UNDER (CONDUCT-BASED) ATTACK: FAMILIAR DISCRIMINATION AND THE TRANS CARE BANS

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ABSTRACT

Transgender youth are under attack.[1] *Facing an already-dire mental health crisis, trans adolescents now confront state legislatures that have enacted sweeping bans on gender-affirming medical care. These prohibitions have barred trans adolescents, their families, and doctors from engaging in and providing medically necessary care. In the face of these laws, transgender minors and their families have gone to the courts for relief. Specifically, these plaintiffs have argued that state bans on gender-affirming medical care for transgender minors violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.*[2] *In this article, we contend that bans on gender-affirming care utilize an all-too-familiar conduct-driven framework to mask status-based discrimination on the basis of transgender status and sex.*

To do so, we explain how legislatures have historically used a deceptive conduct-centered framework against LGBTQIA+ persons and the means by which the Supreme Court has rejected this approach as a cover for status-based discrimination. Next, we describe gender-affirming care as being undertaken by both cisgender and transgender minors alike to reveal how the bans use conduct-based framing to prohibit exclusively transgender minors from accessing such care, thus discriminating on the basis of transgender status. Finally, we apply the interlocked sex discrimination reasoning established in Bostock v. Clayton County *to the bans on gender-affirming care. In doing so, we demonstrate how medical providers must engage in a two-step identification process under the*

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1. We recognize that terminology surrounding gender identity and sexuality evolves over time. In this article, we interchangeably refer to transgender individuals both as "trans" and "transgender." We also refer to the group of individuals impacted by these bans interchangeably as "minors" and "adolescents." Note that, despite misconceptions to the contrary, it is principally *teenage* minors (ages thirteen to seventeen) who are engaging in gender-affirming medical care. *See Get the Facts of Gender-Affirming Care,* HUM. RTS. CAMPAIGN FOUNDATION (Jan. 7, 2025), https://perma.cc/J9GC-8XSV (noting that "[t]ransgender and non-binary people typically do not have gender-affirming surgeries before the age of 18," but that "[i]n some rare exceptions, teenagers under the age of 18 have received gender-affirming surgeries" and stating that "adolescents may receive hormone replacement therapy medications starting in their late teens.").

2. While some transgender plaintiffs have also challenged the state prohibitions on Fourteenth Amendment due process grounds, this article focuses exclusively on Equal Protection Clause challenges to the bans.

bans to determine a minor's access to "masculinizing" or "feminizing" care, thereby uncovering how the prohibitions use conduct as a means of discriminating on the basis of sex. This article concludes by reminding readers that while access to gender-affirming care is a topic of significant controversy and political salience, we must not forget its stakes.

INTRODUCTION

Prior to 2023, only three states had enacted bans on gender-affirming healthcare for minors,[3] with Arkansas being the first to do so in 2021.[4] Since then, a staggering twenty-four additional states have enacted laws barring transgender minors from seeking medical care that affirms their identities.[5] To some, the prohibitions against gender-affirming care appear to be both novel and legally-insurmountable. But laws using conduct-centered framing as a means of disguising status-based discrimination are familiar foes of the Supreme Court. In passing sweeping bans on gender-affirming healthcare for transgender adolescents, state legislatures rely on the same outdated and unconstitutional patterns of discrimination employed in earlier laws targeting LGBTQIA+ civil liberties. From anti-sodomy laws to bans on same-sex marriage, legislatures have frequently attempted to facially distinguish conduct from status in order to circumvent judicial scrutiny under the Equal Protection Clause.[6] The same is true for prohibitions against gender-affirming care for trans adolescents. By utilizing conduct-driven language that focuses on the *type of care sought*, rather than *who is seeking that care*, the prohibitions reference conduct as a means of masking invidious discrimination both on the basis of transgender status and sex. This conduct-based framing has long been utilized by those resisting the growing acceptance and inclusion of queer and transgender identities in all aspects of American life, and it has long been rejected by courts.

In this article, we illustrate how the same conduct-driven framing that has been rebuked by the Supreme Court in other LGBTQIA+ civil rights cases is at work

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3. *Healthcare Laws and Policies: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT (Mar. 29, 2025), https://perma.cc/375Z-433Q; *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (Mar. 29, 2025), https://perma.cc/5NNZ-ULJK.

4. ARK. CODE ANN. § 20-9-1502 (West, Westlaw through the 2025 Reg. Sess. of the 95th Ark. Gen. Assemb.), *invalidated by* Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023). Arkansas appealed *Brandt v. Rutledge* to the Eighth Circuit in July 2023. *See* Notice of Appeal, Brandt v. Rutledge, No. 21-2875 (8th Cir. July 20, 2023).

5. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3, at 7. On January 28, 2025, President Donald Trump also signed an Executive Order entitled "Protecting Children from Chemical and Surgical Mutilation," which takes various steps to enforce "the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called 'transition' of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures." Exec. Order No. 14187, 90 Fed. Reg. 8771 (2025). As we explain below, though this article principally focuses on state bans on gender-affirming care, our analysis has application to the conduct-based portions of the Executive Order that seek to deny insurance coverage to transgender minors. *See id.* §§ 6–7.

6. President Trump's Executive Order entitled "Prioritizing Military Excellence and Readiness" also relies on the same conduct-based framing in order to achieve its impact of banning transgender individuals from the military. *See* Exec. Order No. 14183, 90 Fed. Reg. 8757 (2025) (stating that "*expressing* a false 'gender identity' divergent from an individual's sex cannot satisfy the rigorous standards necessary for military service" and that "[a] man's *assertion* that he is a woman, and his requirement that others honor this falsehood, is not consistent with the humility and selflessness required of a service member.") (emphasis added).

in bans on gender-affirming care for transgender adolescents. After discussing the history of cases addressing laws that have used conduct as a means to discriminate on the basis of LGBTQIA+ status, as well as defining the scope of gender-affirming care, we argue that state bans on gender-affirming healthcare use conduct as a means to discriminate both on the basis of transgender status and sex.[7] Part I focuses on the history of the "conduct-versus-status" distinction as a method of discrimination and its repeated rejection by the judiciary. Part II explains the broad scope of gender-affirming care as utilized by both cisgender and transgender individuals. In Part III, we argue that the familiar and rejected "conduct-versus-status" distinction is at play in state bans on gender-affirming care. Part IV elaborates how the state bans on gender-affirming care facially discriminate on the basis of trans status. In Part V, we contend that the state bans also facially discriminate on the basis of sex. By conceptualizing gender-affirming care as being undertaken by both cisgender and transgender minors alike, we contend that the bans' narrow conduct-based application only as to such care when it is used by transgender minors is clear and facial discrimination on the basis of transgender status. We also apply the Supreme Court's interlocked sex discrimination reasoning established in *Bostock v. Clayton County*, as well as our novel two-step identification procedure that doctors must now engage in to determine access to care under the bans, to illustrate how the prohibitions use conduct as a means to discriminate individually on the basis of sex. We therefore posit that, despite the bans' usage of conduct-driven framing, the prohibitions facially discriminate both on the basis of transgender status and sex.

Transgender adolescents face an already-dire mental health crisis in an era where queer and transgender identities are at the forefront of partisan debate and exploitation. Access to gender-affirming care saves trans lives, improves mental health, and enables families to thrive. The bans discussed in this article prohibit transgender adolescents from engaging in gender-affirming care that remains available to their cisgender peers and punish individuals on the basis of their sex for seeking care that does not conform with their sex assigned at birth. This conduct-as-status framework is not only amoral, but is also the same form of masked discrimination that has consistently been rebuked by courts.

I. THE HISTORICALLY REJECTED CONDUCT VERUS STATUS DISTINCTION

Legislatures have historically used conduct-based discrimination as a cover for status-based classifications that are subject to review under the Equal Protection Clause. As the focus of the anti-LGBTQIA+ agenda has evolved—from anti-sodomy laws to marriage equality and now to anti-trans legislation—their patterns of discrimination have persisted. Opponents of queer and trans civil liberties

7. We do *not* contend that there are no circumstances in which providing certain gender-affirming medical care to minors may be premature, inappropriate, or risky. Rather, this article focuses on the discriminatory *framework* of the at-issue bans on gender affirming care, and asks whether it is the *government* that should be broadly responsible for decision-making surrounding access to such care.

have relied on what is known as the "conduct-versus-status" distinction, a framework that broadly construes the Constitution as guarding against discrimination based on certain protected *statuses*, while permitting states to regulate or discriminate against *conduct*.[8] But what happens when status and conduct are inextricably intertwined?

Time and again, the Supreme Court has rejected the conduct-versus-status distinction and has held that discrimination against conduct that is closely correlated with being a member of a protected class is discrimination against the class itself.[9] The bans on gender-affirming care for trans minors are no different; prohibiting a category of conduct undertaken exclusively by transgender minors constitutes discrimination against transgender minors themselves. A historical overview of the Supreme Court's treatment of the conduct-versus-status distinction in the LGBTQIA+ rights space affirms this conclusion.

Though the conduct-versus-status distinction was first brought to the Supreme Court outside of the LGBTQIA+ rights arena,[10] its utilization against LGBTQIA+ communities began in *Bowers v. Hardwick*, a case challenging the constitutionality of a Georgia statute criminalizing sodomy. Although the Court of Appeals for the Eleventh Circuit held that the statute attempted to regulate "a private and intimate association that is beyond the reach of state regulation,"[11] the Supreme Court rejected Fourteenth Amendment challenges and held that the "right upon homosexuals to engage in sodomy" was neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."[12]

Amidst its decision to deny substantive due process rights to gay adults engaging in consensual sexual conduct, the Supreme Court incorrectly permitted discrimination against LGBTQIA+ individuals based on their conduct. The Georgia statute at issue in *Bowers* read: "A person commits the offense of sodomy when he or she performs or submits to any ***sexual act*** involving the sex organs of one person and the mouth or anus of another."[13] Although the statute outlawed sodomy as committed by both homosexual and heterosexual individuals, the Court

8. *See generally* Sherry F. Colb, *Some Thoughts on the Conduct/Status Distinction,* 51 RUTGERS L. REV. 977 (1999); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017); Diane S. Meier, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. C.R. & SOC. JUST. 147 (2008).

9. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating anti-sodomy laws for discriminating against sexual orientation status); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661 (2010) (rejecting religious student organization's exclusion of gay students); United States v. Windsor, 570 U.S. 744 (2013) (invalidating federal statute defining marriage as a legal union between one man and one woman); Obergefell v. Hodges, 576 U.S. 644 (2015) (invalidating state statute defining marriage as a legal union between one man and one woman).

10. Twenty-four years prior to *Bowers v. Hardwick*, Justice Potter Stewart held in *Robinson v. California* that a state law making the "status" of narcotic addiction a criminal offense inflicted a "cruel and unusual punishment" in violation of the Fourteenth Amendment. 370 U.S. 660, 666–67 (1962).

11. Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

12. *Id.* at 190, 194.

13. GA. CODE ANN. § 16-6-2 (West 1984) (emphasis added).

fashioned the challenge as one exclusively against conduct engaged in by gay people.[14] In doing so, the Court refused to recognize a gay person's right to engage in private conduct.[15] The Court would begin to rethink its decision ten years later in *Romer v. Evans*,[16] but would only formally correct its mistake by overruling *Bowers* seventeen years later in *Lawrence v. Texas*.[17]

In *Romer*, the Court held that Amendment Two to the Colorado Constitution, which prohibited all legislative, executive, or judicial action banning discrimination on the basis of sexual orientation, "impose[d] a special disability upon [gay people] alone" and was therefore unconstitutional.[18] Still clinging to the Court's original error, Justices Antonin Scalia, William Rehnquist, and Clarence Thomas dissented, stating that "[i]n holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts [*Bowers*], unchallenged here, pronounced only 10 years ago."[19] This unfavorable treatment of gay men, assigned under the guise of unlawful conduct, would be formally rejected seven years later in *Lawrence*.

