status and sex.[81] Moreover, the complaint draws attention to the drastic overreach of executive power effectuated in the Executive Order, noting that the

> Order also violates constitutional Separation of Powers by usurping Congress's legislative powers and exclusive power of the purse. None of the federal funding that medical institutions . . . receive is conditioned on a promise by the institutions that they would deny gender-affirming care to their patients under [nineteen] years of age. Congress has never imposed such a condition, and it is unconstitutional for the President to do so via executive fiat.[82]

The district court issued a preliminary injunction, and litigation is ongoing.[83] More recently, sixteen state attorneys general, joined by Pennsylvania Governor Josh Shapiro (in lieu of Pennsylvania's Republican attorney general),[84] brought suit against the Order.[85] The Complaint argues that the Order violates states' Tenth Amendment right "to regulate the practice of medicine within their States,"[86] and "coerce[s] hospitals, individual providers, and others to potentially violate Plaintiff States' antidiscrimination and age-of-majority state laws."[87]

Whether the Executive Order survives the legal battle to follow is uncertain. What is certain is that the President has decided to use the force

79. *See Litigation Tracker: Legal Challenges to Trump Administration Actions*, JUST SEC. (Oct. 31, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration [https://perma.cc/C4NB-E3C2].

80. Complaint, Washington v. Trump, No. 2:25-cv-00244-LK (W.D. Wash. Feb. 7, 2025).

81. *Id.*

82. *Id.* at 5–6.

83. Washington v. Trump, 768 F. Supp. 3d 1239 (W.D. Wash. 2025).

84. S. Baum, *16 States (Plus Washington DC) Launch Joint Legal Fight for Trans Health Care*, ERIN IN THE MORNING (Aug. 1, 2025), https://www.erininthemorning.com/p/16-states-plus-washington-dc-launch [https://perma.cc/DZ3T-Y63X].

85. Complaint, Massachusetts v. Trump, No. 1:25-cv-12162, (D. Mass. Aug. 1, 2025).

86. *Id.* at 71.

87. *Id.* at 4.

of the Executive Branch to vilify and erase a small, already vulnerable minority. This erasure is not merely rhetorical—as Butler notes,

> when the law names you in a certain way, cornering you into a box, then the force of language actually does create a new situation: a legal status is conferred. In these contexts, a performative use of language brings about the reality that it names. . . . Indeed, when one is called male when one is a woman, or called female when one is a man, the calling is an effacement of what one is. That effacement is an actual effect, a modification of reality, and its own specific form of violence.[88]

The mere existence of trans people is already seen as grounds for violence: research indicates that "[t]ransgender people are over four times more likely than cisgender people to experience violent victimization, including rape, sexual assault, and aggravated or simple assault."[89] In addition, among the already high rates of sexual abuse among LGBTQ+ youth, trans children report even more disproportionately high rates.[90]

The inflammatory rhetoric that contributes to high rates of victimization is only escalating under this administration as it takes on the mantle of the anti-trans culture war. Trump has used this issue as a partisan wedge, claiming that Democrats "want transgender for everybody, everybody transgender."[91] Nonsensical phrasing aside, the core of this framing is dangerous, especially as it is borne out in executive policy considerations. The Trump DOJ has latched onto claims that trans people are a security threat and has considered measures to ban trans people in the United States from owning guns in response to false narratives of an epidemic of trans mass shooters,[92] a move so extreme that the NRA has publicly expressed

88. Butler, *supra* note 15, at 183.

89. *Transgender People over Four Times More Likely Than Cisgender People to Be Victims of Violent Crime*, UCLA SCH. L. WILLIAMS INST. (Mar. 23, 2021), https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release [https://perma.cc/KZT4-SNDY].

90. *Sexual Violence and Suicide Risk Among LGBTQ+ Young People*, TREVOR PROJECT (Mar. 27, 2024), https://www.thetrevorproject.org/research-briefs/sexual-violence-and-suicide-risk-among-lgbtq-young-people.

91. The White House, *President Trump Holds a Press Conference, Aug. 11, 2025*, YOUTUBE (Aug. 11, 2025), https://www.youtube.com/watch?v=ZtVMoko3mSI [https://perma.cc/7224-CATQ].

92. Evan Perez & Hannah Rabinowitz, *Trump DOJ Is Looking at Ways to Ban Transgender Americans from Owning Guns, Sources Say*, CNN (Sep. 4, 2025), https://www.cnn.com/2025/09/04/politics/transgender-firearms-justice-department-second-amendment [https://perma.cc/F765-PYD2] ("The vast majority of mass attacks in the US have no connection to transgender people. From January 2013 to the present, of the more than 5,700 mass shootings in America (defined as four or more victims shot and killed), five shooters were confirmed as transgender.").

opposition to it.[93] Reporting also indicates that the FBI "is preparing to designate transgender people as 'violent extremists' in the wake of Charlie Kirk's murder."[94] After Kirk's killing, Attorney General Pam Bondi claimed that the left is " 'putting this crazy ideology in our schools,' echoing the growing view of many in Trump's inner circle that a 'cult of gender ideology' is behind an explosion of violence by some as yet unidentified 'radical left,' "[95] despite the complete lack of evidence for such conspiracy theories. As trans people become an increasingly common scapegoat, the United States becomes an increasingly terrifying place for trans people to live.

Regardless of one's personal beliefs about trans people, it is obvious that the anti-trans moral panic has no basis in reality but plays an outsized role in American politics and culture. Moreover, legal scholars should recognize that the Trump administration's actions—issuing executive orders that intrude into domains of power relegated to Congress and threatening the constitutional rights of a minority group with no real justification—have significant constitutional implications. As it stands, the Executive Branch poses a significant threat to the lives of trans people, usurping legislative power to do so.

II. THE LIMITS—AND RISKS—OF JUDICIAL INTERVENTION

This Part will analyze the role of another branch of the federal government in the battle over trans rights: the judiciary. Much of the legal scholarship on trans rights thus far has focused on leveraging existing law and utilizing the courts as the main tool to secure protections. This Part will evaluate those arguments and discuss how these protections are at risk of being gutted under the current Trump administration, significantly limiting the courts' ability to protect trans healthcare. This Part will also discuss the limits of sex discrimination doctrine in achieving large-scale trans rights victories.

93. Hannah Rabinowitz, *NRA Says It Opposes Idea of Banning Transgender Americans from Owning Guns*, CNN (Sep. 5, 2025), https://www.cnn.com/2025/09/05/politics/nra-transgender-gun-control [https://perma.cc/FGN7-LE9Z].

94. Ken Klippenstein, *FBI Readies New War on Trans People*, KLIPNEWS (Sep. 18, 2025), https://www.kenklippenstein.com/p/fbi-readies-new-war-on-trans-people [https://perma.cc/777R-B3RR].

95. *Id.*

A. THE LIMITS OF EXISTING FEDERAL PROTECTIONS

Two major federal statutory schemes have been utilized to argue for trans healthcare protections: Medicaid and the Affordable Care Act.

1. Medicaid

Medicaid[96] is a "system of 'cooperative federalism,' "[97] jointly funded by the federal government and the states to provide healthcare services to the indigent.[98] Medicaid requires states to cover medically necessary care. Within the Medicaid Act itself, "[t]he principal statutory basis for the contention that states cannot eliminate coverage for medically necessary services is the general purpose clause,"[99] which allows Congressional appropriations of funding to enable

> each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of *necessary medical services,* and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.[100]

Beyond the statute, federal regulations require state Medicaid programs to cover certain services for Medicaid recipients. While states cannot "arbitrarily deny or reduce the amount, duration, and scope of a required service . . . solely because of the diagnosis, type of illness, or condition" of the beneficiary,[101] states do retain a certain level of discretion. State agencies "may place appropriate limits on a service based on such criteria as *medical necessity* or on utilization control procedures."[102]

This "medical necessity" criterion has never been officially defined at the federal level for the purposes of Medicaid. Nevertheless, medical necessity "has become a judicially accepted component of the federal legislative scheme."[103] The Supreme Court has acknowledged that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage."[104] As a result, "the medical

96. Codified as 42 U.S.C. § 1396 et seq.
97. Harris v. McRae, 448 U.S. 297, 308 (1980) (citation omitted).
98. EVELYNE P. BAUMRUCKER, SARAH K. BRAUN, ALISON MITCHELL, ANGELA NAPILI & VARUN SARASWATHULA, CONG. RSCH. SERV., R43357, MEDICAID: AN OVERVIEW 3 (2025).
99. Lucinda M. Finley, *State Restrictions on Medicaid Coverage of Medically Necessary Services*, 78 COLUM. L. REV. 1491, 1499 (1978).
100. 42 U.S.C. § 1396-1 (2023) (emphasis added).
101. 42 C.F.R. § 440.230(c) (2024).
102. *Id.* § 440.230(d) (emphasis added).
103. Moore v. Reese, 637 F.3d 1220, 1232 (11th Cir. 2011).
104. Beal v. Doe, 432 U.S. 438, 444 (1977).

necessity of the procedure is the touchstone for evaluating the reasonableness of standards in state Medicaid plans."[105] This could serve as an extremely powerful tool in GAC litigation for Medicaid recipients because the data is overwhelming and certain—GAC is medically necessary.[106] As there are an estimated 276,000 transgender adults enrolled in Medicaid, Medicaid coverage of GAC would be life-saving for a significant number of people.[107]

The debate over the merits of this argument goes back decades. For example, in 1980, the Fifth and Eighth Circuits came to opposing conclusions on state Medicaid coverage of gender-affirming care. In *Pinneke v. Preisser*,[108] the Eighth Circuit held that gender-affirming care could be found to be medically necessary for a Medicaid recipient, and "[t]he decision of whether or not certain treatment or a particular type of surgery is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials."[109] The Fifth Circuit came to a seemingly opposite conclusion in *Rush v. Parham*.[110] The court in *Rush* noted that, although the physician has "the primary responsibility of determining what treatment should be made available to his patients . . . the physician is required to operate within such reasonable limitations as the state may impose." [111] This ruling upheld a Florida law that limited physicians' power by denying coverage for gender-affirming care (which the state believed to be "experimental"), even when the physician approved the treatment.[112] The reason for the differing outcomes essentially came down to the question of whether states could provide evidence that these services were experimental, demonstrating the weight of state discretion in Medicaid cases.[113]

105. Allen v. Mansour, 681 F. Supp. 1232, 1237 (E.D. Mich. 1986).

106. *See, e.g.*, *What Does the Scholarly Research Say about the Effect of Gender Transition on Transgender Well-Being?*, CORNELL UNIV.: WHAT WE KNOW, (2018) https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people [https://perma.cc/KM22-NCQW]; O'Reilly, *supra* note 11.