Unlike the Georgia statute at issue in *Bowers*, which did not explicitly target exclusively individuals engaged in same-sex intercourse, Texas's anti-sodomy law challenged in *Lawrence* imposed criminal consequences only upon he who "engages in deviate sexual intercourse with another individual of the same sex."[20] Petitioners challenged the law, which discriminated against conduct only when undertaken by gay individuals, on both Due Process Clause and Equal Protection Clause grounds.[21] In order to foreclose the validity of a statute "drawn differently, say, to prohibit the conduct between both same-sex and different-sex participants," and to formally overturn *Bowers*, the Supreme Court chose to strike down the Texas statute under the Due Process Clause rather than the Equal Protection Clause.[22]

Justice O'Connor, concurring in the judgment, would have instead chosen to formally rebuke the faulty conduct-versus-status distinction and hold the statute unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Although sodomy could be practiced by all, the Texas statute chose to "mak[e] particular conduct—and only that conduct—subject to criminal sanction."[23] Justice O'Connor rejected Texas' attempts to distinguish "homosexual conduct" from "homosexual persons," stating that "the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances,

14. *See Bowers*, 478 U.S. at 200–01 (Blackmun, J., dissenting).
15. *See id.* at 213–14.
16. Romer v. Evans, 517 U.S. 620 (1996).
17. Lawrence v. Texas, 539 U.S. 558 (2003).
18. *Romer*, 517 U.S. at 631.
19. *Id.* at 636 (Scalia, J., dissenting).
20. TEX. PENAL CODE ANN. § 21.06(a) (West 2003) (emphasis added).
21. *Lawrence*, 539 U.S. at 564.
22. *Id.* at 575.
23. *Id.* at 581 (O'Connor, J., concurring).

Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[24] Despite deciding the case on due process grounds, the majority came to a similar conclusion by recognizing the illusory line between conduct and status: "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[25]

Ten years after *Lawrence*, in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, the Court reaffirmed its discontent with arguments that attempt to facially distinguish between conduct and status for the purpose of enabling discrimination.[26] Here, a religious student organization argued that excluding gay students from membership was permissible under the school's nondiscrimination policy because it discriminated "on the basis of a conjunction of conduct and the belief that the conduct is not wrong" as opposed to sexual orientation status.[27] Relying on its holding in *Lawrence*, the Court held that "[its] decisions have declined to distinguish between status and conduct in this context."[28] Nonetheless, the conduct-versus-status distinction would soon reappear in front of the Supreme Court, this time with regard to prohibitions on same-sex marriage.

Having lost the battle on sodomy, federal and state governments soon shifted their focus to the issue of gay marriage. In the marriage equality cases, the Supreme Court relied on the majority and Justice O'Connor's reasoning in *Lawrence* to strike down section three of the Defense of Marriage Act (DOMA) and several state statutes which defined marriage as a union between one man and one woman. The plaintiff in *United States v. Windsor*, Edith Windsor, was barred by the IRS from claiming the federal estate tax exemption for surviving spouses because her same-sex marriage did not meet the federal definition of marriage.[29] Section three of DOMA amended the Dictionary Act, which provides rules of construction and definitions for a multitude of federal laws and regulations, to define marriage as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[30]

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24. *Id*. at 583.
25. *Id*. at 575 (majority opinion).
26. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661 (2010).
27. *Id*. at 689.
28. *Id*.
29. 570 U.S. 744, 744 (2013).
30. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104–199, 110 Stat. 2419, *invalidated by Windsor*, 570 U.S. at 744.

The statute did not explicitly reference gay people or any other status-based group. Gay individuals like Edith Windsor were free to claim the federal tax exemption for surviving spouses so long as they did not marry someone of the same sex. Yet, the Supreme Court suffered from no illusion; defining marriage as a legal union between a man and a woman was yet another attempt to use conduct as a proxy for denying gay people benefits.[31] Withholding federal tax exemptions from those engaged in conduct exclusive to LGBTQIA+ couples, specifically marrying someone of the same sex, was unlawful discrimination on the basis of sexual orientation.[32]

The Supreme Court in *Obergefell v. Hodges* employed the same conduct-as-status logic to strike down several similar state statutes.[33] Michigan, Kentucky, Ohio, and Tennessee all had laws defining marriage as a union between a man and a woman.[34] For example, the Kentucky Constitution stated that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[35] The other states' constitutional or statutory provisions similarly focused on the conduct of marriage, as opposed to explicit language discriminating on the basis of sexual orientation.[36] Dismissing the conduct-centered approach in the state laws, the Supreme Court concluded that "[t]he right of same-sex couples to marry [] is part of the liberty promised by the Fourteenth Amendment" in both its Due Process and Equal Protection Clauses.[37] "Liberty and equality," Justice Kennedy explained, share an "interlocking nature . . . in the context of the legal treatment of gays and lesbians."[38] Drawing on these interactive constitutional safeguards, the Court saw through the states' attempts to conceal the very evident status discrimination at play in the bans prohibiting same-sex marriage.

It is true that the words "conduct-versus-status" are not expressly mentioned by Justice Kennedy in his opinions dealing with gay rights, but this is because the Court clearly understood the bans' conduct-as-status framework to be obvious. In other words, the link between the *conduct* of engaging in a same-sex marriage and *status* of being a gay person, and the resulting discriminatory construction of the statutes, was plainly intuitive. Discriminating on the basis of marital conduct exclusively engaged in by gay people was a proxy for impermissible

31. *Windsor*, 570 U.S. at 775.
32. *Id*.
33. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
34. *See id*. at 653–54.
35. KY. CONST. § 233A, *invalidated by Obergefell*, 576 U.S. at 644.
36. *See* MICH. CONST. art. 1, § 25, *invalidated by Obergefell*, 576 U.S. at 644; OHIO REV. CODE ANN. § 3101.01, *invalidated by Obergefell*, 576 U.S. at 644; TENN. CONST. art. XI § 18, *invalidated by Obergefell*, 576 U.S. at 644.
37. *Obergefell*, 576 U.S. at 672.
38. *Id*. at 674–75.

discrimination against sexual orientation status in violation of the Fifth Amendment and the Fourteenth Amendment's Equal Protection Clause.

After its error in *Bowers*, the Court repeatedly dismissed legislatures' attempts to use conduct as a means to discriminate on the basis of LGBTQIA+ status, first establishing the principle in *Romer* and *Lawrence* and later reaffirming it in the marriage equality cases. As new attacks against LGBTQIA+ people are devised in the form of bans on gender-affirming care, courts must remain steadfast in following well-reasoned precedent that discrimination on the basis of conduct engaged in exclusively by LGBTQIA+ people is discrimination against those individuals on the basis of their LGBTQIA+ status.

II. GENDER-AFFIRMING CARE – WHO IS IT FOR?

Understanding the broad scope of "gender-affirming care" is critical to conceptualizing how bans use narrow and suspicious conduct-based framing to discriminate on the basis of transgender status and sex.[39] "Gender-affirming care" is frequently defined as care undertaken exclusively by transgender individuals. Various characterizations of "gender-affirming care" reveal that the term is often applied only when such care is used to affirm a gender identity that "conflicts" with an individual's sex assigned at birth.[40] But defining gender-affirming care as medical interventions used exclusively by transgender individuals inaccurately limits its true scope.

Leading authorities on healthcare have appropriately characterized "gender-affirming care" as, intuitively, being used by *anyone* who wishes to affirm their gender identity. For example, the World Health Organization (WHO) defines "gender-affirmative health care" as "any single or combination of a number of social, psychological, behavioural or medical ... interventions designed to support and affirm an individual's gender identity."[41] Such characterizations appropriately avoid limiting gender-affirming care to interventions used exclusively by transgender individuals. Instead, WHO's definition recognizes that cisgender and transgender individuals alike engage in gender-affirming healthcare.

Indeed, there are numerous medical interventions that cisgender individuals engage in to affirm their gender. As is the case with their transgender counterparts, cisgender adults and adolescents regularly take part in gender-affirming care related to breast modification, hormonal therapy, and hair growth,

39. We use the terms "gender-affirming care," "gender-affirming medical care," and "gender-affirming healthcare" interchangeably throughout this article.

40. *See* Patrick Boyle, *What is gender-affirming care? Your questions answered*, AAMC (Apr. 12, 2022), https://perma.cc/6CP6-YWX6. We include the word "conflicts" in quotations because we recognize that characterizing a gender identity as "conflicting" with sex assigned at birth implicitly reinforces the construct that gender is inextricably or biologically tied to "sex."

41. *Gender incongruence and transgender health in the ICD*, WORLD HEALTH ORG., https://perma.cc/V3R7-H8ND.

removal, and transplantation.[42] And like gender-affirming care tailored toward transgender individuals, these widely-used interventions (and others) come with varying risks and side effects, some of which may be permanent.

Scientific and legal scholarship have also explained how cisgender individuals frequently engage in care that affirms their gender identity, equally, if not more, than those who are a part of the transgender community. Theodore Schall and Jacob Moses have explored how gender-affirming care predominates among cisgender patients by tracing historical shifts in gender-affirming medical practices since the 1950s.[43] In their article "Gender-Affirming Care for Cisgender People," Schall and Moses contend that "an expanded conception of gender-affirming care would recognize that much of this care is, in fact, provided to cisgender people" and "the scrutiny and stigma attached to transgender, but not cisgender, gender-affirming care reflects anti-trans bias and is not due to fundamental differences in technologies, goals, norms, or outcomes involved."[44] They arrive at this conclusion by examining medical procedures used by both cisgender and transgender individuals, including mammoplasties and testicular implants.[45]

Cisgender recipients of gender-affirming care have publicized the sociopolitical importance of recognizing that individuals who are not transgender engage in such care.[46] In his article, Justin T. Brown, a cisgender man, explores the differences in social treatment of cisgender and transgender minors engaged in gender-affirming care.[47] Brown notes that "[he does not] see the care that affirms cisgender norms, expectations and functions, including for children, being questioned to the same extent as transgender care."[48] Similarly, in another piece, Megan Burbank recognized the confounding nature of restricting androgen blockers only as to transgender patients by arguing that "[i]f you can dispense a drug this easily for some patients, there's no excuse to make it harder for anyone else."[49] Although we acknowledge that gender-affirming care, as a term of art, frequently refers to care for transgender individuals, many identical and similar medical

42. *See Gender-Affirming Care for Cisgender People: Q&A with Theodore Schall and Jacob Moses*, THE HASTINGS CTR. (June 14, 2023), https://perma.cc/ZLP2-PK7F.

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

44. *Id*. at 16. Notable for reasons explained later in this article, Dr. Schall and Dr. Moses also characterize gender-affirming care as either being "masculinizing" or "feminizing" at multiple points in their article.

45. *Id*. at 15–21.

46. *See, e.g*., Justin T. Brown, *When I started growing breasts as a teen boy, I got gender-affirming care without stigma,* NBCNEWS.COM (Oct. 30, 2022), https://perma.cc/L74Z-T7HG; Megan Burbank, *It's Time to Stop Acting Like Cisgender People Don't Benefit from Gender-Affirming Care,* S. SEATTLE EMERALD (Dec. 11, 2023), https://perma.cc/9WSX-NA6K.

47. Brown, *supra* note 46.

48. *Id*.

49. Burbank, *supra* note 46.

interventions are used by cisgender individuals to affirm their gender identities as well.[50]

The widespread adoption of gender-affirming care by both cisgender and transgender individuals reveals that the laws do not ban gender-affirming care in the broadest sense of the term; rather, they prohibit gender-affirming interventions used *exclusively* by transgender individuals. As we explain below, by prohibiting care only when it has the purpose of affirming a gender identity that is *inconsistent* with one's sex assigned at birth, the bans narrowly circumscribe prohibited conduct to ban transgender minors from engaging in similar procedures used by their cisgender peers.[51] Status-as-conduct principles dictate that this is facial discrimination on the basis of transgender status and sex.

III. THE TRANS BANS: RESURRECTING CONDUCT-AS-STATUS DISCRIMINATION

Although the Supreme Court's approval of same-sex marriage in *Obergefell v. Hodges* devastated the hopes of many opponents of LGBTQIA+ civil liberties, these actors quickly shifted their focus to transgender youth.[52] Most recently, courts have addressed challenges to the rapid rise of statewide bans on medical care used for the purpose of affirming transgender identities of adolescents. With its grant of certiorari and holding of oral arguments in *United States v. Skrmetti*,[53] the Supreme Court is destined to rule on whether these prohibitions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[54]

Prior to 2023, less than a handful of states had bans against gender-affirming healthcare on the books.[55] At the time that the Supreme Court heard oral arguments in *Skrmetti*, twenty-six states had enacted sweeping prohibitions on gender-affirming care for trans youth.[56] These laws broadly prohibit minors from taking part in medical care that has the purpose of affirming a gender identity that

50. Schall & Moses, *supra* note 43; Dannie Dai, Brittany M. Charlton, Elizabeth R. Boskey, Landon D. Hughes, Jaclyn M. W. Hughto, E. John Orav, & Jose F. Figueroa, *Prevalence of Gender-Affirming Surgical Procedures Among Minors and Adults in the US*, JAMA NETWORK OPEN (June 27, 2024), https://perma.cc/G3FE-S675.