107. Christy Mallory & Will Tentindo, *Medicaid Coverage for Gender-Affirming Care*, UCLA SCH. L. WILLIAMS INST. (Dec. 2022), https://williamsinstitute.law.ucla.edu/publications/medicaid-trans-health-care [https://perma.cc/6RZP-F2S4].

108. Pinneke v. Preisser, 623 F.2d 546, 550 (8th Cir. 1980).

109. *Id.*

110. Rush v. Parham, 625 F.2d 1150, 1154–56 (5th Cir. 1980).

111. *Id.* at 1155–56.

112. *Id.* at 1154–55.

113. Gene P. Schultz & Charles A. Parmenter, *Medical Necessity, AIDS, and the Law*, 9 ST. LOUIS U. PUB. L. REV. 379, 397–98 (1990) ("The *Pinneke* court was not confronted with the question of how the treating physician's discretion might be circumscribed in a case where the record revealed a supportable state determination that a given medical procedure is experimental.").

In the following decades, successful arguments for Medicaid coverage of GAC have often rested on the fact that there is broad medical consensus in favor of GAC, and these services should thus be considered medically necessary. Some have even recognized that past decisions denying coverage for gender-affirming care lacked the medical knowledge now available.[114] These cases demonstrate that an understanding of medical necessity that incorporates medical consensus is vital to protecting gender-affirming care.

However, not all courts have this understanding. Because of the weight of a state's discretion in defining medical necessity, a state's characterization of GAC services as "experimental" could sink the justification for Medicaid coverage of GAC, especially in front of judges who do not recognize the stakes of treating gender dysphoria. At least eleven states have instituted policies excluding trans healthcare for all ages from their Medicaid policies, [115] indicating that deference to state discretion is becoming increasingly risky. So, while the "medical necessity" argument has been successful in securing GAC in many cases, it is not a surefire solution to protecting Medicaid coverage of these services.

This is especially true under the new Trump administration and its influence on Congress. Precedent set by the Supreme Court in *Harris v. McRae* weakens the medical necessity argument. [116] There, the Court considered whether state Medicaid programs were required to cover the cost of medically necessary abortions when the state would not receive federal reimbursements due to the Hyde Amendment, which prohibited the use of federal funds to pay for abortion services.[117] The Court ruled that states had no such obligation, despite the plaintiffs' argument that that the state's refusal to pay for medically necessary abortions violated the Medicaid statute as well as their Due Process rights under *Roe v. Wade*.[118] Rejecting these arguments, the Court held that "absent an indication of contrary legislative intent by a subsequent Congress, Title XIX does not obligate a participating state to pay for those medical services for which federal

114. *See, e.g.*, Fain v. Crouch, 618 F. Supp. 3d 313, 331 (S.D.W. Va. 2022), *aff'd sub nom.* Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024) (recognizing that previous court decisions that denied gender-affirming care lacked "the robust medical evidence in the record that this Court has before it"); *see also* Flack v. Wis. Dep't of Health Servs., 395 F. Supp. 3d 1001, 1021 (W.D. Wis. 2019) ("[T]he medical consensus is that gender-confirming treatment, including surgery, is accepted, safe, and effective in the treatment of gender dysphoria . . . the denial of Medicaid benefits for needed medical treatment completely fails to protect the public health.").

115. *Medicaid Coverage of Transgender-Related Health Care*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/medicaid [https://perma.cc/ER63-KCHL].

116. Harris v. McRae, 448 U.S. 297, 309 (1980).

117. *See* Departments of Labor and Health, Education, and Welfare Appropriation Act, Pub. L. No. 94-439, § 209, 90 Stat 1418, 1434 (1977).

118. *Harris*, 448 U.S. at 312–18.

reimbursement is unavailable," so the exclusion of coverage for even medically necessary abortions did not violate Medicaid regulations.[119]

Members of Congress are exploring the possibility of creating an equivalent of the Hyde Amendment for trans healthcare. The House Appropriations Committee's proposed Fiscal Year 2026 bill for the Labor, Health and Human Services, Education, and Related Agencies Subcommittee included language blocking the use of funds for "for any social, psychological, behavioral, or medical intervention performed for the purposes of intentionally changing the body of an individual (including by disrupting the body's development, inhibiting its natural functions, or modifying its appearance) to no longer correspond to the individual's biological sex."[120] The scope of this provision is wide-ranging, and "[r]ead broadly, the provision could shutter entire hospital programs that serve transgender patients and, at minimum, severely disrupt care for adults who rely on Medicaid, Medicare, and other federally funded services."[121] Should a provision like this pass, states will be free to argue that they are not obligated to cover GAC services under *Harris*.

President Trump has wielded his influence on this matter, using anti-trans provisions as a key point in his messaging on government funding debates in Congress.[122] Another issue is posed by President Trump's Executive Order restricting GAC for transgender youth.[123] The Executive Order is also analogous to the Hyde Amendment in that it seeks to halt federal funding for GAC.[124] Whether this element of President Trump's Executive Order will stand in the coming years is another unanswered question, especially because the President does not have Congress's Commerce Clause authority. Nonetheless, in an era where the Supreme Court is expanding the Executive's power beyond its traditionally understood limits,[125] the Order could very well survive and foreclose the medical necessity argument for trans healthcare in Medicaid litigation.

119. *Id.* at 309.

120. H.R. 5304, 119th Cong. § 244 (2025).

121. Erin Reed, *House HHS Appropriations Bill Would Devastate Trans Adult Healthcare Nationwide*, ERIN IN THE MORNING (Sep. 8, 2025), https://www.erininthemorning.com/p/house-hhs-appropriations-bill-would [https://perma.cc/3TC7-UGXP].

122. Erin Reed, *Trump Digs in on Anti-Trans Provisions in Shutdown Fight Message*, ERIN IN THE MORNING (Sep. 23, 2025), https://www.erininthemorning.com/p/trump-digs-in-on-anti-trans-provisions [https://perma.cc/KY5M-T6D5].

123. Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

124. Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

125. Catherine Lewis, *The Uncertain Future of the Separation of Powers*, REGUL. REV. (Aug. 24, 2025), https://www.theregreview.org/2025/08/24/spotlight-the-uncertain-future-of-the-separation-of-powers [https://perma.cc/U7TY-9CJV].

2. The Affordable Care Act

Another major federal legislative scheme that has been used to strike down bans on GAC is the Affordable Care Act ("ACA").[126] It has been argued that GAC bans violate Section 1557, the anti-discrimination provision of the Affordable Care Act. This provision states that:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29 [(The Rehabilitation Act)], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.[127]

Section 1557 thus incorporates the protections of other anti-discrimination laws, including Title IX and its prohibition on sex discrimination.[128] Prior to President Trump's second term, there had already been significant back and forth over the definition of sex discrimination under this provision. Under the Biden administration, the Department of Health and Human Services ("HHS") in 2024 issued a rule "codifying that Section 1557's prohibition against discrimination based on sex includes LGTBQI+ patients."[129] This HHS action sought to reinstate and expound upon an Obama-era HHS rule that included gender identity under the umbrella of sex discrimination,[130] but was removed in 2020 by the HHS under the Trump administration.[131] Three federal courts postponed the

126. 42 U.S.C. § 18116.

127. 42 U.S.C. § 18116(a).

128. 20 U.S.C. § 11681.

129. *HHS Issues New Rule to Strengthen Nondiscrimination Protections and Advance Civil Rights in Health Care*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Apr. 26, 2024), https://www.hhs.gov/about/news/2024/04/26/hhs-issues-new-rule-strengthen-nondiscrimination-protections-advance-civil-rights-health-care.html [https://web.archive.org/web/20241223223823/https://www.hhs.gov/about/news/2024/04/26/hhs-issues-new-rule-strengthen-nondiscrimination-protections-advance-civil-rights-health-care.html].

130. Nondiscrimination in Health Programs and Activities, 8 Fed. Reg. 31376, 31387 (proposed May 18, 2016) (to be codified at 45 C.F.R. pt. 92) ("[D]iscrimination on the basis of sex further includes discrimination on the basis of gender identity.").

131. Nondiscrimination in Health Programs and Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37163 (June 19, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92,

effective date of the provisions or prohibited the full implementation of the 2024 rule.[132]

It follows that federal agencies cannot be relied upon as a stable protector of healthcare rights. Although agencies are a function of the power-sharing system between Congress and the President, as part of the executive branch, they are subject to the priorities and agendas of any given president. The trend towards the weakening of federal agencies[133] is further indication that, when important rights are at stake, waiting for an agency to create and implement protections—which could be easily upended when a new president comes into office—is a precarious strategy.

Irrespective of HHS guidelines, the ACA has been successfully used to secure trans rights in litigation, namely as a result of the 2020 Supreme Court decision in *Bostock v. Clayton County*.[134]

B. THE SHIFTING BORDERS OF SEX DISCRIMINATION LAW: *BOSTOCK* AND THE ACA

Bostock v. Clayton County has sparked national debate over the relationship between LGBTQ+ rights and protections against sex discrimination.[135] *Bostock* was a sex discrimination case under Title VII of the Civil Rights Act of 1964, which bans discrimination in employment.[136] In this case, gay and trans employees brought suit when they were fired after their respective employers learned of the employees' sexual orientation or transgender status.[137] The Court held that firing an employee for being gay

147, 155, 156).

132. Tennessee v. Becerra, 739 F. Supp. 3d 467 (S.D. Miss. July 3, 2024); Fla. v. Dep't of Health & Hum. Servs., No. 8:24-CV-1080-WFJ-TGW, 2024 WL 3537510 (M.D. Fla. July 3, 2024); Texas v. Becerra, No. 6:24-CV-211-JDK, 2024 WL 3297147 (E.D. Tex. July 3, 2024), modified on recons., No. 6:24-CV-211-JDK, 2024 WL 4490621 (E.D. Tex. Aug. 30, 2024) (clarifying that the nationwide stay of the 2024 Rule applies only to the sections relating to sex and gender identity). *See also* MaryBeth Musumeci, *New Regulations Counter Discrimination in Health Coverage and Care but Are Delayed by Courts*, THE COMMONWEALTH FUND (July 10, 2024) https://www.commonwealthfund.org/blog/2024/new-regulations-counter-discrimination-health-coverage-and-care-are-delayed-courts [https://web.archive.org/web/20251016131718/https://www.commonwealthfund.org/blog/2024/new-regulations-counter-discrimination-health-coverage-and-care-are-delayed-courts].

133. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (overturning *Chevron* deference); Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court,* N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html [https://web.archive.org/web/20250914061419/https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html].

134. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

135. *Id.*

136. 42 U.S.C. § 2000(e).

137. *Bostock*, 140 S. Ct. at 1737–38.

or transgender constitutes sex discrimination and thereby violates Title VII.[138]

The *Bostock* majority opinion focuses on a purely textualist, "formal, sterile, individualistic concept of 'but-for' causation,"[139] never touching explicitly upon gender identity per se. The opinion—written, unexpectedly, by Justice Gorsuch—notes that there is a dispute between the parties as to whether the term "sex" "reach[es] at least some norms concerning gender identity and sexual orientation. But . . . we proceed on the assumption that *'sex' . . . refer[s] only to biological distinctions between male and female*."[140] The majority thus operates on a binary definition of sex, choosing not to directly address the term "gender identity."

It is vital to note that *Bostock* did not materialize from thin air—there is a body of caselaw considering disparate treatment for gender-nonconformity as a form of sex-stereotyping, and, therefore, as sex discrimination. In the 1989 case *Price Waterhouse v. Hopkins*, the Supreme Court found that sex-stereotyping is a form of sex discrimination, [141] establishing "[s]ex equality's crown jewel," [142] the anti-stereotyping principle, which asserts the "idea that sex classifications are illegal when they force people to conform to sex roles, like the homemaker wife or the breadwinning husband."[143] The Court noted, for example, that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*."[144] Here, as Justice Brennan observed, basing a decision—in this case, a hiring decision—on perceived flaws in the performance of gender is sex discrimination. As a district court later explained, "*Price Waterhouse* shows that gender-stereotyping discrimination *is* sex discrimination *per se*."[145]

The implications for transgender people are apparent in a number of Title VII cases that arose from *Price Waterhouse*.[146] In 2016, a federal

138. *Id.* at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.").

139. Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1702 (2023).

140. *Bostock*, 140 S. Ct. at 1739 (emphasis added).

141. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (in which a female employee was denied the opportunity to become a partner at the accounting firm and brought a Title VII claim, alleging that she was denied the promotion in part because she was seen as overly aggressive for a woman).

142. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1070 (2023).

143. *Id.* at 1097–98 (2023).

144. *Price Waterhouse*, 490 U.S. at 250 (emphasis added).

145. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 522 (D. Conn. 2016).

146. *Id.* at 522–23 ("The acknowledgement in *Price Waterhouse* that discrimination by means of

district court judge evaluated some of these cases (including decisions from the Ninth, Sixth, and Eleventh Circuits),[147] ultimately concluding that,

> In some usages, the word "sex" can . . . mean the distinction between male and female, or the property or characteristic (or group of properties or characteristics) by which individuals may be so distinguished. Discrimination "because of sex," therefore, is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.[148]

"Sex stereotyping arguments rooted in *Price Waterhouse* and its progeny have thus far played the most significant doctrinal role in convincing courts to recognize transgender discrimination as sex discrimination."[149] *Bostock* follows this line of cases,[150] bringing an undercurrent in sex discrimination law up to the surface: discrimination on the basis of gender non-conformity is a facet of sex discrimination. Regardless of its normative implications, the ruling was clear: "discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[151]

gender stereotyping is discrimination 'because of sex' under Title VII eventually led to a significant shift in the direction of decisions examining alleged discrimination on the basis of transgender identity.").

147. *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("What matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one. Thus, under *Price Waterhouse,* 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender."); Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (criticizing decisions that exclude trans people from Title VII protections, as "these courts superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification"); Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); Macy v. Holder, EEOC Appeal No. 120120821 (Apr. 20, 2012) ("When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' . . . In . . . these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that 'an employer may not take gender into account in making an employment decision.' ") (internal citations omitted). *See also* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009) ("[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women.").

148. *Fabian*, 172 F. Supp. 3d at 526.

149. Annie Schuver, *Scrutinizing the Bathroom Binary: Equal Protection Theories for Nonbinary Students*, 122 MICH. L. REV. 1519, 1526 (2024).

150. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) ("Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.' ") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).

151. *Id.* at 1747.

The next consideration, then, is whether *Bostock*'s understanding of sex discrimination applies to the ACA. For now, this is an open question. In *Skrmetti*, the Court declined to extend the *Bostock* analysis to the interpretation of a Tennessee statute banning gender-affirming care for trans minors and deferred the question of the scope of *Bostock*'s reasoning to a later date.[152] Nevertheless, many courts have extended *Bostock*'s logic, and there are obvious reasons for doing so, as discussed below. The majority in *Bostock* itself clarifies that questions beyond hiring decisions "are questions for future cases, not these," which has does nothing to bar courts from applying the analysis thus far.[153]

However, the application of *Bostock* outside of the Title VII context has been a major point of contention between the lower courts, and the analysis of these approaches is imperative to understanding the current state of federal trans healthcare protections. As stated by the Western District of Washington,

> [A] plaintiff states a viable claim for sex discrimination under Title IX, and by extension the ACA's anti-sex discrimination provision, by plausibly alleging: (1) the defendant is a healthcare program that receives federal financial assistance, contracts or credits; (2) the plaintiff was excluded from participation in, denied the benefits of, or subjected to discrimination in the provision of healthcare services; and (3) the latter occurred on the basis of sex.[154]

Because the ACA incorporates Title IX protections, the link between Title VII jurisprudence and the ACA is neither tenuous nor novel. "The entire legal theory of sexual harassment," one of the most significant strands of sex discrimination law,[155] "has been developed in the context of Title VII," originating in the issue of quid pro quo sexual harassment in hiring and firing decisions.[156] Federal courts have long used the abundance of sex discrimination case law under Title VII in assessing Title IX claims,[157] including federal appellate courts. For example, the Tenth Circuit reasoned in 1987 that, "[b]ecause Title VII prohibits the identical conduct prohibited

152. United States v. Skrmetti, 145 S. Ct. 1816, 1833–34 (2025).

153. *Bostock*, 140 S. Ct. at 1753.

154. C.P. v. Blue Cross Blue Shield of Ill., 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021).

155. Sexual harassment is "a subspecies of sex discrimination," and "[s]exual harassment law derives from Title VII's prohibition on discrimination against any individual 'because of such individual's . . . sex.' . . . Thus, to prevail on a sexual harassment claim, a woman must show she was harassed because she is female." Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 525, 529 (2013). *See also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that same-sex harassment is also actionable under Title VII).

156. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993).

157. *Id.*

by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards."[158]

Continuing this trend, several courts have extended *Bostock*'s Title VII analysis of sex discrimination to various contexts, such as Title IX, Equal Protection, and Due Process claims,[159] including appellate courts. The Tenth Circuit has used "*Bostock*'s commonsense explanation for how to detect a sex-based classification" in evaluating Equal Protection and Due Process claims against an Oklahoma law that prevented transgender individuals for changing the sex listed on their birth certificates.[160] The court found no issue with *Bostock*'s narrow holding, reasoning that the *Bostock* "Court's focus on Title VII and the issue before it suggests a proper exercise of judicial restraint, not a silent directive that its reasoning about the link between homosexual or transgender status and sex was restricted to Title VII."[161] Four circuit courts have mirrored the Tenth Circuit's reasoning in various Title IX cases: the Fourth Circuit stated in 2020 that "[a]lthough *Bostock* interprets Title VII of the Civil Rights Act of 1964, . . . it guides our evaluation of claims under Title IX."[162] Since 2020, the Seventh, Eighth, and Ninth circuits have also approved the use of *Bostock*'s sex discrimination analysis in evaluating Title IX claims.[163]

Can this analysis be applied to the Affordable Care Act? So far, the only federal appellate court that has done so is the Fourth Circuit; in *Kadel v. Folwell*, a case from April 2024, the Fourth Circuit held that state health programs must provide coverage for gender-affirming surgeries.[164] The

158. Mabry v. State Bd. of Cmty. Colleges & Occupational Educ., 813 F.2d 311, 317, n.6 (10th Cir. 1987). *See also* Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

159. *See, e.g.*, D.T. v. Christ, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021); Hammons v. Univ. of Md. Med. Sys. Corp., 649 F. Supp. 3d 104, 116 (D. Md. 2023); LeTray v. City of Watertown, 718 F. Supp. 3d 192, 205 (N.D.N.Y. 2024); Doe v. Ladapo, 676 F. Supp. 3d 1205, 1217 (N.D. Fla. 2023); Tirrell v. Edelblut, 748 F. Supp. 3d 19, 26–27 (D.N.H. 2024).

160. Fowler v. Stitt, 104 F.4th 770, 790–91 (10th Cir. 2024).

161. *Id.* at 790.

162. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020) (holding that a school district's policy of excluding transgender students from their preferred bathrooms constitutes sex discrimination).

163. A.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023), *cert. denied sub nom*. Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024); Brandt v. Rutledge, 47 F.4th 661, 667 (8th Cir. 2022) (affirming a district court's decision that relied on *Bostock*'s sex discrimination analysis in Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021)); Hecox v. Little, 104 F.4th 1061, 1079–80 (9th Cir. 2024).

164. Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024).

court directly stated that *Bostock* provides the appropriate standard, observing that "there is nothing in *Bostock* to suggest the holding was that narrow" so as to only apply to employment.[165]

The *Kadel* court employed an analogy Justice Gorsuch used in *Bostock*, a thought experiment in which an interviewer requires the applicant to tick a box on the application indicating whether they are gay or transgender, redacting any indication of the applicant's sex. In this scenario, even when the employer does not know what the applicant's sex is, there is still sex discrimination because

> There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex . . . . Likewise, . . . [b]y discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.[166]

The Fourth Circuit reshaped this analogy and applied it to the healthcare context. At issue in *Kadel* is North Carolina's health program, which covers surgical procedures for cisgender people, but does not cover those same procedures for transgender people.[167] The court gave various examples, including that of a patient seeking vaginoplasty, a situation in which the patient's sex is not readily apparent because the procedure is used by both transgender and cisgender people.[168] Under the state's policy, the coverage decision cannot be made "without knowing whether the vaginoplasty is to treat gender dysphoria—in other words, whether the patient was assigned male at birth."[169] The decision, like the interviewer's decision in Justice Gorsuch's thought experiment, hinges on the person's sex. Ultimately, the state law at issue

> is textbook sex discrimination, for two reasons. For one, we can determine whether some patients will be eliminated from candidacy for these surgeries solely from knowing their sex assigned at birth. And two, conditioning access to these surgeries based on a patient's sex assigned at

165. *Id*. at 164.

166. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746 (2020).

167. *Kadel*, 100 F.4th at 133–34 ("For example, the Program covers mastectomies to treat cancer, but not to treat gender dysphoria; breast-reduction surgery to treat excess breast tissue in cisgender men, but not to treat gender dysphoria in transgender men; and chest-reconstruction surgery for cisgender women post-mastectomy, but not for gender dysphoria in transgender women.").

168. *Id*. at 153.

169. *Id*. at 154.

> birth stems from gender stereotypes about how men or women should present.[170]

While *Kadel* can serve as a model for courts to use *Bostock*'s understanding of sex discrimination in ACA cases, the Supreme Court has thrown a wrench in the works by vacating and remanding the case back to the Fourth Circuit in light of its ruling in *Skrmetti*.[171] The Fourth Circuit could very well come to the same conclusion as its original ruling, but uncertainty remains. Nevertheless, *Kadel* is, in many ways, the culmination of decades of evolving interpretations of sex discrimination law, trending towards the recognition—whether intentional or not—of the role of gender identity in sex discrimination. When we interpret the ACA's prohibition on sex discrimination to include discrimination on the basis of gender identity and transgender status, many of the legal arguments for gender-affirming care bans collapse. However, the key issue here is just that—interpretation. It comes down to individual judges and justices to interpret sex discrimination law in this manner, and this has led to a significant variation of outcomes in gender-affirming care litigation.

Not every court has applied *Bostock* in trans rights cases. The Eleventh Circuit, for example, argued that *Bostock* should not apply in a Title IX case regarding the exclusion of transgender students from school bathrooms that aligned with their gender identity.[172] The court did not interpret *Bostock*'s ruling as equating sex with gender identity, as "the Supreme Court in *Bostock* actually 'proceed[ed] on the assumption' that the term 'sex,' as used in Title VII, 'refer[ed] only to biological distinctions between male and female.' "[173] The majority even characterizes "reading 'sex' to include 'gender identity' " as detrimental to Title IX litigation, claiming that it "would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity."[174]

The argument that *Bostock*'s conception of sex does not extend to gender identity is unconvincing. The crux of the argument for linking transgender status to sex discrimination is the choice to fire someone "for *traits or actions* it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[175] For example, if "an employer who fires a woman,

170. *Id.* at 153 (citing *Bostock*, 140 S. Ct. at 1742–49).
171. Folwell v. Kadel, 145 S. Ct. 2838 (2025).
172. Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 811 (11th Cir. 2022).
173. *Id.* at 813 (citation omitted).
174. *Id.* at 814.
175. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (emphasis added).

Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine . . . in *both* cases the employer fires an individual in part because of sex."[176] Discrimination on the basis of gender non-conformity is thus an inherent aspect of sex discrimination, reflecting the long-established anti-stereotyping principle in sex discrimination doctrine.

Interestingly, the dissenters in *Bostock* seemed to base their arguments on the belief that the majority is equating transgender status with gender identity. Justice Alito, for example, mentioned the term "gender identity" forty-eight times in his dissent, repeatedly characterizing the majority's opinion as extending Title VII to gender identity.[177] Such catastrophizing indicates the fear—and understanding—that the Court has recognized gender identity as a facet of sex.

Nonetheless, the Eleventh Circuit has repeatedly insisted that *Bostock* applies only to Title VII and the employment context. In a 2023 case brought against Alabama for its ban on gender-affirming care for minors, the Eleventh Circuit declined to extend the *Bostock* analysis to the plaintiffs' Equal Protection claims.[178] In doing so, the court referenced the Sixth Circuit's decision earlier that year in *L.W.* ex rel. *Williams v. Skrmetti,* which upheld Tennessee's ban on gender-affirming care for minors.[179] The Sixth Circuit explicitly stated that *Bostock*'s "reasoning applies only to Title VII."[180] The Sixth Circuit had already established this position in 2021[181] and reiterated it in 2024.[182] It seemed the Eleventh Circuit almost had a change of heart in 2024 when it used *Bostock* to rule against the exclusion of gender-affirming care from insurance coverage, but this case was granted rehearing en banc, and the original decision was subsequently vacated.[183]

176. *Id.* at 1741.

177. *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting) ("By proclaiming that sexual orientation and gender identity are 'not relevant to employment decisions,' the Court updates Title VII to reflect what it regards as 2020 values."); *Id.* at 1778 ("What the Court has done today—interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.").

178. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1229 (11th Cir. 2023).

179. L. W. v. Skrmetti, 83 F.4th 460, 491 (6th Cir. 2023), *aff'd sub nom.* United States v. Skrmetti, 145 S. Ct. 1816, 1837 (2025).

180. *L.W.*, 83 F.4th at 484.

181. Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

182. Gore v. Lee, 107 F.4th 548, 556 (6th Cir. 2024) (holding that Tennessee's refusal to allow transgender people to change the biological sex on their birth certificates did not constitute sex discrimination, and *Bostock* does not apply).

183. Lange v. Houston Cnty., 101 F.4th 793, 798–99 (11th Cir. 2024), *reh'g en banc granted, vacated*, 110 F.4th 1254 (11th Cir. 2024).

Aligning with the Sixth and Eleventh Circuits, several district courts have declined to extend *Bostock* beyond the Title VII context.[184] This was also a major component of the reasoning behind delaying the 2024 HHS rule that would have included gender identity under sex discrimination.[185] For example, a Florida district court granted an injunction against the HHS Rule, stating that the "Eleventh Circuit has spoken on this point, clearly: Title IX does not address discrimination on the basis of gender identity."[186] Whether the Supreme Court will validate these arguments is uncertain. Given the Supreme Court's ambivalence on *Bostock* and its affirming of the Sixth Circuit's ruling in *Skrmetti*,[187] it could very well refuse to extend its reasoning to the ACA. However, this refusal would be inconsistent with the crux of *Bostock*'s reasoning: a textualist approach to Title VII.

Common criticisms of expanding the scope of *Bostock* fall away when considering the ACA context. As discussed above, the link between Title VII and Title IX analysis is well-established, and the ACA explicitly incorporates Title IX's prohibition on sex discrimination. Justice Thomas's contention in his *Skrmetti* concurrence that *Bostock* cannot be applied to constitutional questions[188] is irrelevant: interpreting the ACA is a matter of statutory analysis, not Fifth or Fourteenth Amendment equal protection doctrine. Justice Gorsuch's purely textualist approach can just as easily be applied to Title IX as it can to Title VII. The question of whether sex encompasses gender identity are equivalent is also irrelevant: under a but-for causation standard, sex assigned at birth is enough to satisfy the analysis.

Nevertheless, in light of the current legal landscape, arguments under the ACA could be weakened or potentially shut down altogether. While both the ACA and Medicaid have historically been used to secure trans healthcare protections—and could very well be used to do so in the future—these paths are increasingly narrowing.

184. *See, e.g.*, Neese v. Becerra, 640 F. Supp. 3d 668, 676 (N.D. Tex. 2022) ("*Bostock* does not purport to interpret Section 1557, Title IX, or any other non-Title VII statute . . . *Bostock* decided only what *Bostock* decided."); Poe v. Drummond, 697 F. Supp. 3d 1238, 1251 (N.D. Okla. 2023); Texas v. Cardona, 743 F. Supp. 3d 824, 880 (N.D. Tex. 2024) ("*Bostock* stated without equivocation that its holding only applies to Title VII.").

185. *See* discussion *supra* Section II.A.2.

186. Florida. v. Dep't of Health & Hum. Servs., 739 F. Supp. 3d 1091, 1104 (M.D. Fla. 2024) (citing Adams v. Sch. Bd. of St. John's Cnty., 57 F.4th 791, 812–15 (11th Cir. 2022)). *See also* Texas v. Becerra, 739 F. Supp. 3d 522, 535 (E.D. Tex. 2024) ("HHS contends that the Supreme Court's 2020 decision in *Bostock* compels its interpretation of Title IX to prohibit discrimination on the basis of 'gender identity' and 'sexual orientation.' Not so. *Bostock*'s holding was limited and clear.") (citation omitted).

187. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

188. *Id.* at 1839 (Thomas, J., concurring) ("I would make clear that, in constitutional challenges, courts need not engage *Bostock* at all.").

C. IS SEX EQUALITY ENOUGH? TRANS RIGHTS UNDER EQUAL PROTECTION

Much of the existing scholarship on trans rights focuses on establishing that LGBTQ+ discrimination is sex discrimination, and rightfully so. Sex discrimination jurisprudence is an already existing framework doctrinally consistent with LGBTQ+ equality, with precedent favorable to trans rights cases, as seen in the above discussion on *Bostock*. However, as the previous Section demonstrates, there is significant room for judges to inject their own biases in deciding to apply *Bostock*. For advocates bringing constitutional claims, there is even further risk of anti-trans animus to poison the legal reasoning. This Section discusses how sex discrimination doctrine under an Equal Protection framework can be misapplied or outright ignored in trans rights cases, underscoring the limits of sex equality doctrine in protecting trans rights.