51. *See* Schall & Moses, *supra* note 43, at 22.

52. Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 17, 2023), https://perma.cc/79SV-SB2Q.

53. L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. granted*, 144 S.Ct. 2679 (Mem.), 219 L.Ed.2d 1297 (2024).

54. If the questions raised during *Skrmetti* oral arguments and the ideological composition of the Court serve as credible predictors of the impending decision, the odds of success appear to be narrow for the appellant doctors, parents, and transgender adolescents. In the event that the Court upholds the state bans on gender-affirming care, this article will remain as a scholarly response to the Court's peculiar acceptance of the faulty conduct-versus-status distinction and illogical limitation of *Bostock*'s interlocked but-for sex discrimination reasoning as applied to bans on gender-affirming care.

55. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3; *see also* ARK. CODE ANN. § 20-9-1502 (West, Westlaw through the 2025 Reg. Sess. of the 95th Ark. Gen. Assemb.), *invalidated by* Brandt v. Rutledge, 677 F. Supp. 3d 877 (E.D. Ark. 2023).

56. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3. Since *Skrmetti* oral arguments, Kansas has also enacted a ban on gender-affirming medical care through Senate Bill 63. *See* S.B. 63, 2025 Leg., Reg. Sess. (Kan. 2025).

is "inconsistent" with one's sex assigned at birth. For example, in Kentucky, the state legislature overrode Governor Andy Beshear's veto and enacted Senate Bill 150, which states that:

> (2) [. . .] a health care provider shall not, for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex, knowingly:
>
> (a) Prescribe or administer any drug to delay or stop normal puberty;
>
> (b) Prescribe or administer testosterone, estrogen, or progesterone, in amounts greater than would normally be produced endogenously in a healthy person of the same age and sex;
>
> (c) Perform any sterilizing surgery, including castration, hysterectomy, oophorectomy, orchiectomy, penectomy, and vasectomy;
>
> (d) Perform any surgery that artificially constructs tissue having the appearance of genitalia differing from the minor's sex, including metoidioplasty, phalloplasty, and vaginoplasty; or
>
> (e) Remove any healthy or non-diseased body part or tissue.[57]

Kentucky's Senate Bill 150 allows for some exceptions to this general prohibition, including a weaning provision to allow those already engaged in gender-affirming care to continue to do so for up to a year.[58] Unfortunately, a majority of the states with bans on gender-affirming care have gone further than Kentucky in restricting access.

In Arkansas, the state legislature enacted the now-invalidated House Bill 1570, the first state gender-affirming care ban for adolescents in the country:

> 20-9-1502. Prohibition of gender transition procedures for minors.
>
> (a) A physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age.
>
> (b) A physician or other healthcare professional shall not refer any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures.[59]

57. KY. REV. STAT. ANN. § 311.372 (West, Westlaw through laws effective Apr. 10, 2025 and the Nov. 5, 2024 election).

58. *Id.* § 311.372(6).

59. ARK. CODE ANN. § 20-9-1502, *invalidated by Brandt*, 677 F. Supp. 3d at 877.

The Arkansas law, like Kentucky's Senate Bill 150, permitted procedures involving sex characteristics for purposes other than "gender transition procedures."[60]

Viewed collectively, these prohibitions ban the use of three main categories of gender-affirming healthcare used for the purpose of affirming a gender identity that does not align with a minor's sex assigned at birth: puberty blockers, hormone therapies, and surgical procedures.[61] In response to these attacks on gender-affirming healthcare, transgender youth and their advocates have gone to the courts for relief. Much like the successful challenges to state bans on same-sex marriage, statewide prohibitions on gender-affirming care for trans minors have faced sweeping constitutional challenges under both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.[62]

The Supreme Court is now destined to address one such challenge to bans on gender-affirming care. In June of 2024, the Supreme Court of the United States granted certiorari in *United States v. Skrmetti*.[63] In that case, transgender youth and their families appealed to the Supreme Court after a divided panel of the United States Court of Appeals for the Sixth Circuit struck down preliminary injunctions issued by district courts in Tennessee and Kentucky that enjoined state officials' enforcement of laws prohibiting gender-affirming medical care for trans youth. The Tennessee law at issue, Senate Bill 1, broadly prohibits transgender minors from engaging in gender-affirming medical care:

68-33-103. Prohibitions.

(a) A healthcare provider shall not perform or offer to perform on a minor, or administer or offer to administer to a minor, a medical procedure if the performance or administration of the procedure is for the purpose of:

> (1) Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or
>
> (2) Treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.[64]

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60. *Id.* § 20-9-1502(c).

61. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 3.

62. *See, e.g.*, L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. granted*, 144 S.Ct. 2679 (Mem.), 219 L.Ed.2d 1297 (2024); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023); Brandt ex rel. Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023); Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023); K.C. v. Individual Members of Med. Licensing Bd. of Ind., 677 F. Supp. 3d 802 (S.D. Ind. 2023), *rev'd*, 121 F.4th 604 (7th Cir. 2024); Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023), *rev'd*, 83 F.4th 460 (6th Cir. 2023); Poe v. Drummond, 697 F. Supp. 3d 1238 (N.D. Okla. 2023); Poe ex rel. Poe v. Labrador, 709 F. Supp. 3d 1169 (D. Idaho 2023), *appeal filed*, No. 24-142 (9th Cir. Jan. 9, 2024).

63. *See* United States v. Skrmetti, 144 S.Ct. 2679 (Mem.), 219 L.Ed.2d 1297 (2024).

64. TENN. CODE ANN. § 68-33-103 (West, Westlaw through the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb).

Examining these bans, the Sixth Circuit majority concluded that the statute at issue does not improperly discriminate under the Equal Protection Clause.[65] The Sixth Circuit rejected the plaintiffs' arguments that the trans-based discrimination in the laws warrants intermediate scrutiny, which places the burden on the government to show that the challenged laws are substantially related to an important government interest.[66] Instead, the majority held that laws that discriminate on the basis of transgender status only warrant the more deferential rational basis review, which places the burden on the plaintiff to show that the challenged laws are not rationally related to a legitimate government interest.[67] Under this standard, the majority determined that the law passed constitutional muster.[68] The petitioner, the United States of America, filed a writ of certiorari to the United States Supreme Court, with the question presented being:

> [w]hether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment.[69]

The Tennessee statute, much like the anti-sodomy and marriage laws that preceded it, does not explicitly identify transgender individuals. Nonetheless, we contend that, by targeting conduct exclusively engaged in by transgender individuals, the statute and others like it discriminate on the basis of transgender status and sex. Despite the Supreme Court's repeated rejection of attempts to distinguish between conduct and status, state legislatures are once again asking courts to disaggregate conduct and status in reviewing the gender-affirming care bans so that they may withstand legal challenge. This article provides a roadmap as to why such arguments are illogical because the bans impermissibly use conduct as a proxy to discriminate on the basis of status.

IV. TARGETING TRANS CONDUCT

State prohibitions against gender-affirming care facially discriminate on the basis of transgender status because they target conduct that is exclusively engaged in by trangender individuals. A quick examination of some of the state bans on gender-affirming care reveal their trans-only application. For example, Tennessee's ban on gender-affirming care prohibits all medical procedures for minors that have the purpose of "[e]nabling a minor to identify with, or live as,

65. *Skrmetti*, 83 F.4th at 479–89.
66. *Id*. at 481.
67. *Id*. at 486, 488–89.
68. *Id*. at 489.
69. Petition for Writ of Certiorari, U.S. v. Skrmetti, 2023 WL 7327440 at *I (Nov. 6, 2023) (No. 23-477).

a purported identity inconsistent with the minor's sex" or "[t]reating purported discomfort or distress from a discordance between the minor's sex and ***asserted identity***."[70] The statute's narrow and exclusive application to conduct that has the purpose of affirming an "asserted" or "purported" identity that is "inconsistent" or "discordan[t]" with an individual "minor's sex" definitionally applies *only* to minors who are transgender.[71]

Widely-accepted definitions of "transgender" highlight how the prohibited conduct described within the bans applies exclusively to transgender individuals. The American Psychological Association defines "transgender" as "an umbrella term for persons whose gender identity, gender expression or behavior ***does not conform*** to that typically associated with the sex to which they were assigned at birth."[72] Similarly, Merriam Webster defines "transgender" as "of, relating to, or being a person whose gender identity ***differs*** from the sex the person was identified as having at birth."[73] Planned Parenthood likewise defines "transgender" as when your "gender identity is ***different*** from the gender that the doctor gave you when you were born, based on the way your body looked."[74] Pairing these definitions with the language of the bans, there is no manner in which the statutes could be construed as prohibiting medical procedures for anyone except individuals who identify as transgender.

Opponents of gender-affirming care for transgender minors are quick to point to certain "exceptions" in some of the state prohibitions that allow for gender-affirming care when it is used by intersex minors. However, these carve-outs only further underscore the trans-only application of the laws' prohibitions on gender-affirming care. By allowing for gender-affirming care only when it is used to affirm a gender identity that is "consistent" with a minor's sex assigned at birth, or when it is used by intersex individuals, the laws are construed to target only one class of persons: *transgender* individuals.

Various precedential decisions from federal appellate courts also support the conclusion that bans against conduct engaged in exclusively by transgender individuals are in essence bans that discriminate on the basis of transgender status.[75] Most on point is the United States Court of Appeals for the Fourth Circuit's decision in *Kadel v. Fowell*.[76] In that case, transgender minors and their parents

70. TENN. CODE ANN. § 68-33-101 (West, Westlaw through the 2024 Reg. Sess. of the 113th Ten. Gen. Assemb.) (emphasis added).

71. *Id.*

72. *Understanding transgender people, gender identity and gender expression*, AM. PSYCH. ASS'N (July 8, 2024) (emphasis added), https://perma.cc/JPA6-VCAC.

73. *Transgender*, MERRIAM-WEBSTER (emphasis added), https://perma.cc/D2MS-PLYU.

74. *Transgender and Nonbinary Identities*, PLANNED PARENTHOOD (emphasis added), https://perma.cc/9LWK-EYHE.

75. *See, e.g.*, Kadel v. Folwell, 100 F.4th 122 (4th Cir. 2024); Fowler v. Stitt, 104 F.4th 770 (10th Cir. 2024).

76. *See Kadel*, 100 F.4th 122. The Supreme Court of Texas recently referenced the *Kadel* decision in *State v. Loe*, and indicated that under the Texas state constitution's Equal Rights Clauses, the Texas ban on gender-affirming care for transgender minors would not be a violation of any equal protection rights.

alleged that North Carolina and West Virginia's healthcare plans violated the Equal Protection Clause by excluding coverage for medically necessary treatments for gender dysphoria, while covering the same treatments for alternative diagnoses.[77] Specifically, the plans at issue "bar[red] coverage of '[t]reatment or studies leading to or in connection with sex changes or modifications and related care' (North Carolina) and 'transsexual surgery' (West Virginia)."[78] The parties primarily disputed "whether the exclusion discriminates on the basis of diagnosis and procedure . . . or on the basis of sex and transgender identity."[79] In a divided ruling, the Fourth Circuit majority held that:

> The excluded treatments aim at addressing incongruity between sex assigned at birth and gender identity, the very heart of transgender status. In contrast to pregnancy—which is a condition that can be described entirely separately from a person's sex—gender dysphoria is simply the medical term relied on to refer to the clinical distress that can result from transgender status.[80]

The *Kadel* majority went on to explain that, despite arguments that the plans and programs prohibit coverage for anyone seeking certain medical care, the exclusions' narrow, conduct-driven language applied in practice only to transgender individuals:

> The gender-affirming surgeries that are not covered for anyone are surgeries that only transgender people would get; they are either not physically possible for other groups or would not be gender-affirming for them. Specifically, any surgeries involving removing genitals or

692 S.W.3d 215, 238 n.17 (Tex. 2024). The Texas Supreme Court attempted to distinguish *Kadel*'s holding by contending that pregnancy jurisprudence forecloses the argument that a restriction directed at a particular medical condition affecting only a certain class of people implicates our Equal Rights Clauses. *Id*. As we explain, *infra*, in our discussion of the Supreme Court's *Geduldig* decision, which was also referenced for support in *Loe*, this interpretation of equal protection jurisprudence is wrong.

77. *Kadel,* 100 F.4th at 133–34.

78. *Id*. at 142 (internal citations omitted). We also note that the prohibitions at issue in *Kadel* are similar to President Donald Trump's January 28, 2025 Executive Order, which in part appears to enforce the denial of insurance coverage for gender-affirming care used by trans minors. *See* Exec. Order No. 14187, 90 Fed. Reg. 8771 (2025) ("The Director of the Office of Personnel Management, as appropriate and consistent with applicable law, shall: (a) include provisions in the Federal Employee Health Benefits (FEHB) and Postal Service Health Benefits (PSHB) programs call letter for the 2026 Plan Year specifying that eligible carriers, including the Foreign Service Benefit Plan, will exclude coverage for pediatric transgender surgeries or hormone treatments."). To the extent the Executive Order enforces the denial of medical coverage exclusively for trans minors seeking gender-affirming care, much of our analysis with respect to facial trans-based and sex discrimination applies despite the fact that the Fourteenth Amendment's Equal Protection Clause does not directly apply to the federal government. Rather, the Supreme Court has ruled that the Due Process Clause of the Fifth Amendment, which applies to the federal government, incorporates the concept of equal protection. See Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

79. *Kadel*, 100 F.4th at 142.

80. *Id*. at 146.

> internal parts of the body are not covered when performed for gender-affirming purposes. So neither a cisgender woman nor cisgender man would be entitled to a hysterectomy, oophorectomy, vaginectomy, orchiectomy, or penectomy for gender-affirming purposes. Appellants argue that this fact shows that the Program does not discriminate against transgender people.
>
> This is just another version of Appellants' "applies equally to all to whom it applies" argument. Just as cisgender people would not seek any treatment for gender dysphoria, they would not seek certain surgeries for gender-affirming purposes. For instance, a cisgender woman would never seek a hysterectomy, oophorectomy, or vaginectomy for gender-affirming reasons because, for her, those surgeries are not gender-affirming. Nor would a cisgender man ever seek an orchiectomy or penectomy for gender-affirming reasons because, for him, those surgeries are not gender-affirming. Again, while the exclusion may *apply* to everyone, for many treatments, it is only relevant to transgender individuals.
>
> . . . We hold that gender dysphoria, a diagnosis inextricable from transgender status, is a proxy for transgender identity. And coverage exclusions that bar treatments for gender dysphoria bar treatments on the basis of transgender identity by proxy.[81]

The *Kadel* majority makes clear that targeting conduct that is a proxy for status constitutes facial discrimination. "A law is not facially neutral simply because, in place of explicit references to protected identities, the law uses different words that mean the same thing."[82] Rather, laws that use "glaringly[—]facially[—] obvious" proxies to classify conduct are unmistakably discriminatory.[83] This reasoning is squarely applicable to bans on gender-affirming healthcare for transgender minors. Like the plaintiffs in *Kadel*, transgender minors and their advocates are challenging laws that frame themselves as prohibiting a particular type of conduct. The bans on gender-affirming medical care construe themselves as prohibiting all medical care sought for the purpose of affirming a gender identity that does not align with an individual's sex assigned at birth.[84] In practice, these bans use such conduct-centered language only as a proxy for precluding exclusively trans individuals from taking part in gender-affirming care. As the *Kadel* majority explained, "[t]he excluded treatments aim at addressing incongruity between sex assigned at birth and gender identity, the very heart of transgender status."[85] "[I]t

81. *Id.* at 148–49 (internal citations omitted).
82. *Id.* at 152.
83. *Id.* at 151.
84. *See, e.g.*, TENN. CODE ANN. §§ 68-33-101 to -110 (West, Westlaw through 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.).
85. *Kadel*, 100 F.4th at 146.

is enough to know that gender dysphoria, and therefore treatment for gender dysphoria, is unique to transgender individuals in order to conclude that the exclusions use gender dysphoria as a proxy for transgender identity."[86] In the case of the bans against gender-affirming care for trans minors, it is enough to know that care designed to allow individuals to identify with a gender distinct from their sex assigned at birth is definitionally applicable exclusively to transgender individuals.

Similarly, in *Fowler v. Stitt*, the United States Court of Appeals for the Tenth Circuit addressed arguments that misconstrue laws applying exclusively to trans individuals as prohibiting conduct as to everyone.[87] In *Fowler*, trans plaintiffs challenged Oklahoma Governor Kevin Stitt's Executive Order prohibiting amendments to sex designations on birth certificates.[88] The Executive Order at issue stated that Oklahoma law did not provide state agencies "any legal ability to in any way alter a person's sex or gender on a birth certificate."[89] In deciding that the Executive Order discriminates against transgender people, the panel majority stated that:

> Before the Policy, cisgender and transgender people could obtain Oklahoma birth certificates that accurately reflected their gender identity. After the Policy, cisgender people still have access to Oklahoma birth certificates reflecting their gender identity. Transgender people, however, may no longer obtain a birth certificate reflecting their gender identity. Consequently, the Policy affects transgender people but not cisgender people.[90]

The Tenth Circuit then addressed the Governor's argument that there is no disparate impact because both cisgender and transgender individuals are prohibited from having a sex-designation amendment on their birth certificate.[91] The *Fowler* majority noted that

> [t]his argument fails to recognize that cisgender people do not need sex-designation amendments because they already have birth certificates accurately reflecting their gender identity. And because cisgender people do not need amendments, the Policy has no effect on them. After all, state action may apply to everyone equally but not affect everyone equally—"[a] tax on wearing yarmulkes is a tax on Jews."[92]

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86. *Id.* at 150.
87. *See* Fowler v. Stitt, 104 F.4th 770, 775 (10th Cir. 2024).
88. *Id.*
89. OKLA. STAT. tit. 63, § 1-321 (West, Westlaw through Second Reg. Sess. of the 59th Legislature 2024); Okla. Exec. Order No. 2021-24 (Nov. 8, 2021), https://perma.cc/7TBR-L43U.
90. *Fowler*, 104 F.4th at 786.
91. Brief of Appellees at 20, Fowler v. Stitt, 104 F.4th 770, No. 23-5080 (10th Cir. Nov. 13, 2023).
92. *Fowler*, 104 F.4th at 786 (citation omitted).

The reasoning in *Fowler* has direct application to bans on gender-affirming medical care. Like in *Fowler*, proponents of the gender-affirming care bans seek to frame the prohibitions as banning conduct as to everyone, with no explicit distinctions between cisgender and transgender status.[93] The *Fowler* court indicates that "[t]his argument fails to recognize that cisgender people do not need"[94] medical care "enabling [them] to identify with, or live as, a purported identity ***inconsistent*** with [their] sex" or "treating purported discomfort or distress from a ***discordance*** between [their] sex and asserted identity."[95] "After all, state action may apply to everyone equally but not affect everyone equally."[96] Cisgender people, by definition, have a "gender identity [that] corresponds with the sex the person was identified as having at birth."[97] The bans linguistically prohibit *all* gender-affirming conduct when it is undertaken with the purpose of changing one's gender identity; yet, in reality, the bans would permit the very same procedures if they were sought out by a cisgender minor rather than a transgender minor. Because the laws prohibit only transgender minors from engaging in gender-affirming care, they discriminate on the basis of transgender status.

As discussed above, Supreme Court precedent also supports our conclusion that the laws, despite purporting to prohibit conduct as to everyone, in fact discriminate on the basis of transgender status.[98] Here, the state bans on gender-affirming care rely on the same outdated and half-baked scheme of referencing conduct rather than status itself in order to discriminate on the basis of LGBTQIA+ status. Rather than explicitly stating that they are prohibiting transgender minors from accessing all gender-affirming medical care, the banning states half-heartedly mask this desired effect by framing the laws as banning "anyone" from seeking medical care that affirms a gender identity that is "inconsistent" with one's sex assigned at birth. This suspiciously and narrowly circumscribed conduct is behavior that only a transgender individual would engage in. "When [transgender] ***conduct*** is made criminal by the law of the State, that declaration in and of itself is an invitation to subject [transgender] ***persons*** to discrimination both in the public and in the private spheres."[99]

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93. Brief of Appellants at 39, State v. Loe, 692 S.W.3d 215, No. 23-0697 (Tex. 2024); Idaho Reports, *Idaho House Debates Bill to Prohibit Gender-Affirming Medical Treatment of Transgender Minors-HB675*, YOUTUBE (Mar. 11, 2022), https://perma.cc/HG2Y-A44N; L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 484 (6th Cir. 2023).

94. *Fowler*, 104 F.4th at 786.

95. TENN. CODE ANN. § 68-33-101 (West, Westlaw through the 2024 Reg. Sess. of the 113th Ten. Gen. Assemb.) (emphasis added).

96. *Fowler*, 104 F.4th at 786 (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

97. *Cisgender*, MERRIAM-WEBSTER, https://perma.cc/7FVF-J4H5.

98. *See supra* section I.

99. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (emphasis added). Other decisions have similarly reaffirmed the principle that laws prohibiting conduct may in fact facially discriminate on the basis of a trait protected under the Equal Protection Clause. *See, e.g.,* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."); *Bray*, 506 U.S. at 270 ("Some activities may

V. UNMISTAKABLE SEX DISCRIMINATION: *BOSTOCK* AND THE BANS

The bans not only discriminate on the basis of transgender status; they also discriminate on the basis of sex. The Supreme Court's sex discrimination reasoning in *Bostock v. Clayton County* illustrates that prohibiting masculinizing conduct when it is used by a minor who was assigned female at birth or feminizing conduct when it is undertaken by a minor who was assigned male at birth is facial discrimination on the basis of sex.[100] In this section, we discuss (A) our novel two-step analysis that reveals the inherent sex-discrimination of the laws; (B) *Bostock's* application to the gender-affirming care bans; (C) hypotheticals that illustrate the application of *Bostock's* reasoning; (D) the breadth of *Bostock* outside of the Title VII context; and (E) the Equal Protection Clause's inclusion of individual discrimination claims. In doing so, we reveal the unmistakable sex discrimination of the state bans on gender-affirming care.

A. A TWO-STEP ANALYSIS, A SEX-BASED DECISION

Proponents of statewide bans on gender-affirming care argue that the laws prohibit conduct undertaken by both boys and girls and thus do not discriminate on the basis of sex under the Equal Protection Clause. However, we posit that in order to comply with the bans, doctors must engage in a two-step identifying procedure that reveals the sex-based discrimination inherent in the bans.

Supporters frame the state laws as prohibitions against *anyone* seeking medical care for the purpose of identifying with a gender that does not conform to their sex assigned at birth. For example, in Kentucky, former state Attorney General Daniel Cameron intervened on behalf of the Commonwealth in a lawsuit where trans plaintiffs sought to preliminarily enjoin the state from enforcing its gender-affirming care ban.[101] In the Commonwealth of Kentucky's Response in Opposition to the Plaintiff's Motion for Preliminary Injunction, Cameron argued that:

> [N]othing about the challenged provisions "closes a door or denies opportunity" to just one of the sexes or "create[s] or perpetuate[s] . . . the inferiority" of one of the sexes. The provisions apply equally to *both* sexes. Children of both sexes are prohibited from doing the same thing—taking off-label drugs to attempt to alter biological appearance inherent in sex. Since the challenged provisions apply to both sexes equally, it is impossible to conclude that they prefer one sex over the other, the necessary basis of a sex-based equal protection claim.[102]

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be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.").

100. *See* Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

101. Commonwealth of Kentucky's Response in Opposition to the Plaintiff's Motion for Preliminary Injunction, Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (No. 3:23-CV-00230-DJH).

102. *Id.* at 9; Doe 1 v. Thornbury, 679 F. Supp. 3d 576, *rev'd*, L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (alteration in original).

Similarly, in state litigation over Texas's Senate Bill 14, which prohibits gender-affirming medical care for transgender minors, the Texas Attorney General's Office stated in their opening brief to the Texas Supreme Court that:

> Plaintiffs' equal-treatment challenges to S.B. 14 fail because, like other States' laws, the statute "regulate[s] sex-transition treatments for all minors, regardless of sex." *Skrmetti*, 2023 WL 6321688, at *13. "Under [S.B. 14], no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another." *Id.* . . .
>
> Just as legal classifications for abortion as a medical procedure were not discrimination based on sex, S.B. 14's classifications are not based on boys or girls as a class, but on the prohibited procedures "as a medical treatment" for gender dysphoria. *Bell*, 95 S.W.3d at 258. "Far from 'command[ing] dissimilar treatment for [boys] and [girls] who are similarly situated,'" S.B. 14 treats "boys and girls exactly the same for constitutional purposes—reasonably limiting potentially irreversible procedures until they become adults." *Skrmetti*, 2023 WL 6321688, at *15.[103]

During a floor debate regarding Idaho's gender-affirming healthcare ban, State Representative Bruce D. Skaug openly contended that such a prohibition applies to boys and girls equally:

> This bill is about protecting children [. . .] *this bill is not about adults, or [the] adult trans community, at all, this is about children.* [. . .] Today, we're asking you to amend the bill to include boys *and* girls who have their genitals mutilated by chemicals or surgery for the purpose of changing their birth sex.[104]

Some courts have been persuaded by this misleading framing of bans on gender-affirming care as being neutrally applicable to boys and girls. Notably, the Sixth Circuit majority in *Skrmetti* argued that the laws are equally applicable to boys and girls to ultimately conclude that there is no sex-based discrimination:

> The third potential classification in both laws, and the one on which plaintiffs train their arguments, turns on sex. This kind of classification, it is true, receives heightened review. *See Virginia*, 518 U.S. at 532–33. But no such form of discrimination occurs in either law. The laws regulate sex-transition treatments for all minors, regardless of sex. Under each law, no minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another. Tenn.