1. When Is Sex Discrimination Doctrine (Mis)applied?

In assessing how courts deploy sex discrimination analysis, it is worth discussing the definitional debates over the term "sex." One of President Trump's recent Executive Orders, for example, states that sex is defined by "an individual's immutable biological classification as either male or female," and states that the government will only "recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality."[189]

Biologists, medical professionals, and historians, however, dispute this aforementioned "fundamental and incontrovertible reality." The Executive Order fails to take into account the existence of intersex people, who have "innate bodily traits that . . . cause a person's chromosomes, gonads or other internal reproductive organs, genitals, and/or hormone function to differ from characteristics that are 'typically' male or female."[190] The manifestations of intersex conditions vary widely[191] and are not always obvious or consistently apparent. For example, "[s]ome intersex traits—such as atypical external genitalia—are apparent at birth. Others—such as gonads or chromosomes that do not match the expectations of the assigned sex—manifest later in life, such as around puberty."[192] Intersex people constitute

189. Exec. Order No. 14168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025).

190. *US: Anti-Trans Bills Also Harm Intersex Children*, HUM. RTS. WATCH (Oct. 26, 2022), https://www.hrw.org/news/2022/10/26/us-anti-trans-bills-also-harm-intersex-children [https://perma.cc/2J3S-8SKL].

191. Alice D. Dreger & April M. Herndon, *Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action,* 15 GLQ: J. LESBIAN & GAY STUD. 199, 210 (2009) [https://perma.cc/73B6-6G2Q].

192. *"I Want to Be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children*

around 1.7% of the population, although some estimates place the number closer to 4%—because components of sex such as chromosomes, genes, and hormones cannot be evaluated unless testing occurs, many do not realize they are intersex unless they seek such testing as a part of other medical treatment, so the number of intersex people may be significantly undercounted.[193] While some see intersex people as "statistical outliers" that have no bearing on how we conceptualize sex categories,[194] this framing is inaccurate—rather than being fringe cases, intersex people exemplify the spectrum upon which sex is constructed for everyone. Nor is intersex simply a "third" box to neatly funnel "outliers" into. The vast variation in intersex conditions and the physical manifestations of these conditions indicate that "intersex is not a discrete biological category."[195]

Intersex people are often cited as an indication that sex is socially constructed because the definition of intersex itself is socially constructed. The medical field views intersex as "variations in congenital sex anatomy that are considered atypical for females or males. The definition of intersex is thus context specific. What counts as an intersex phallus, for example, depends on local standards for penises and clitorises."[196] The treatment of intersex people demonstrates that sex categories are informed by beliefs and norms. However, asserting "that sex is 'socially constructed' does not mean that biological sex differences do not exist or do not matter. It simply conveys that our definition of sex, and the way that we categorize people into sexes, is determined by society and our assumptions about how the world works."[197]

It is, of course, unlikely that most politicians and judges are interested in sitting down and carefully pondering the social construction of sex. The purpose of this discussion is to demonstrate that, regardless of normative claims, both objective science and historical reality show that efforts to pin

in the US, HUM. RTS. WATCH (July 25, 2017) https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us [https://perma.cc/73B6-6G2Q].

193. Fradella, *supra* note 27, at 293; *see also* Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 290 (Feb. 2015) ("Many people never discover their condition unless they seek help for infertility, or discover it through some other brush with medicine. Last year, for example, surgeons reported that they had been operating on a hernia in a man, when they discovered that he had a womb. The man was [seventy], and had fathered four children.").

194. Kathleen Stock, *Changing the Concept of "Woman" Will Cause Unintended Harms*, THE ECONOMIST (July 6, 2018), https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms [https://web.archive.org/web/20250602022906/https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms].

195. Dreger & Herndon, *supra* note 191, at 217.

196. *Id.* at 200.

197. Julia Serano, *Transgender People and "Biological Sex" Myths*, MEDIUM (July 17, 2017), https://juliaserano.medium.com/transgender-people-and-biological-sex-myths-c2a9bcdb4f4a [https://perma.cc/XRB3-236U].

down a definition of "biological sex" are inherently messy, misguided, and inaccurate. Moreover, these messy, misguided, and inaccurate efforts have material consequences in how they are applied and interpreted in the law.

The next question, then, is how sex is or should be defined in the law. Should we define sex based on paperwork? Many states do: twenty-two states and Washington, D.C. allow "residents to mark M, F, or X on their driver's license," and sixteen states and Washington, D.C. allow "residents to mark M, F, or X on their birth certificates."[198] These states promote the idea that gender identity is "the primary indicator of legal sex."[199] However, not all states agree—some focus on binary, biological indicators of sex. Definitions based in biological sex that identify specific physical traits are deeply misguided, as biologists do not think there is " 'one biological parameter that takes over every other parameter.' "[200] Nevertheless, many state "laws regulate gender and define sex as only male or female, typically based on a person's presumed reproductive anatomy, chromosomes, hormones, or other physical characteristics at birth."[201] At least twelve states regulate sex under these laws, creating "dangerous implications for transgender people when it comes to bathrooms, identity documents, and other areas of law or policy."[202] Laura Lane-Steele identifies the contours of such " 'sex defining laws,' " which

> are a product of state legislatures and school boards, among other legal actors, codifying what they understand to be the true meaning of sex. For the most part, these laws define sex based on some combination of sex assigned at birth (SAAB), genitalia, chromosomes, and reproductive anatomy. Under these laws, people assigned male at birth (AMAB), who have penises, testes, and XY chromosomes are male, while people assigned female at birth (AFAB), who have vaginas, ovaries, uteruses, and XX chromosomes are female. These definitions are deployed to determine if someone is male (M) or female (F) for bathroom access, participation on single-sex sports teams, and eligibility for sex marker changes, among other things.[203]

Such laws are not necessarily a barrier to favorable rulings. In bathroom bill cases involving these laws, for example, courts have ruled that trans-

198. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (2025), https://www.lgbtmap.org/equality-maps/identity_documents [https://perma.cc/GXB2-BQF8].

199. Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. REV. 335, 374 (2024).

200. Ainsworth, *supra* note 193, at 291.

201. *Regulating Gender to Allow Discrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/nondiscrimination/defining_sex [https://perma.cc/RP76-C6AK].

202. *Id.*

203. Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 CAL. L. REV. 259, 262 (2024).

exclusionary bathroom policies discriminate on the basis of sex.[204] Yet, Lane-Steele points out that although these courts came to the right conclusions, they failed to explain why the state's definition of sex does not comport with the state's purported justification for the exclusion.[205] As a result, "they are of limited use in future sex-defining equal protection cases."[206]

To remedy this, Lane-Steele argues that courts should apply "a contextual approach to sex applied to an equal protection challenge to a sex-defining law" in which "a court would identify the precise model of sex the state is using . . . . Once the court has identified how exactly the state is defining sex, it can then square up the question presented, using the state's exact definition of sex as the relevant means" to determine whether the state law substantially relates to the state's interest and should survive intermediate scrutiny.[207] However, Lane-Steele also acknowledges that, because the decision to apply a contextual approach requires "rejection of naturalized and pre-legal definitions of sex . . . some conservative judges will not adopt it."[208] As she puts it, "[a] contextual sex analysis is off the table for those committed to certain pre-existing and inflexible views about sex and who cannot suspend their gender ideologies when doing their jobs. Indeed, most, if not all pro-trans arguments are probably off the table for these judges."[209] Judges, then, cannot be fully relied upon to accurately identify and evaluate how states are deploying definitions of sex in sex discrimination claims brought by trans people. Absent such evaluation, equal protection arguments could easily be struck down.

Another issue is that sex discrimination cases depend on which thread of sex equality doctrine the judge chooses to follow. Jessica Clarke identifies an "ascendant"[210] trend of "sex discrimination formalism" in which judges tend to apply one of

> three distinct types of formal rules when it comes to intentional sex discrimination: (1) but-for causation, which asks whether mistreatment would have befallen an individual if their sex were different; (2) anticlassification rules, also referred to as "blindness," which ask whether a decision-maker acted pursuant to an explicit or implicit policy that considers sex; and (3) "similarly situated" rules, which forbid

204. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).
205. Lane-Steele, *supra* note 203, at 291.
206. *Id.*
207. *Id.* at 300–01.
208. *Id.* at 324.
209. *Id.*
210. Clarke, *supra* note 139, at 1795.

> decision-makers from treating individuals of different sexes who are alike in all relevant respects differently.[211]

While Clarke maps this typology in great detail, this Subsection will briefly discuss one of these rules as an example of the judicial malleability of certain aspects of sex discrimination doctrine—the "similarly situated" inquiry, which "has been particularly prominent in transgender rights litigation."[212]

In this inquiry, it is necessary to identify which groups are being compared and evaluate whether they are truly similarly situated. Yet, what is the point of comparison? Take, for example, trans inclusion in sports. Satisfying the similarly situated inquiry "requires recognizing gender identity as the relevant point of comparison—that is, that a transgender girl excluded from girls' sports is being treated worse than other similarly situated girls whose gender identity (when aligned with their 'biological sex') is being respected."[213] In other words, the court must understand gender identity as the indicator of sex, rather than "biological sex." If the court chooses to define sex as "biological sex," this argument could fail, as the court might find that a transgender girl who is excluded from girls' sports is being treated the same as other students assigned to teams based on their " 'biological sex' (e.g., male students)."[214] The definitional debate over sex is thus always running in the background.

Additional complications arise for nonbinary people. While many material concerns of trans people and nonbinary people overlap (such as access to gender-affirming care), other concerns are thought to be in contradiction. For example, "plaintiffs in transgender bathroom cases (ostensibly) are fine with sex separatism in restrooms; their disagreement is with the sex category into which they have been assigned. The same holds true for plaintiffs in transgender-sports litigation: theirs is an issue of sex assignment, not sex separatism."[215] Annie Schuver reminds us that for nonbinary people, the re-entrenchment of sex separatism is not the goal; rather, many nonbinary people seek sex-neutral spaces, such as all-gender bathrooms.[216]

How do sex discrimination claims for nonbinary people play out? In analyzing the application of but-for rules to nonbinary cases, Schuver poses the hypothetical of "two students, both assigned female at birth. They are

211. *Id.* at 1704.
212. *Id.* at 1706.
213. Brake, *supra* note 19, at 82.
214. *Id.*
215. Cahill, *supra* note 142, at 1132.
216. Schuver, *supra* note 149, at 1520–21.

identical in all significant respects, except one identifies as nonbinary and the other does not. The aforementioned bathroom policy requires both students to use the girls' bathroom because it aligns with their sex assigned at birth."[217]

What happens if a judge uses the "similarly situated" route? Similar to the but-for inquiry, if the point of comparison is assigned sex at birth, the argument fails—both students are of the "same" sex, and they were treated equally.[218] The difficulty here is coming up with an alternate point of comparison. A transgender boy could argue that he was "treated worse than other boys because he was not permitted to use restrooms consistent with his gender identity."[219] This argument does not work for nonbinary students. If gender identity is an indicator of sex, then no nonbinary student is being treated worse than any other nonbinary student—none of them have access to all-gender bathrooms, so they are all being treated the same. The judge in this case might hesitate to deviate from this formalistic reasoning because "[a]part from ideology, courts are unlikely to explicitly adopt principles directed at systemic injustice, stereotypes, or balancing of interests as controlling inquiries due to concerns about institutional competence."[220] So, if a judge chooses to use the similarly situated inquiry in a case of this nature, the nonbinary plaintiff will likely fail.

The success of trans and nonbinary plaintiffs can hinge on the judge's choices in selecting from a menu of definitions of sex and formal rules of evaluating sex discrimination. There is thus a significant amount of room for personal anti-trans biases to slip into the analysis. Ultimately, "[j]udges with ideological reasons for upholding laws that target transgender people will find grounds for doing so, even if they acknowledge that those laws classify on the basis of sex and therefore trigger heightened scrutiny."[221]

2. When Is Sex Discrimination Doctrine Not Applied At All?

The most consequential recent development in trans rights cases has been the Supreme Court's 2025 decision in *U.S. v. Skrmetti*.[222] At issue in this case was a Tennessee law—referred to as SB1—that banned gender-affirming care for transgender minors. The operative word here is "transgender"—the same procedures are permissible

217. *Id.* at 1537.
218. *Id.*
219. Clarke, *supra* note 139, at 1735.
220. *Id.* at 1769.
221. Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. 1, 10 (2025).
222. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

> to treat a minor's congenital defect, precocious (or early) puberty, disease, or physical injury. . . . The law defines the term "[c]ongenital defect" to include an "abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex," . . . but excludes from the definitions of "[c]ongenital defect" and "disease" "gender dysphoria, gender identity disorder, [and] gender incongruence."[223]

In other words, cisgender children can receive these treatments, but healthcare providers are prohibited from administering the same treatments to transgender children. Three transgender minors, their parents, and a medical provider were joined by the United States government under President Joe Biden's administration in bringing suit against the law, alleging that it violated equal protection.[224]

Unlike the above discussion on the misapplication of sex discrimination doctrine, the majority—written by Chief Justice Roberts—sidestepped the application altogether, holding that SB1 classifies on the basis of age and on the basis of medical use, neither of which "turn[] on sex. Rather, SB1 prohibits healthcare providers from administering puberty blockers and hormones to minors for certain medical uses, regardless of a minor's sex."[225] To establish SB1's classification on the basis of medical use, Roberts used the example of a transgender boy who takes puberty blockers to treat his gender dysphoria and a cisgender boy who uses the same treatment for precocious puberty.[226] According to Roberts, SB1 simply "restricts which of these medical treatments are available to minors,"[227] and "[t]he application of that prohibition does not turn on sex."[228]

Nor does SB1, according to the Court, "mask sex-based classifications" because

> the law does not prohibit conduct for one sex that it permits for the other. Under SB1, no minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of any sex may be administered puberty blockers or hormones for other purposes.[229]

Chief Justice Roberts also rejected the Plaintiffs' argument that SB1 constitutes impermissible sex-stereotyping through somewhat circular logic,

223. *Id.* at 1826–27 (citations omitted).
224. *Id.* at 1827.
225. *Id.* at 1829.
226. *Id.* at 1830–31.
227. *Id.* at 1830.
228. *Id.* at 1831.
229. *Id.*

asserting that there is no sex-stereotyping because the law does not classify on the basis of sex.[230]

The opinion also dodged the question of whether transgender individuals constitute a suspect or quasi suspect class, asserting that the question is immaterial in this case because "SB1 does not classify on the basis of transgender status."[231] In reaching this conclusion, the majority resurrects a case that had "long been largely moribund as a precedent"[232] in Supreme Court equal protection doctrine since it was handed down in 1974—*Geduldig v. Aiello*.[233] In *Geduldig*, the Court upheld a California insurance program that excluded pregnancy-related disabilities from coverage, ruling that the policy did not discriminate on the basis of sex.[234] The Court "explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather 'remove[d] one physical condition—pregnancy—from the list of compensable disabilities.' "[235] Furthermore, there was no sex discrimination because the program "divided potential recipients into two groups: 'pregnant women and nonpregnant persons,' " and "[b]ecause women fell into both groups, the program did not discriminate against women as a class."[236] This case established that "a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination."[237]

Chief Justice Roberts analogized SB1 to the insurance program at issue in *Geduldig*. SB1

> removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions . . . . Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only

230. *Id.* at 1832.
231. *Id.* at 1833.
232. Katie Eyer, *Transgender Equality and Geduldig 2.0*, 55 ARIZ. ST. L.J. 475, 480 (2023).
233. Geduldig v. Aiello, 417 U.S. 484 (1974). This case faced significant public backlash and was repudiated by Congress through the passage of the Pregnancy Discrimination Act of 1978. *See* discussion *infra* Part III.
234. *Id.*
235. United States v. Skrmetti, 145 S. Ct. 1816, 1833 (2025) (citing *Geduldig*, 417 U.S. 484, 496 n.20 (1974)).
236. *Id.*
237. *Id.* at 515; *see also Geduldig*, 417 U.S. at 496 n.20.

> transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals.[238]

This logic, coupled with the lack of showing that "SB1's prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals," led the Court to reject a finding of discrimination on the basis of transgender status.[239]

Because the Court found no sex-based classification and no suspect or quasi-suspect class status for trans people, it did not apply heightened scrutiny.[240] Instead, under a rational basis review standard, the Court upheld SB1. Echoing Tennessee's misleading claims about the supposed experimental nature of gender-affirming care and its threat to the mental and physical wellbeing of minors, the Court found SB1 to be rationally related to the state's purported "interests in 'encouraging minors to appreciate their sex' and in prohibiting medical care 'that might encourage minors to become disdainful of their sex.' "[241]

Justice Sotomayor laid out a powerful critique of the majority's unconvincing reasoning in her dissent, pointing out that which is obvious—SB1 facially classifies on the basis of sex and on the basis of transgender status. The majority's assertion that the law does not classify on the basis of transgender status (an assertion so dubious that even Justice Alito rejected it in his concurrence)[242] does not hold water. Justice Sotomayor observed that the law "prohibits Tennessee physicians from offering hormones and puberty blockers to allow a minor to 'identify with' a gender identity inconsistent with her sex."[243] However, "[d]esiring to 'identify with' a gender identity inconsistent with sex is, of course, exactly what it means to be transgender. The two are wholly coextensive."[244]

Even more salient for the purposes of this Note is Justice Sotomayor's argument that SB1 *does* classify on the basis of sex. The law establishes that "sex determines access to the covered medication."[245] To illustrate, Justice Sotomayor used the example of a "mother who contacts a Tennessee doctor, concerned that her adolescent child has begun growing unwanted facial hair. This hair growth, the mother reports, has spurred significant distress because

238. *Skrmetti*, 145 S. Ct. at 1833.
239. *Id.* at 1833–34.
240. *Id.* at 1832–34.
241. *Id.* at 1832.
242. *Id.* at 1855 (Alito, J., concurring).
243. *Id.* at 1879 (Sotomayor, J., dissenting).
244. *Id.*
245. *Id.* at 1873.

it makes her child look unduly masculine."[246] The physician's course of action "depends on the adolescent's sex. If the patient was identified as female at birth, SB1 allows the physician to alleviate her distress. . . . What if the adolescent was identified male at birth, however? SB1 precludes the patient from receiving the same medicine."[247]

Justice Sotomayor identified a key point that is completely glossed over by the majority—the treatments at issue are used by both transgender and cisgender children for *gender-affirming* purposes. Medical providers

> may prescribe these same medicines to adolescents whose physical appearance does not align with what one might expect from their sex identified at birth. An adolescent female, for example, might receive testosterone suppressors and hormonal birth control to reduce the growth of unwanted hair on her face or body (sometimes called male-pattern hair growth or hirsutism). . . . [and] [a]n adolescent male may also receive hormones to address a benign but atypical increase in breast gland tissue (known as gynecomastia), sometimes resulting from below-average testosterone levels. Like any medical treatment, hormones and puberty blockers come with the potential for side effects. . . . Yet patients and their parents may decide to proceed with treatment on the advice of a physician, despite the accompanying medical risks.[248]

This passage highlights that cisgender children, like transgender children, may have an interest in potentially altering even physically "benign" characteristics to alleviate psychological distress about their gender presentation. Under SB1, cisgender children and their parents are allowed to make informed decisions about their treatment in conjunction with their doctors. Transgender children, seeking the same care with the same informed consent standards and for the same purpose, do not have the same right.

Such a policy is, contrary to the majority's circular logic, rooted in sex-stereotyping. After all, "[m]ale (but not female) adolescents can receive medicines that help them look like boys, and female (but not male) adolescents can receive medicines that help them look like girls,"[249] cementing expectations of gender presentation within the law.

This becomes especially clear when considering SB1's built-in exception for intersex children. SB1, like virtually all state bans on gender-affirming care, provides a carve out for "gender-normalizing surgeries, which are performed on intersex infants to conform their bodies to socially

246. *Id.*
247. *Id.*
248. *Id.* at 1868–69.
249. *Id.* at 1868.

constructed expectations about the male/female binary."[250] In SB1's case, this is reflected in allowance for the use of these treatments to treat a " '[c]ongenital defect,' " which is defined as "an 'abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex.' "[251] Significant "research has demonstrated that intersex surgeries often produce a range of harms that can include sterilization (sometimes triggering the need for lifelong hormone therapy), loss of sexual sensation, physical scarring, ongoing pain, and a host of psychological ailments."[252] Moreover, "[t]he irreversibility of these surgeries and the inability of infants to consent are abundantly clear."[253]

How can these procedures be squared with GAC bans? The contradiction is glaring—"[t]he very concerns cited to justify the bans—medical harm, irreversibility, and lack of informed consent—are even more pronounced in the context of intersex surgeries."[254] However, "intersex exceptions are, in fact, consistent with sentiments behind bans on gender-affirming care: a deep-seated fear of and discomfort with children who do not conform to traditional sex stereotypes."[255] Tennessee's concern that minors "appreciate their sex" seems to fall away when it considers intersex children, whose physical characteristics at birth can "challenge cultural understandings about the fixedness of biological sex characteristics."[256] By allowing for exceptions for intersex and cisgender children, the law reflects the state's commitment to enforcing sex stereotypes. The majority's sanctioning of such a law threatens and "implicates the core concern of the Supreme Court's sex discrimination jurisprudence—that the state should not use its laws to force individuals to conform to a stereotyped view of how members of one sex should act."[257]

Even if we put aside these contradictions and assume that Tennessee is operating out of a good faith concern for protecting the health and wellbeing of minors, the fundamental calculus does not change. Deference to the state in its policy decisions may be valid and necessary in some contexts, but Justice Sotomayor reminds us that the role of the legislature "does not change

250. Holning Lau & Barbara Fedders, *Scrutinizing Transgender Healthcare Bans Through Intersex Exceptions*, 36 YALE J.L. & FEMINISM 1, 1 (2025).