103. Brief of Appellants at 38–39, State v. Loe, 692 S.W.3d 215, No. 23-0697 (Tex. 2024).

104. Idaho Reports, *supra* note 93 (emphasis added). The opposition pointed out that the bill would be subject to heightened scrutiny, not rational basis.

> Code Ann. § 68-33-103(a)(1); Ky. Rev. Stat. Ann. § 311.372(2). Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. *See Reed*, 404 U.S. at 73, 76 (preferring male executors). It does not include one sex and exclude the other. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (denying entry to men); *Virginia*, 518 U.S. at 519–20 (denying entry to women); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (excluding potential jurors based on sex). It does not bestow benefits or burdens based on sex. [. . .]And by limiting access to sex-transition treatments to "all" children, the bans do not "constitute[] a denial of 'the equal protection of the laws.'" *Palmer v. Thompson*, 403 U.S. 217, 226 (1971); *accord Vacco*, 521 U.S. at 800; *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974). There thus is no reason to apply skeptical, rigorous, or any other form of heightened review to these laws.[105]

Similarly, in *Eknes-Tucker v. Governor of the State of Alabama,* the United States Court of Appeals for the Eleventh Circuit concluded that Alabama's law prohibiting gender-affirming medical care for trans minors applies equally to boys and girls and therefore does not discriminate on the basis of sex:

> [T]he statute does not establish an unequal regime for males and females. In the Supreme Court's leading precedent on gender-based intermediate scrutiny under the Equal Protection Clause, the Court held that heightened scrutiny applies to "official action that closes a door or denies opportunity to women (or to men)." *Virginia*, 518 U.S. at 532. Alabama's law does not distinguish between men and women in such a way. *Cf. Adams*, 57 F.4th at 800–11. Instead, section 4(a)(1)–(3) establishes a rule that applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for all minors. *See Skrmetti*, 73 F.4th at 419 (explaining that this sort of restriction on puberty blockers and cross-sex hormone treatment "does not prefer one sex to the detriment of the other").[106]

These arguments that frame the laws as prohibiting conduct as to boys and girls equally fail to recognize that, in practice, the laws ban boys and girls from

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105. *Skrmetti*, 83 F.4th at 480–81.

106. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1228 (11th Cir. 2023). In his concurrence, Judge Lynn Brasher also addressed the plaintiffs' equal protection arguments and remarked on the district court's determination that Alamaba's ban discriminated on the basis of sex, stating that "the [district] court concluded that Arkansas's comparable law discriminates based on sex because, referring to cross-sex hormones, it said that 'medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex.' [. . .] But the court ignored the law's ban on puberty blockers, which applies the same way to both sexes." *Id.* at 1232 (Brasher, J., concurring).

receiving the same *form* of gender-affirming care available to the "opposite" sex. We contend that a simple two-step identifying procedure will always be applied when an individual approaches a healthcare provider to access care for gender-affirming purposes. In every instance, to comply with the bans, the doctor must identify: (1) the *purpose* of the care sought (i.e., is it to "masculinize" or "feminize" that individual's physical traits?); and (2) the individual's sex assigned at birth (to determine whether it "*coincides*" with the "masculinizing" or "feminizing" care they seek).[107] This two-step identifying procedure reveals how sex will *always* be dispositive in determining whether an individual can access gender-affirming care under the bans. Additionally, this identifying procedure is an appealing test by which courts can determine whether a gender-affirming care ban discriminates on the basis of sex. The test creates a widely-applicable analysis for all "masculinizing" or "feminizing" gender-affirming care and allows courts to avoid the challenge of debating the nuances of distinct medical procedures.[108]

Characterizing gender-affirming care as "masculinizing" or "feminizing" also coincides with the real-world analysis that healthcare providers must now engage in to comply with the bans. Some may argue that characterizing gender-affirming medical care as being either "masculinizing" or "feminizing" fails to encapsulate the varied motives behind cisgender and transgender individuals' decisions to engage in such care. We recognize that limiting the effects of gender-affirming medical care to being that of "masculinizing" or "feminizing" physical characteristics may be reductive of the intentions behind a trans persons' desire to engage in gender-affirming care. This characterization does not limit the real and variable goals behind transitioning, but rather addresses only the practical physical effect of the care provided.

For example, trans identities that operate within the "boy-girl" gender binary inherently reinforce the social import of masculine and feminine gender norms.[109] Trans minors who identify as "boy" or "girl" are not rejecting the binary-based

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107. We acknowledge that this two-step process does not appear to neatly apply to gender-affirming care that does not seek to immediately "feminize" or "masculinize" an individual's physical traits, such as puberty blockers. Even in those instances, the intention behind utilizing puberty blockers is frequently to *prevent* "masculinization" or "feminization" in conformance with an adolescent's sex assigned at birth that would otherwise occur due to puberty. Thus, a doctor must still (1) determine the purpose of taking the puberty blockers (i.e. to affirmatively leave open the possibility of eventually either "masculinizing" or "feminizing" in *non-conformance* with the minor's sex assigned at birth); and (2) identify the minor's sex to determine whether their sex is discordant or non-conforming with that purpose. Notably, many of the bans carve out exemptions to their puberty blocker prohibitions in instances of precocious puberty, given that puberty blockers in those instances are only used to temporarily delay "masculinization" or "feminization" in *conformance* with a minor's sex. These exemptions provide further evidence of the trans-exclusive application of the prohibitions and their sex-based discrimination.

108. *See e.g.*, Kadel v. Folwell, 100 F.4th 122, 148–49 (4th Cir. 2024) (debating the nuances of specific medical procedures and their characterizations).

109. Alecia D. Anderson, Jay A. Irwin, Angela M. Brown, & Chris L. Grala., *"Your Picture Looks the Same as My Picture": An Examination of Passing in Transgender Communities*, 37 GENDER ISSUES

conceptualization of gender identities as being that of either of a "man" or a "woman," but are rather identifying with whichever categorization within the binary that does not conform to their sex assigned at birth.[110] Thus, for cisgender and transgender boys alike, masculinizing care is the desired form of gender-affirming care. For cisgender and transgender girls, feminizing care is the desired form of gender-affirming care. The only factor that determines access to such masculinizing or feminizing care is sex.

In instances where a trans adolescent seeks to engage in gender-affirming medical care to identify as non-binary, gender fluid, or as someone who exists outside of the gender binary, taking part in gender-affirming care nonetheless implicitly recognizes the socially-constructed meaning assigned to physical sex characteristics (i.e., the societal impression that breasts are "feminine," a penis is "masculine," etc.). It is the very act of rejecting those characteristics as being part of one's gender identity that assigns gendered meaning to them.

Thus, in all instances where a cisgender or transgender person engages in gender-affirming care, the practical effect of such care is to *either* "masculinize" or "feminize" the person's physical appearance *away from* the socially-constructed import of their sex assigned at birth or *toward* their preferred gender identity.[111] To determine who gets access to such "masculinizing" or "feminizing" medical care, sex must always play a role.

B. *BOSTOCK'S* APPLICATION TO THE BANS

The United States Supreme Court's decision in *Bostock v. Clayton County* forecloses arguments that the laws do not discriminate on the basis of sex because of their facially neutral application to boys and girls as groups.[112] In the summer of 2020, the Supreme Court issued its landmark *Bostock v. Clayton County* decision that expanded federal anti-discrimination protections to include queer and transgender individuals.[113] At issue in *Bostock* was the scope of anti-discrimination protections for government employees in Title VII of the Civil Rights Act of 1965. Title VII stipulates that

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44 (2020) (exploring the concept of "passing" for trans individuals seeking to conform to socially acceptable gender roles).

110. Some gender scholars have argued that the notion of a "sex assigned at birth" is itself a social construct. In "Gender Trouble," philosopher Judith Butler has explored in depth what she characterizes as the socially constructed influences of "biological sex." *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1999). Butler argues that the distinction between sex and gender is meaningless, noting that "perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender with the consequence that the distinction between sex and gender turns out to be no distinction at all." *Id.* at 7. Butler critiques the social framing of individuals who do not fall clearly into one of the two biological sex categories as being pathological in nature and necessitating rectification. *Id.* at 7, 44.

111. Schall & Moses, *supra* note 43.

112. Bostock v. Clayton Cnty., 590 U.S. 644, 659–60 (2020).

113. *Id.* at 644–683.

> [i]t shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.[114]

Specifically, the Supreme Court in *Bostock* was tasked with determining whether Title VII's prohibition against sex discrimination included discrimination on the basis of sexual orientation and gender identity.[115] Writing for the six justice majority, Justice Neil Gorsuch wrote that

> [a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."[116]

The *Bostock* majority also appeared to be well aware of the importance of its reasoning that grounds discrimination on the basis of gender identity as being inextricably intertwined with sex-based discrimination:

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.[117]

The Court in Bostock then proceeded to discuss hypothetical scenarios that clearly reveal individualized sex-based discrimination:

> Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female

114. Civil Rights Act of 1964, Title VII, 42 U.S.C.A. § 2000e-2(b) (West, Westlaw through P.L. 118-223).

115. *Bostock*, 590 U.S. at 659–60.

116. *Id.* (internal citations omitted).

117. *Id.* at 659.

> at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[118]

The Supreme Court's reasoning in *Bostock* that discrimination on the basis of transgender status is discrimination on the basis of sex has clear application to the bans on gender-affirming care. Proponents of the bans argue that the laws do not prohibit procedures based on sex, but rather prohibit access to medical care that has the *purpose* of gender transitioning for *all* adolescents.[119]

This rhetorical contortion is a distinction without a difference. The laws prohibit only *trans* youth from engaging in masculinizing and feminizing medical care, while permitting masculinizing and feminizing care for *cisgender* youth. Such a distinction in access is discrimination on the basis of sex. With a few modifications to the hypothetical reasoning found in *Bostock*, the facial sex discrimination riddled within the bans becomes readily apparent:

> [T]ake **law that prohibits feminizing medical care for** a transgender person who was identified as a male at birth but who now identifies as a female. If the **law permits feminizing care for** an otherwise identical **minor** who was identified as female at birth, the **law** intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in **minor** identified as female at birth. Again, the individual **minor's** sex plays an unmistakable and impermissible role in the **ban** .[120]

Take Tennessee's Senate Bill 1, which prohibits doctors from engaging in procedures that have the purpose of "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or "treating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[121] For a minor who desires masculinizing or feminizing medical care to affirm their gender identity, there is only one characteristic that determines access: sex. Under Tennessee's ban, while a minor assigned male at birth would be permitted access to medical care offered to "masculinize" physical appearances, a minor assigned female at birth would not. While a minor assigned female at birth would be permitted to "feminize" her physical characteristics through any available medical care, a minor assigned male at birth would not. This is discrimination on the basis of sex.

States attempt to mask the discrimination riddled within their gender-affirming care bans using language that centers on the *purpose* rather than the *impact* of the

118. *Id*. at 659–60.

119. Idaho Reports, *supra* note 93.

120. *Bostock,* 590 U.S. at 659–60.

121. TENN. CODE ANN. §§ 68-33-101 to 110 (West, Westlaw through effective legis. from the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.).

care. But this language fools no one. The bans' use of purpose-centered language such as, "prohibiting [care with the purpose of]. . . enabling a minor to identify with . . . a purported identity inconsistent with the minor's sex," or "treating purported . . . distress from a discordance between the minor's sex and asserted identity" is a mere proxy for excluding only transgender adolescents from feminizing and masculinizing medical care based on their trans identity and sex assigned at birth. Indeed, even ban opponents' references to the laws as being general prohibitions against gender-affirming care do not reflect that the bans only prohibit gender-affirming care as to transgender minors. According to the text of the bans, cisgender youth are permitted to continue engaging in any and all gender-affirming procedures, no matter the risks that may be present.[122] Indeed, many of these procedures are identical regardless of whether it is a cisgender or transgender minor seeking care.[123] Therefore, the laws effectively ban feminizing care for adolescents assigned male at birth and masculinizing care for adolescents assigned female at birth. This is clear discrimination on the basis of sex.