251. *Skrmetti*, 145 S. Ct. at 1826–27.

252. Lau & Fedders, *supra* note 250, at 16.

253. *Id.* at 1.

254. *Id.*

255. *Id.*

256. *Id.* at 28.

257. *Bagenstos and Schlanger on Supreme Court Trans Rights Ruling in US v. Skrmetti*, MICH. L. (June 19, 2025), https://michigan.law.umich.edu/news/bagenstos-and-schlanger-supreme-court-trans-rights-ruling-us-v-skrmetti [https://web.archive.org/web/20250916045333/https://michigan.law.umich.edu/news/bagenstos-and-schlanger-supreme-court-trans-rights-ruling-us-v-skrmetti].

the Court's obligation, as mandated by our precedents, to determine whether the challenged sex classification in SB1's categorical ban is tailored to protecting minors' health and welfare, or instead rests on unlawful stereotypes about how boys and girls should look and act."[258] The core question here is not a finding of fact regarding the medical efficacy of GAC procedures to the treat gender dysphoria—the question is whether the law is subject to heightened scrutiny, and thereby, whether the law is sufficiently tailored to the state's purported interest. Had the majority applied sex discrimination analysis and heightened scrutiny, it could have formed a far more principled analysis of SB1.

The long-term implications of *Skrmetti* are yet to be seen. While " '[t]he Court left undisturbed Supreme Court and lower court precedent that other examples of discrimination against transgender people are unlawful,' "[259] *Skrmetti* "offers cover for the courts, including the Supreme Court, to simply deny reality and refuse to see sex or gender identify classifications. If there was no such classification in *Skrmetti*, then perhaps there are also no such classifications in laws banning transgender people from the military, excluding them from sports, or banning them from gender-identity-congruent restrooms."[260]

The Supreme Court seems open to such outcomes, vacating and remanding major favorable trans rights cases back to the circuit courts: *Kadel v. Folwell*[261] and its companion case *Anderson v. Crouch*[262] in the Fourth Circuit, as well as *Fowler v. Stitt*[263] in the Tenth Circuit. While *Kadel* and *Anderson* concerned GAC coverage, *Fowler* had nothing to do with trans healthcare; the state law at issue involved gender markers on identity documents.[264] Despite *Skrmetti*'s apparent silence on issues outside trans healthcare for minors, it seems that the Court is willing to wield its influence on the lower courts on other trans rights issues. This influence is far reaching—even cases untouched by the Court are now being reconsidered. For example, the Seventh Circuit has decided *sua sponte* to vacate and reopen *D.P. v. Mukwonago Area School District* (a trans bathroom case in

258. United States v. Skrmetti, 145 S. Ct. 1816, 1883 (2025).

259. *ACLU, Lambda Legal Respond to Supreme Court Ruling in U.S. v. Skrmetti*, ACLU (June 18, 2025 10:50 AM), https://www.aclu.org/press-releases/aclu-lambda-legal-respond-to-supreme-court-ruling-in-u-s-v-skrmetti [https://perma.cc/F2X4-HNN4].

260. Katie Eyer, *The Limits of Anti-Classification Doctrine in U.S. v. Skrmetti*, REGUL. REV. (July 14, 2025), https://www.theregreview.org/2025/07/14/eyer-the-limits-of-anti-classification-doctrine-in-u-s-v-skrmetti [https://perma.cc/V8X6-YRBS].

261. Crouch v. Anderson, 145 S. Ct. 2838 (2025).

262. Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024), *vacated sub nom.*, Crouch v. Anderson, 145 S. Ct. 2835 (2025).

263. Fowler v. Stitt, 104 F.4th 770 (10th Cir. 2024), *vacated*, 145 S. Ct. 2840 (2025).

264. *Fowler*, 104 F.4th at 770.

which the court ruled in favor of the transgender plaintiff) in light of *Skrmetti*.[265]

Skrmetti is a prime example of how, even when there is obvious sex discrimination at play in a trans healthcare case, the courts—including the highest court in the land—can simply ignore it. While the battle for trans rights is ongoing and unresolved, the case poses a significant danger to trans healthcare—and the future of the Court's equal protection doctrine.

III. CONGRESSIONAL ACTION: MODERNIZING CIVIL RIGHTS LAW

This Part argues that Congress should pass new civil rights legislation specific to LGBTQ+ equality. This Part then proposes that, as a part of this legislation, Congress pass a new healthcare statute prohibiting "discrimination on the basis of transgender or nonbinary status."

A. REFRAMING LGBTQ+ EQUALITY

Through the courts, the category of "sex" in discrimination claims has broadened to include trans people. As the previous Part demonstrates, however, current sex equality jurisprudence has its limitations in that judges retain a certain amount of ideological leeway. This Section proposes reframing LGBTQ+ discrimination as its own category within civil rights law. If broadly applied, this additional categorization would carve out explicit protections for LGBTQ+ people in the same areas as other civil rights laws, such as in employment and education.

On a macro level, there are various reasons for this proposed change. Directly naming LGBTQ+ status as a basis for protection against discrimination codifies a cultural recognition of LGBTQ+ people—in other words, it makes us socially and legally legible. This legibility is especially vital in this current moment, where efforts to erase trans people from public life are on the rise. This change would also acknowledge that LGBTQ+ people face specific challenges that must be addressed and rectified at the national level.

Beyond signaling a new cultural understanding, this change would also significantly simplify the legal analysis. Many judges are ill-equipped to sort through the nuances of sexuality and gender. Instead of bumbling through normative questions into which they can inject their own biases, judges could

265. D.P. v. Mukwonago Area Sch. Dist., No. 23-2568, 2025 U.S. App. LEXIS 16097, at *1 (7th Cir. June 30, 2025).

focus their decision on a clear question: was this person discriminated against on the basis of their LGBTQ+ status?

B. A BRIEF NOTE ON FEMINISM

Some feminists and trans rights advocates may ask that, in a moment where anti-gender ideology and trans-exclusionary feminism is on the rise, does separating LGBTQ+ equality from sex equality concede that the concerns of trans people have no place in questions of women's rights? For example, does such distinction cement the idea that trans women are not "real women" because their concerns are not the same as cis women?[266] Does this not feed directly into the rhetoric of TERFs and the anti-gender ideology movement?[267]

Not at all—this proposal does not in any way suggest that LGBTQ+ rights should be severed from principles of sex equality. As Courtney Cahill notes, "sex equality and LGBTQ equality are overlapping and interdependent . . . Historically, the social and political movements for sex equality and LGBTQ equality were intertwined—at least for a time—based on their shared commitment to eradicating sex-role stereotypes"[268] Just as many "American feminists are far from trans-exclusionary and have long been among the most supportive groups of LGBTQ equality," many "transgender women and men have long and fully participated in all factions of feminist activism."[269] LGBTQ+ equality and sex equality are inextricably linked, and this Note does not advocate for severing this tie.[270]

The implementation of this Note's proposal would not preclude queer and trans people from bringing sex discrimination claims. Regardless of the Supreme Court's decision in *Skrmetti*, the Court has made clear that LGBTQ+ discrimination falls under sex discrimination in at least some contexts, indicating that these two forms of discrimination are not mutually exclusive, and decades of sex equality jurisprudence support this understanding.[271]

266. *See, e.g.*, Samantha Schmidt, *Women's Issues are Different from Trans Women's Issues, Feminist Author Says, Sparking Criticism*, WASH. POST (Mar. 13, 2017 7:14 AM EDT), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/13/womens-issues-are-different-from-trans-womens-issues-feminist-author-says-sparking-criticism [https://perma.cc/472T-B5AR].

267. *See* discussion *supra* Part I.

268. Cahill, *supra* note 142, at 1129.

269. Kelsy Burke, *Feminists Have Long Supported Trans Rights*, WASH. POST (July 27, 2023), https://www.washingtonpost.com/made-by-history/2023/07/27/trans-rights-feminism-conservative-women. [https://perma.cc/3EL5-GH3U].

270. *See generally*, Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 YALE J.L. & FEMINISM 88, 91 (2023).

271. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

Activists and advocates have no reason to abandon the implications of this hard-fought victory. The legislation proposed in this Note is based in large part on practicality—creating a new category of discrimination law specific to LGBTQ+ status provides an additional or alternate cause of action when judges misapply sex equality doctrine and avails LBGTQ+ people to a more concrete layer of protection. This Note, therefore, encourages advocates to fight for this legislation in addition to promoting arguments based on sex equality.