Proponents of the bans have argued that proxy discrimination in this context is not sex-based discrimination under the Equal Protection Clause.[124] These ban-advocates refer to the Supreme Court's decision in *Geduldig v. Aiello*, as support for their argument that proxy discrimination does not constitute sex-based discrimination.[125] *Geduldig* is easily distinguishable from the facts here. In that case, the Supreme Court held that pregnancy-related disabilities could be excluded from state-run disability insurance programs and that discrimination based on pregnancy did not constitute sex discrimination.[126] Although the Court in *Geduldig* specifically held that pregnancy is not a proxy for sex, scholars have rightly noted that the Court did *not* broadly hold that a characteristic of a subset

122. Proponents of the bans frequently contend that the prohibitions on gender-affirming care may be appropriate because such care is relatively novel and the risks are not yet fully explored. *See, e.g.*, Skrmetti Oral Arguments Tr., 7:25-20:9; 49:22-51:3, 90:21-94:10, 115:10-11I 7:15; Kadel v. Folwell, 100 F.4th 122, 153 (4th Cir. 2024) (Richardson, J., dissenting) (Wilkinson, J., dissenting) (Quattlebaum, J., dissenting). Some of these ban advocates would likely be the first to acknowledge that gender-affirming care and the procedures and prescriptions that come with it will change in conformance with future developments in medicine. This recognition is precisely why our characterization of the countless gender-affirming procedures and prescriptions as either "masculinizing" or "feminizing" does the best job of creating a workable legal standard for determining whether sex discrimination is present, regardless of what future procedures and prescriptions may be developed. Under the bans, a doctor will always have to undergo the two-step process that we outline in this article to determine access. That test, and its associated illustration of the sex discrimination present in the bans, does not disappear based on the specifics of any procedure or prescription.

123. *See* Schall & Moses, *supra* note 43, at 15.

124. *See Kadel*, 100 F.4th at 150.

125. *See, e.g.,* Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) ("Our conclusion that there is a "lack of identity" between the bathroom policy and transgender status is informed by the Supreme Court's reasoning in *Geduldig*."); L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 481 (6th Cir.), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389, 217 L. Ed. 2d 285 (2023), and *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679, 219 L. Ed. 2d 1297 (2024).

126. *See* Geduldig v. Aiello, 417 U.S. 484 (1974).

of a protected group can *never* be a proxy for that group.[127] Doing so would have contravened other Supreme Court decisions from both before and after *Geduldig* was decided in 1974.[128]

Additionally, as the Fourth Circuit explained in *Kadel*, unlike instances where a doctor must determine the sex of a person seeking gender-affirming care to determine access, "[d]etermining whether someone requires pregnancy-related treatment—the issue in *Geduldig*—does not turn on or require inquiry into a protected characteristic."[129] The court in *Kadel* went on to explain that "determining whether a treatment like reduction mammoplasty constitutes 'transsexual surgery' or whether a testosterone supplement is prescribed in connection with a 'sex change[] or modification[] ' is impossibl—literally cannot be done—without inquiring into a patient's sex assigned at birth and comparing it to their gender identity."[130] As we describe through our two-step process, healthcare providers cannot determine whether care is being sought for affirming a gender identity that is "inconsistent" with a minor's sex "without inquiring into a patient's sex assigned at birth and comparing it to their gender identity."[131] Because the state bans on gender-affirming care inherently require doctors to inquire into an individual's sex to determine access to feminizing or masculinizing healthcare, the bans facially discriminate on the basis of sex.

Proponents also argue that, unlike the hypotheticals in *Bostock* that controlled for all factors except sex, there are meaningful distinctions between the types of procedures used for transitioning and comparable procedures typically undertaken for other purposes.[132] For example, proponents of banning hormone therapy for minors may distinguish hormone therapy for transgender adolescents from the use of hormones for purposes such as contraception or other conditions.[133] For instance, estrogen prescribed for transitioning is typically given at a higher

127. *See* Katie Eyer, *Transgender Equality and Geduldig 2.0*, 55 ARIZ. ST. L.J. 475 (2022).

128. *See generally Geduldig*, 417 U.S. 484; *but see* Guinn v. United States, 238 U.S. 347, 364–65 (1915) ("It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage."); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews."); Christian Legal Soc'y Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

129. *Kadel*, 100 F.4th at 146–47.

130. *Id.*

131. *Id.*

132. *See, e.g.*, L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 478 (6th Cir. 2023) ("Gender-transitioning procedures often employ FDA-approved drugs for non-approved, 'off label' uses.").

133. *See, e.g.*, *Kadel*, 100 F.4th at 195 (Wilkinson, J., dissenting).

dosage than estrogen prescribed for contraception.[134] We also acknowledge that there are sometimes practical distinctions between some of the interventions that affirm gender characteristics in cisgender adolescents as opposed to care undertaken for transitioning purposes.

But these distinctions are irrelevant for the purposes of determining whether the bans discriminate on the basis of sex, and are better suited for the question of tailoring present in the second step of equal protection analysis. To establish that a classification exists, it matters only that a doctor *could* engage in any sort of gender-affirming care that conforms with a minor's sex assigned at birth, but is prohibited from doing so if the gender-affirming care does not conform with the minor's sex assigned at birth. There is only one dispositive factor for access to care designed to feminize or masculinize physical characteristics: sex.

Applying the two-step analysis outlined above, a doctor must always identify whether (1) the care is being used to masculinize or feminize physical characteristics; and (2) the minor's sex assigned at birth "aligns" with the care they seek. The prohibitions necessarily reference a minor's sex assigned at birth to determine whether there is an "incongruence" between sex assigned at birth and gender, making sex a dispositive factor in determining access to care. The prohibitions on gender-affirming care could not exclude a minor from access to such care without relying on their sex assigned at birth. Thus, in determining whether the laws facially discriminate based on sex, the answer is found in the simple reality that masculinizing care is banned for adolescents assigned female at birth, and feminizing care is banned as to adolescents assigned male at birth.

These laws punish transgender minors for seeking medical care that would enable them to masculinize or feminize their physical traits in accordance with their gender identity, while permitting such treatments for cisgender minors. Through this lens, it is clear that the laws' trans-only application is designed to punish minors from expressing a gender identity that does not conform with their sex assigned at birth. The laws permit any and all medical care designed to masculinize physical traits for minors assigned male at birth, regardless of the risks, but prohibit the same care for minors assigned female at birth. These laws permit gender conformance and prohibit non-conformance. The laws permit care designed to feminize physical traits for minors assigned female at birth, but prohibit the same care for minors assigned male at birth. This is "unmistakable" facial discrimination on the basis of sex.

C. EXPLORING HYPOTHETICALS

As the Supreme Court did in *Bostock*, exploring hypothetical scenarios of the real-world implications of the gender-affirming care bans perhaps best illuminates

134. Clarissa Kripke, *Lower- vs Higher-Dose Estrogen for Contraception*, 72 AM. FAM. PHYSICIAN 1224 (2005); Mayo Clinic, *Which Birth Control is Right for You?*, MAYO CLINIC (2022), https://perma.cc/DH99-CNEL; Louise Tomlins, *Prescribing for Transgender Patients*, 42 AUSTRALIAN PRESCRIBER 10 (2019).

the sex discrimination inherent in these laws. Because hormone therapies, surgical procedures, and puberty blockers come with distinct analyses under *Bostock*'s sex discrimination reasoning, we will address each category of care individually.[135]

1. Hormone Therapies

The statewide prohibitions on gender-affirming care discriminate on the basis of sex because access to hormone therapy for "feminizing" or "masculinizing" purposes is determined *solely* by the individual's sex. Under the bans, minors assigned male at birth are barred from any hormone therapies used for the purpose of feminizing their physical appearance, while minors assigned female at birth are prohibited from accessing any hormone therapies used to masculinize their physical appearance. This is discrimination on the basis of sex.

The sex discrimination present in the bans can also be illustrated through specific hypotheticals using real hormone therapies. Imagine that you were assigned female at birth, but identify as a teenage boy. You hope to receive masculinizing testosterone therapy so that you may align your physical appearance with your gender. You have consulted with your family, therapist, and doctor about the benefits and risks of taking testosterone, and they all agree with your decision. Nonetheless, your state bans therapies with the purpose of "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or "treating "purported discomfort or distress from a discordance between the minor's sex and asserted identity."[136]

In order to determine access to such medical care under the bans, your doctor must first identify whether you are seeking feminizing or masculinizing care. Here, it is clear you are seeking to masculinize your physical appearance. Second, your doctor must identify your sex assigned at birth. If your sex assigned at birth is male, you are permitted to engage in masculinizing hormone therapy. If your sex assigned at birth is female, you are prohibited from doing so under the state ban. Because your sex assigned at birth was female, you are unable to receive masculinizing hormone therapy.

Now imagine instead that you are a cisgender boy who seeks testosterone. You hope to further masculinize your appearance and offset feminizing traits.[137] Your stated goal is identical to that of the trans boy: physical masculinization. You

135. Courts have struggled with determining whether to discuss gender-affirming care broadly or to focus on specific types of gender-affirming care. *See, e.g.*, *Kadel*, 100 F.4th at 164. For the reasons explained previously, we believe that characterizing all forms of gender-affirming care as either "masculinizing" or "feminizing" and applying our two-step test that doctors must engage in to determine access is sufficient to reveal that the statutes inherently discriminate on the basis of sex. Nonetheless, addressing specific categories of care and detailed hypotheticals of how access to such care would be determined can help to illustrate the real situations that doctors must respond to in deciding whether prescribing or offering certain care is permissible under the bans.

136. TENN. CODE ANN. §§ 68-33-101 to -110 (West, Westlaw through 2025 1st Reg. Sess. of the 114th Tenn. Gen. Assemb.).

137. Indeed, this is a reason that cisgender boys experiencing hypogonadism engage in testosterone therapy. *See Hypogonadism*, MEDLINE PLUS (Aug. 12, 2022), https://perma.cc/M6DC-ERP4.

consult with your family, therapist, and doctor about the many potential risks of engaging in testosterone therapy.[138] Again, your doctor must engage in the two-step process of (1) determining whether you are seeking masculinizing or feminizing care; and (2) identifying your sex assigned at birth to evaluate whether the desired care conforms to it. Solely because your sex assigned at birth is male, you are permitted to engage in the same masculinizing testosterone therapy that the transgender boy is not.

2. Surgical Interventions

The statewide prohibitions on gender-affirming care also discriminate on the basis of sex in that access to surgical procedures to feminize or masculinize physical characteristics is determined by an individual's sex.[139] Under the bans, minors assigned male at birth are barred from surgical procedures used for the purpose of feminizing their physical appearance, while minors assigned female at birth are prohibited from surgical procedures used to masculize their physical appearance. This is facial discrimination on the basis of sex.[140]

Detailed hypotheticals also reveal how bans on gender-affirming surgical procedures for trans minors facially discriminate on the basis of a minor's sex. Imagine that you are a cisgender boy who seeks breast reduction surgery due to gynecomastia, a condition that results in an increase in the amount of breast gland tissue in people assigned male at birth.[141] You desire breast reduction surgery because of the social distress and physical discomfort that having large quantities of breast tissue has caused you. Like trans boys, you wish to masculize your appearance by having breast reduction surgery. The doctor must engage in the two-step process to determine your access to care. First, based on the facts above, you are clearly seeking masculinizing gender-affirming care. Second, your sex assigned at birth was male and thus conforms with the masculinizing care you seek. Solely because you are cisgender man, it is completely permissible for you to engage in breast reduction surgery. "[W]e can determine whether some patients will be eliminated from candidacy for these [masculinizing or feminizing] surgeries solely from knowing their sex assigned at birth."[142]

Now, imagine instead that you are a 17-year-old assigned female at birth, but identify as a boy. Since a young age, you have dressed, spoken, and lived your life as a teenage boy. Sure of your gender identity, you discuss with your parents, therapist, and doctor about your desire to have breast reduction surgery so that

138. *See id.*

139. In their article, Schall and Moses explore in great depth the identical nature of various gender-affirming procedures used by cisgender and transgender individuals alike. *See* Schall & Moses, *supra* note 43, at 19–20. For additional hypothetical comparisons that reveal sex-based discrimination under our two-step analysis that doctors must engage in to determine access, one can apply Schall's examples of such procedures.

140. We note that surgical interventions were not raised in the *Skrmetti* Plaintiffs' appeal to the Supreme Court.

141. *Enlarged breasts in men (gynecomastia)*, MAYO CLINIC, https://perma.cc/E9NV-E3N2.

142. Kadel v. Folwell, 100 F.4th 122, 153 (4th Cir. 2024).

you will be able to masculinize your physical appearance and fully express yourself as a young man. After significant counseling and dialogue surrounding the benefits and risks of the procedure, your parents, therapist, and doctor agree that the benefits of the procedure outweigh the risks. But you live in a state that has passed legislation that prohibits gender-affirming medical care if it is for the purpose of allowing a minor to identify with a gender that is "inconsistent" with the minor's sex assigned at birth.[143] To determine whether the law permits you to go forward with breast surgery, your doctor must engage in a two-step analysis. First, based on the facts, you are clearly seeking masculinizing gender-affirming care. Second, you were assigned female at birth, and therefore the care you seek does not conform to your sex. You are unable to obtain a gender-affirming breast reduction that the cisgender boy was permitted to receive solely because your sex assigned at birth was female.

3. Puberty Blockers

Unlike scenarios that explore the bans' impact on access to hormone therapies and surgical procedures, which best reveal sex-based discrimination by comparing access between two hypothetical minors, scenarios involving puberty blockers are best illustrated at an individual level. Imagine, for instance, that you are a 16-year-old transgender girl. Your sex assigned at birth is male, but you identify as a girl and have told your parents that you will experience life-threatening mental anguish if puberty masculinizes your physical appearance and leaves you unable to feminize your appearance to your liking in the future. After consulting with your family, therapist, and doctor, they agree that the benefits of puberty blockers outweigh the risks. But you live in a state that has passed legislation that prohibits puberty blockers if they are used to treat discomfort associated with having a gender identity that is "inconsistent" with one's sex assigned at birth.[144] Applying a slightly modified version of our two-step identifying procedure reveals the sex-centered calculus in determining access. First, your doctor must determine whether you seek puberty blockers for potential gender-affirming purposes (i.e., to leave open the opportunity to more easily feminize). Second, your doctor must identify your sex assigned at birth to determine whether it is inconsistent with the care you seek. Your doctor cannot determine whether you are seeking puberty blockers for the prohibited purposes outlined in the law without considering your sex assigned at birth and whether there is an "inconsisten[cy]" or "discordance" with your gender identity. The doctor "must, along the way, intentionally treat" a transgender minor "worse based in part on that individual's sex."[145] Your sex plays a dispositive role in determining access.

It is these exact species of hypotheticals and lived experiences that the Supreme Court in *Bostock* relied on to find facial discrimination on the basis of sex. The Supreme Court in *Bostock* went through hypothetical instances of

143. TENN. CODE ANN. §§ 68-33-101 to -110 (West, Westlaw through 2025 1st Reg. Sess. of the 114th Tenn. Gen. Assemb.).

144. *Id.*

145. Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020).

individual discrimination on the basis of sexual orientation and gender identity to demonstrate that discrimination on those bases is discrimination on the basis of sex.[146] That logic applies equally here. The statewide bans on gender-affirming care tolerate the *same* procedures, with the *same* purpose of masculinizing or feminizing a person to affirm their gender identity (or to delay puberty to leave open the opportunity to masculinize or feminize with puberty blockers), if it was a cisgender person seeking as much. It matters not that males and females are treated equally as groups under the bans; it is the individual discrimination on the basis of sex that is dispositive.[147]

D. THE BREADTH OF *BOSTOCK*

The Supreme Court's reasoning in *Bostock* that discrimination on the basis of sexual orientation and gender identity is discrimination on the basis of sex applies not only to claims brought under Title VII, but to other statutory and Equal Protection Clause claims as well. Proponents of bans on gender-affirming care for trans minors, as well as some courts, have objected on various grounds to the application of *Bostock*'s sex discrimination logic to equal protection claims raised against the state prohibitions. These objections are baseless.

1. What the Supreme Court has (and hasn't) said about *Bostock's* Scope

Some courts have concluded that the Supreme Court expressly confined its *Bostock* reasoning to Title VII.[148] For example, the Sixth Circuit in *Skrmetti* determined that *Bostock*'s reasoning applies exclusively to Title VII jurisprudence:

> Moving from constitutional to statutory cases, the plaintiffs and the federal government invoke a Title VII case, *Bostock v. Clayton County*. The [Supreme] Court concluded that Title VII's prohibition on employment discrimination "because of . . . sex" covers gay and transgender individuals. But that text-driven reasoning applies only to Title VII, as *Bostock* itself and many subsequent cases make clear.[149]

146. *Id.* at 661–62.

147. *Id.* at 662 (explaining that there is discrimination on the basis of sex even in instances where an employer is "equally happy to fire male and female employees who are homosexual and transgender.").

148. *See, e.g.*, L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 484 (6th Cir. 2023) ("The [Supreme] Court concluded that Title VII's prohibition on employment discrimination 'because of . . . sex' covers gay and transgender individuals. But that text-driven reasoning applies only to Title VII, as Bostock itself and many subsequent cases make clear." (quoting *Bostock*, 590 U.S. at 662) (citing 42 U.S.C. § 2000e-2(a)(1))); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1228 (11th Cir. 2023) ("After noting that 'only the words on the page constitute the law adopted by Congress and approved by the President,' the Court in *Bostock* relied exclusively on the specific text of Title VII." (quoting *Bostock*, 590 U.S. at 654)).

149. *Skrmetti*, 83 F.4th at 484 (internal citations omitted).

The *Skrmetti* majority mistakes the Supreme Court's silence as to the possible scope of *Bostock*'s sex discrimination reasoning as an outright prohibition. Nowhere in *Bostock* did the Supreme Court state that its "reasoning applies only to Title VII."[150] In fact, as the Tenth Circuit concluded in *Fowler*, the Supreme Court very well could have chosen to state that its sex discrimination analysis was strictly limited to Title VII:

> [T]he Supreme Court did not once state that its analysis concerning the relationship between transgender status and sex was specific to Title VII cases—and it could have done so without unduly encumbering the opinion. Indeed, although the employers in *Bostock* warned that the reasoning adopted by the Court would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," *id*. at 681, 140 S.Ct. 1731, the Court did not expressly limit its analysis to Title VII. Rather, the Court stated that other laws were not before it, so it would not "prejudge." *Id*. And the Court stated it was not "purport [ing] to address bathrooms, locker rooms, or anything else of the kind." *Id*. But the 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.[151]

The Supreme Court's silence on the scope of its reasoning regarding the inextricable interrelatedness of sexuality, gender, and sex discrimination has not stopped courts across the country from extending *Bostock*'s logic outside of the Title VII realm.[152] The *Skrmetti* majority picks and chooses cases to support its argument that *Bostock*'s reasoning is confined to the Title VII context.[153] The majority does so without acknowledging the numerous circuit and district court cases that have gone the other way.

2. Applying *Bostock*'s Reasoning to Statutory Claims Beyond Title VII

In statutory cases, courts have extended *Bostock*'s analysis in Title VII to other federal statutes. *Bostock*'s reasoning has frequently been extended to claims brought under Title IX, a statute that grounds its own power in the Fourteenth

150. *Bostock*, 590 U.S. at 659–60.

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

152. Notably silent during the Supreme Court's *Skrmetti* oral arguments was the typically-inquisitive Justice Neil Gorsuch, who authored *Bostock*. *See Skrmetti* Oral Arguments, *supra* note 122. Some have already speculated on the meaning of Justice Gorsuch's silence. *See, e.g.*, Josh Blackman, *The Sound of Silence in* Skrmetti, REASON MAG., (Dec. 4, 2024), https://perma.cc/K58A-SYHT. The impending *Skrmetti* decision may provide the answer as to why Justice Gorsuch declined to discuss the scope and application of *Bostock* during oral arguments.

153. *See Skrmetti*, 83 F.4th at 484 (citing *Bostock*, 590 U.S. at 681; Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021); Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021)).

Amendment's Equal Protection Clause.[154] Perhaps most compelling for this article's purposes, in *Grimm v. Gloucester Cnty. School Board,* the Fourth Circuit found that *Bostock*'s sex discrimination reasoning extended to the Title IX context where a school board prohibited a trans boy from using a bathroom that matched his gender identity.[155] In addressing a bathroom policy that, like the bans here, was framed as prohibiting *everyone* from actions that in practice applied only to transgender individuals, the Fourth Circuit held that:

> [T]he Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."[156]

Other court decisions have similarly extended *Bostock*'s logic that gender-based discrimination is sex-based discrimination to statutes beyond Title VII.[157] These cases illustrate how *Bostock*'s reasoning has been applied to statutes that are textually distinct from Title VII.[158]

3. Applying *Bostock*'s Reasoning to Equal Protection Claims

More importantly, circuit courts across the country have concluded that *Bostock*'s reasoning that discrimination on the basis of gender identity is discrimination on the basis of sex has application to Equal Protection Clause

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154. *See, e.g.,* Soule by Stanescu v. Connecticut Ass'n of Schs., Inc., 57 F.4th 43, 56 (2d Cir. 2022) (extending *Bostock* to Title IX); A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 769 (7th Cir. 2023) (same), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683, 217 L. Ed. 2d 382 (2024); Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (same) Dodds v. United States Dep't of Educ., 845 F.3d 217, 220 (6th Cir. 2016) (same); B.P.J. by Jackson v. West Virginia State Bd. of Educ., 98 F.4th 542, 551 (4th Cir. 2024) (same); *but see Meriwether*, 992 F.3d at 510 n.4 (declining to apply Title VII analysis to Title IX).

155. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020).

156. *Id.*

157. *See* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 40 (D.D.C. 2020) (noting "*Bostock's* clear import for the meaning of discrimination based on sex under Title IX"); Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 351 (Nev. 2020) ("Applying *Bostock's* reasoning to the analogous language in Title IX prohibiting harassment 'on the basis of sex,' we first conclude sufficient facts support a claim under Title IX.").

158. *Contra Pelcha*, 988 F.3d at 324 (declining to apply *Bostock*'s reasoning to the Age Discrimination in Employment Act ("ADEA")). The *Pelcha* case is distinguishable because the Sixth Circuit relied on an ADEA-specific meaning of "because of" in the but-for analysis. *Id.* at 323–24 (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009)). *Pelcha*'s reasoning is also faulty because, as we discuss *supra*, it is wrong to suggest that the Supreme Court expressly forbade the extension of *Bostock*'s reasoning outside of Title VII.

jurisprudence.[159] Meanwhile, proponents of the bans, as well as some courts, have argued that the linguistic distinctions between Title VII and the Equal Protection Clause foreclose the application of *Bostock*'s reasoning to the latter.[160] This contention holds little water in light of the circuit and district court decisions, as well as significant legal scholarship, that have applied the sex discrimination reasoning found in *Bostock* to claims brought under the Equal Protection Clause.

First, courts of appeals have expressly extended *Bostock*'s sex discrimination reasoning to Equal Protection Clause claims. Prior to its *Kadel* decision, discussed *supra*, the Fourth Circuit's *Grimm* decision also found that *Bostock*'s sex discrimination logic applies to claims brought by transgender individuals under the Equal Protection Clause.[161] There, a transgender plaintiff alleged that his school had established a policy that denied him access to the bathroom that aligned with his gender identity. In ruling in favor of the plaintiff, the Fourth Circuit noted that "[m]any courts. . . have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender nonconformity, thereby relying on sex stereotypes."[162] The court proceeded to apply heightened scrutiny under the Equal Protection Clause to the bathroom policy because it facially discriminated on the basis of sex.[163]

In *Kadel v. Folwell*, the Fourth Circuit applied *Bostock*'s sex discrimination reasoning and hypotheticals to contend that statewide exclusions on gender-affirming surgical procedures discriminate on the basis of sex under the Equal

159. *See, e.g.*, Fowler v. Stitt, 104 F.4th 770, 793 (10th Cir. 2024); Kadel v. Folwell, 100 F.4th 122, 153–54 (4th Cir. 2024) (en banc); *id.* at 177–81 (Richardson, J., dissenting); Hecox v. Little, 104 F.4th 1061, 1080 (9th Cir. 2024); LeTray v. City of Watertown, No. 520CV1194FJSTWD, 2024 WL 1107903 (N.D. NY Feb. 22, 2024); D.T. v. Christ, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021).