C. LEGISLATING NEW TRANS HEALTHCARE POLICY

As the central focus of this Note is trans healthcare, I specifically propose that, in conjunction with this reframing of LGBTQ+ equality law, Congress pass a new healthcare statute explicitly prohibiting "discrimination on the basis of transgender or nonbinary status" in the coverage and administration of healthcare services. Congress can use its power of the purse to enforce this law on all institutions receiving federal funding.[272]

This proposed legislation is narrow and straightforward. It is predicated on the idea that transgender and nonbinary people should have access to the same treatments available to cisgender people. As discussed in Part II, a core aspect of gender-affirming care bans is that they do not ban this care for cisgender people.[273] The discrimination question—whether it be on the basis of sex or on the basis of transgender status—disappears if legislatures categorically ban GAC for everyone.[274] However, legislatures will not do this, "likely because nontransgender people require health care for purposes indistinguishable from gender affirmation,"[275] and routinely access this care already. In reality, "most gender-affirming care is in fact provided to cisgender patients—that is, persons whose sex assigned at birth matches their gender identity. Puberty blockers, hormone replacement therapy, and surgery are interventions provided for cisgender and TGD [(transgender and gender-diverse)] patients alike to affect their embodiment of gender."[276]

There are also significant disparities in *how* such care is accessed. For example, among the millions of cisgender men taking off-label testosterone to affirm their masculinity, studies demonstrate that these men "tend to initiate conversations about the treatment, do their own research at home,

272. U.S. CONST. art. I, § 8, cl. 1.
273. *See* discussion *supra* Part II.
274. Clarke, *supra* note 221, at 28.
275. *Id.*
276. Jacob D. Moses, Theodore E. Schall & Lisa Campo-Engelstein, *Unjust Discrimination Between Cisgender and Transgender Gender-Affirming Care*, 176 ANNALS INTERNAL MED. 991, 991 (July 2023).

and see their role in decision making as that of self-advocacy."[277] In contrast, when trans patients pursue hormone therapy, they are "criticized by prescribers for doing their own research, asking about interventions 'out of turn,' and advocating for access to gender-affirming care."[278] Both cisgender and transgender people "may engage in the same behaviors that facilitate cisgender access to the hormone but experience very different judgments from some clinicians."[279]

These disparities are not just seen in attempts to seek hormone therapy, but also in attempts to receive gender-affirming surgery. Research has shown that while gender-affirming surgeries are incredibly rare for trans minors, "cisgender minors and adults had substantially higher utilization of analogous gender-affirming surgeries than their [transgender and gender-diverse] counterparts." [280] For example, "[d]espite affecting analogous anatomical structures and sharing evaluation criteria, the legitimacy of cisgender postmastectomy surgery has been protected in law, whereas the legality of chest surgery for TGD people is being undermined in many states." [281] Prohibiting discrimination on the basis of transgender and nonbinary status would help reduce these disparities and increase fairness in the administration of healthcare.

Has *Skrmetti* foreclosed the efficacy of such a statute by holding that a ban on GAC for minors does not discriminate on the basis of transgender status? Not necessarily. *Skmetti*'s reliance on *Geduldig* [282] is actually instructive here. As Reva Siegel explains, the Supreme Court applied its *Geduldig* reasoning to *General Electric Co. v. Gilbert,* [283] a pregnancy discrimination case brought under Title VII, "[b]ut Congress soon repudiated the Court's efforts. Within two years, it enacted the Pregnancy Discrimination Act of 1978 ("PDA"), which defined discrimination on the basis of pregnancy as discrimination on the basis of sex under the nation's employment discrimination law."[284]

277. *Id.*
278. *Id.*
279. *Id.*
280. Maya Brownstein, *Gender-Affirming Surgeries Rarely Performed on Transgender Youth*, HARV. T. CHAN SCH. PUB. HEALTH (July 8, 2024), https://hsph.harvard.edu/news/gender-affirming-surgeries-rarely-performed-on-transgender-youth [https://perma.cc/WX76-A3L9].
281. Moses et al., *supra* note 276, at 991.
282. United States v. Skrmetti, 145 S. Ct. 1816, 1833 (2025).
283. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
284. Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 193 (2020). *See also Enforcement Guidance on Pregnancy Discrimination and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [https://perma.cc/5DXD-VSVC] ("Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title

The PDA contains specific language rejecting the Supreme Court's holdings, clarifying that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[285] An analogous provision could be implemented in the context of trans healthcare. The statute could prohibit "discrimination on the basis of transgender status" in the administration of healthcare, with the added provision that "the terms 'because of transgender status' or 'on the basis of transgender status' include, but are not limited to, because of or on the basis of diagnosis of gender dysphoria, gender incongruence, or related medical conditions." Like the PDA's rejection of *Geduldig* and *Gilbert*, this proposed provision would reject *Skrmetti* and overcome its negative implications for trans healthcare protections.

D. NOTES ON PARTISANSHIP AND POLITICAL RESPONSIBILITY

While I acknowledge that this Note's proposed legislation cannot come to fruition in the near future, it is worth addressing the politics of protecting trans rights. Some think it is a simple question of partisanship—once Democrats are back in power, they will surely endeavor to protect trans rights. However, it would be a mistake to assume that a Democratic majority in Congress is the direct answer. Many non-cisgender people—the author included—feel that the Democratic Party has abdicated responsibility in protecting trans rights and is headed in a dangerous direction. Of course, Democrats have endeavored to protect trans rights, from President Biden's administration's attempts to effectuate trans healthcare protections via HHS guidelines[286] and arguments against gender-affirming care bans in front of the Supreme Court, [287] to attorneys general of Democrat-led states challenging President Trump's anti-trans executive orders.[288]

However, it has been disheartening to see some Democrats and liberals shift away from trans rights as the anti-trans moral panic intensifies. Some Democrats, including high-profile Party figures like California Governor Gavin Newsom, have taken the bait, "ceding ground on trans rights—particularly when it comes to sports—following Trump's re-election."[289] Some are now parroting Republican talking points about the "dangers" of trans people's participation in sports and ignoring any sort of scientific

VII of the Civil Rights Act of 1964 (Title VII).").

285. 42 U.S.C. § 2000e(k).

286. *See* discussion *supra* Part I.

287. United States v. Skrmetti, 145 S. Ct. 1816 (2025).

288. Complaint, Commonwealth v. Trump, No. 1:25-cv-12162 (D. Mass. Aug. 1, 2025).

289. Orion Rummler, *As Anti-Trans Laws Get More Extreme, Here's Where State Laws Stand in 2025*, THE 19TH (May 28, 2025), https://19thnews.org/2025/05/anti-trans-extreme-state-laws-2025 [https://perma.cc/PW6F-L5JP].

nuance on the issue,[290] despite the negligible number of trans girls and women in girls' and women's sports.[291] Giving in to these distractions diverts attention from the real, material harms currently affecting trans people and only serves to perpetuate fear of trans people.

Trans people are not only scapegoated for society's ills by conservatives[292] but also scapegoated for the Democratic Party's own failures. Some blame support for trans rights as a factor in former Vice President Harris's loss in the 2024 presidential election, despite the fact that "Harris largely avoided the issue on the trail and in interviews and it was notably absent from [that] year's Democratic National Convention."[293] There was virtually no response to Trump's anti-trans advertising, and "reports have emerged indicating that some Democratic strategists [were] shaken by the anti-trans ad blitz and are getting cold feet around anti-trans advertising."[294] The last election's postmortem need not be reopened, but these points are important to acknowledge because they indicate that, to many, trans people are now an "issue" to be debated and cast aside when politically expedient. This is especially obvious as the Party debates how to appeal to voters[295] in the midst of a "new discomfort on the issue from a party that has long seen itself as a champion of L.G.B.T.Q. Americans."[296] This Note urges Democrats—and for that matter, Republicans—to remember that trans people are ordinary Americans and to not let partisanship interfere with protecting civil rights.

290. *See, e.g.*, Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams [https://perma.cc/7DQE-35GP]; Joshua D. Safer, *Fairness for Transgender People in Sport*, 6 J. ENDOCRINE SOC'Y 1 (2022).

291. For example, "[o]ut of 510,000 athletes competing at the collegiate level, there are fewer than 10 who publicly identify as transgender, Charlie Baker, the N.C.A.A. president, said in January" of 2025. Talya Minsberg, *What We Know About Trump's New Executive Order on Trans Athletes*, N.Y. TIMES (Feb. 5, 2025), https://www.nytimes.com/2025/02/05/us/politics/trump-trans-athletes-executive-order.html [https://web.archive.org/web/20260125015553/https://www.nytimes.com/2025/02/05/us/politics/trump-trans-athletes-executive-order.html].

292. *See* discussion *supra* Section I.A.

293. Matt Lavietes, *Some Democrats Blame Party's Position on Transgender Rights in Part for Harris' Loss*, NBC NEWS (Nov. 8, 2024 3:15 PM PST), https://www.nbcnews.com/nbc-out/out-politics-and-policy/democrats-blame-partys-position-transgender-rights-part-harris-loss-rcna179370 [https://perma.cc/J2M8-UT8Z].

294. Erin Reed, *Opinion: This Week's Gallup Poll Shows Why Dems Shouldn't Fear Anti-Trans Ads*, ERIN IN THE MORNING (Oct. 10, 2024), https://www.erininthemorning.com/p/opinion-this-weeks-gallup-poll-shows [https://perma.cc/FCU4-UGJB].

295. Rummler, *supra* note 289.

296. Kellen Browning, *Democrats' Wary Response to Transgender Ruling Shows the Party's Retreat*, N.Y. TIMES (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/democrats-supreme-court-transgender-ruling.html [https://web.archive.org/web/20250912173224/https://www.nytimes.com/2025/06/18/us/politics/democrats-supreme-court-transgender-ruling.html].

CONCLUSION

This Note has endeavored to outline the current state of trans rights in the United States and to suggest that advocates, lawyers, and policymakers pursue a new strategy to promote trans equality. Passing civil rights legislation specific to trans people will provide protections while limiting both executive overreach and the power of ideologically driven judges, creating a concrete basis upon which trans people can bring discrimination claims.

It will certainly be an uphill battle to reach a point where enactment is feasible. However, it is clear that neither the executive branch nor the judiciary can be relied upon to establish protections for trans people, especially in the realm of healthcare. Nor is it necessarily within their jurisdiction to do so. Congress is the branch that decides how federal funds are spent.[297] Congress is the branch that establishes national standards in healthcare policy.[298] Congress is the branch that enacts federal civil rights law and provides means of enforcing it.[299] Establishing clear standards and protections in the area of trans rights and trans healthcare is thus the responsibility of Congress. Protecting and engaging with the democratic process will therefore be a vital component of the American LGBTQ+ equality movement.

Trans people will continue to exist. As will nonbinary people, intersex people, and gender non-conforming people. How many will be able to survive unscathed by the current legal and cultural assault on our existence is an open question. What is clear, however, is that absent a principled approach to equality, the clock will continue to turn back on civil rights.

297. U.S. CONST. art. I, § 8, cl. 3.
298. *See, e.g.*, Affordable Care Act, 42 U.S.C. § 18116.
299. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 1981.