160. *See, e.g.*, L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 484 (6th Cir. 2023) ("Differences between the language of the statute and the Constitution supply an initial reason why one test does not apply to the other."). Additionally, the Eleventh Circuit has declined to extend *Bostock*'s reasoning to a case dealing with equal protection challenges to a school board's denial of gender-affirming bathroom access. *See* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 808–09 (11th Cir. 2022). However, the en banc *Adams* decision is by no means the nail in the coffin for plaintiffs seeking to import *Bostock*'s reasoning into challenges to bans on gender-affirming care. First, the *Adams* majority failed to acknowledge how the bathroom bans, while being construed as a prohibition for students regardless of sex, in fact exclusively discriminated against trans students by prohibiting only those students from using a bathroom that aligned with their gender identity. *Id.* at 808 ("Transgender status and gender identity are wholly absent from the bathroom policy's classification."). Second, for reasons discussed *supra*, the *Adams* majority incorrectly relied on the Supreme Court's *Geduldig* decision in contending that there is a "'lack of identity' between the bathroom policy and transgender status." *Id.* at 809. Finally, and as we discuss *infra*, multiple other circuit courts have disagreed with the reasoning in *Adams* under nearly-identical factual circumstances. *See, e.g, Grimm*, 972 F.3d at 608; A.C. by M.C. v. Metro. Sch. Dist. of Martinsville, 75 F.4th 760, 771 (7th Cir. 2023), *cert. denied sub nom.* Metro. Sch. Dist. of Martinsville v. A. C., 144 S. Ct. 683 (2024).

161. *Grimm*, 972 F.3d at 617.

162. *Id.* at 608.

163. *Id.* at 616–17.

Protection Clause.[164] The en banc *Kadel* majority reached this conclusion by recognizing that discrimination on the basis of transgender status is sex-based discrimination because "we can determine whether some patients will be eliminated from candidacy for these surgeries solely from knowing their sex assigned at birth."[165]

In *Fowler*, the Tenth Circuit "join[ed] the courts that have applied *Bostock*'s reasoning to equal protection claims."[166] It did so after determining that "*Bostock*'s reasoning leads to the conclusion that the Policy [of denying health coverage for gender-affirming procedures] intentionally discriminates against Plaintiffs based in part on sex."[167] The majority then applied the same hypotheticals from *Bostock* to reveal the facial sex discrimination present in Executive Order 2021-24, which denied health benefit coverage for gender-affirming medical care:

> Take Ms. Fowler, for example. If her sex were different (i.e., if she had been assigned female at birth), then the Policy would not deny her a birth certificate that accurately reflects her identity. So too for Mr. Hall and Mr. Ray—had they been assigned male at birth, the Policy would not impact them. Thus, the Policy intentionally treats Plaintiffs differently because of their sex assigned at birth.[168]

In *Hecox v. Little*, the United States Court of Appeals for the Ninth Circuit applied *Bostock*'s reasoning to equal protection claims brought by transgender plaintiffs. There, the court addressed an Equal Protection Clause claim that challenged an Idaho law stipulating that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex."[169] In determining that the Idaho law discriminated on the basis of sex, the Ninth Circuit referenced *Bostock*'s logic to support its conclusion that "discrimination on the basis of transgender status is a form of sex-based discrimination."[170]

In *Whitaker v. Kenosha Unified School District*, the United States Court of Appeals for the Seventh Circuit decided three years before the Supreme Court's *Bostock* decision that a school district's policy of precluding transgender students

164. *Kadel*, 100 F.4th at 153.

165. *Id.* Even the dissent in *Kadel* recognizes that *Bostock*'s analysis should apply to findings of facial discrimination in the Equal Protection Clause. *Id.* at 180 (Richardson, J., dissenting) ("The Equal Protection Clause requires a showing of but-for causation. *Bostock* gave us a test for identifying 'traditional' and 'simple' but-for causation. It therefore follows that *Bostock*'s test can identify but-for causation under the Equal Protection Clause. A plaintiff can establish the first step of an Equal Protection claim by showing that they suffered intentional discrimination because of their protected trait.") (internal citations omitted).

166. Fowler v. Stitt, 104 F.4th 770, 793 (10th Cir. 2024).

167. *Id.*

168. *Id.* at 789.

169. Hecox v. Little, 104 F.4th 1061, 1079–80 (9th Cir. 2024); ID. CODE § 33-6203(2) (2020) (current with effective leg. through ch. 300 of the 1st Reg. Sess. of the 68th Idaho Legis.).

170. *Hecox*, 104 F.4th at 1080.

from using a bathroom that aligns with their gender identity discriminates on the basis of sex.[171] The *Whitaker* court reasoned that, although the district's policy treats boys and girls equally as a group, the "policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate."[172] This logic is precisely what was used only three years later in the Supreme Court's *Bostock* decision.[173]

Finally, in *Brandt v. Rutledge,* the United States Court of Appeals for the Eighth Circuit addressed a case brought by transgender youth as well as their parents and physicians against Arkansas officials over allegations that an Arkansas statute prohibiting gender transition procedures for minors violated the Equal Protection Clause. In applying heightened scrutiny to affirm a preliminary injunction against the enforcement of the law, the Eighth Circuit noted that "Arkansas's characterization of the Act as creating a distinction on the basis of medical procedure rather than sex is unpersuasive."[174] Although not referencing *Bostock* explicitly, the court used the decision's reasoning in concluding that "the biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not."[175]

Lower courts have similarly applied the sex discrimination reasoning found in *Bostock* to equal protection claims raised by queer and trans plaintiffs.[176] A great deal of legal scholarship has also raised arguments in favor of the application of *Bostock*'s sex discrimination reasoning to Equal Protection Clause claims.[177] For example, in "Redefining What It Means to Discriminate Because of Sex: *Bostock*'s Equal Protection Implications," Susannah Cohen outlines both the existing application of *Bostock*'s reasoning to equal protection claims, as well as the reality that *Bostock*'s reasoning may, as we argue below, lay the foundation for discrimination on the basis of transgender status to be subject to intermediate scrutiny.[178] In light of the growing consensus among courts and scholars as to the application of *Bostock*'s reasoning to equal protection claims, arguments hinging

171. Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (abrogated on other grounds).

172. *Id.*; *see also* A.C. by M.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, 217 L. Ed. 2d 382 (2024) (discussing the broad scope of *Bostock*'s reasoning in a case with both Title IX and Equal Protection Clause claims relating to discrimination against transgender minors).

173. *See* Bostock v. Clayton Cnty., 590 U.S. 644, 659–60 (2020).

174. Brandt ex rel. Brandt v. Rutledge, 47 F.4th 661, 670–71, n.4 (8th Cir. 2022).

175. *Id.* at 670.

176. *See, e.g.,* M.E. v. T.J., 854 S.E.2d 74, 108–11 (N.C. 2020); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (applying heightened scrutiny to a law that prohibited various medical treatments for gender dysphoria in minors).

177. Susannah Cohen, Note, *Redefining What It Means to Discrimination Because of Sex:* Bostock*'s Equal Protection Implications*, 122 COLUM. L. REV. 407 (2022).

178. *Id.* at 439, 441–42; *see also* Corbin Carter & Michael S. Arnold, *Supreme Court Rules That Title VII Protects LGBTQ Employees*, MINTZ (June 16, 2020), https://perma.cc/9LVS-WLNW; Sharita

on the fact that Title VII and the Equal Protection Clause analyses are distinct in many ways ring hollow.

4. Importing *Bostock*'s Reasoning, Not Its Defenses

Proponents of the bans have also argued that importing *Bostock*'s reasoning to equal protection claims would also necessitate importing Title VII defenses. For example, the Sixth Circuit in *Skrmetti* suggested that applying *Bostock*'s sex discrimination would require courts to also consider Title VII defenses when analyzing equal protection claims.[179] This argument fails on two grounds.

First, as both the *Skrmetti* dissent and *Fowler* majority point out, there is no reason why *Bostock*'s sex discrimination reasoning cannot apply solely for the purpose of determining whether there is facial discrimination under the Equal Protection Clause.[180] Although proponents of the bans, and indeed some courts, conflate importing *Bostock*'s sex discrimination reasoning with categorically equating large swaths of Title VII and equal protection analyses, doing so is a false equivalence. Like Title VII's burden-shifting framework, the Equal Protection Clause's tiers of scrutiny and their respective standards are well established and need not be influenced by the application of *Bostock*'s sex discrimination analysis to determine whether a statute facially discriminates on the basis of sex.

Secondly, Title VII and its defenses predated *Bostock*'s reasoning regarding the interrelatedness of gender and sex discrimination. As the *Skrmetti* majority appears to concede in its opinion, Title VII defenses are based on that statute's language in a manner that should not be transposed into analyses of Equal Protection Clause claims.[181] Unlike the defenses that are unique to Title VII's

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Gruberg, *Beyond* Bostock*: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://perma.cc/F6AY-U2WU ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny."); *A Q&A with Professor Eskridge on Landmark SCOTUS Decision on LGBTQ Rights*, YALE L. SCH. (June 16, 2020), https://perma.cc/8Q5C-SMMT ("[T]he statutory ruling will have constitutional echoes. . . . The Court has not said exactly what level of scrutiny should apply to state action harming sex and gender minorities—but after *Bostock* one must assume that heightened scrutiny applies.").

179. *See* L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 485 (6th Cir. 2023) ("Importing the Title VII test for liability into the Fourteenth Amendment also would require adding Title VII's many defenses to the Constitution: bona fide occupational qualifications and bona fide seniority and merit systems, to name a few.") (internal citation omitted).

180. *See id.* at 503 n.7 (White, J., dissenting) ("[N]o one suggests that the 'test for liability' is the same under Title VII and the Equal Protection Clause, only that the standard for determining the existence of a facial classification is the same."); Fowler v. Stitt, 104 F.4th 770, 790–91 (10th Cir. 2024) ("[A]dopting *Bostock*'s commonsense explanation for how to detect a sex-based classification does not require us to import Title VII's 'test for liability.'")

181. *See Skrmetti*, 83 F.4th at 503 n.7 (White, J., dissenting) ("[T]he majority itself acknowledges implicitly that separate provisions of Title VII codify those defenses, thus belying any notion that those defenses must apply in equal-protection cases were we to conclude that a facial classification under Title VII is also a facial classification under the Equal Protection Clause. Instead, those considerations factor into the heightened-scrutiny balancing analysis.") (internal citation omitted).

statutory language, *Bostock*'s logic that discrimination on the basis of gender is discrimination on the basis of sex fits squarely within the Equal Protection Clause's pre-existing analytical framework that requires a determination as to whether a statute facially discriminates.[182]

E. THE EQUAL PROTECTION CLAUSE AND *BOSTOCK*'S INCLUSION OF INDIVIDUAL DISCRIMINATION CLAIMS

Some courts have posited that the state bans on gender-affirming medical care do not discriminate on the basis of sex as a group and that individualized discrimination on the basis of sex does not entitle the plaintiffs to intermediate scrutiny.[183] Established precedent and *Bostock*'s reasoning support the opposite conclusion.

"An equal protection plaintiff must plausibly allege that she was treated differently and that 'the different treatment was based on her membership in a particular class.'"[184] A plaintiff can make such a showing by alleging that they, individually, were "treated differently because of [their] membership in a group."[185] In other contexts, the Supreme Court has been quick to recognize the validity of equal protection claims that rely on individualized discrimination, rather than group discrimination. In *Loving v. Virginia*, the Supreme Court dealt with an equal protection challenge to Virginia's anti-miscegenation law which stipulated that "[i]f any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."[186] In holding that the law violated the Equal Protection Clause, the Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[187]

Challenges to jury selection procedures have also proven that individualized discrimination still constitutes discrimination under the Equal Protection Clause. In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court explained that the Equal Protection Clause prohibits litigants from striking "potential jurors solely on the

182. *See id.* (White, J., dissenting); Washington v. Davis, 426 U.S. 229, 242 (1976).

183. *Fowler*, 104 F.4th at 791.

184. *Id.* (quoting Engquist v. Oregon Dept. of Agric., 553 U.S. 591, 594 (2008)).

185. *Fowler*, 104 F.4th at 791 (citing *Engquist*, 553 U.S. at 594); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (stating that the Equal Protection Clause "protect[s] persons, not groups"); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) (stating that Supreme Court precedent "makes clear that the Equal Protection Clause 'protect[s] persons, not groups'" (alteration in original) (quoting *Adarand*, 515 U.S. at 227)).

186. Loving v. Virginia, 388 U.S. 1, 4 (1967) (citing VA. STAT. § 20–59 (1924), which defined the penalty for miscegenation).

187. *Loving*, 388 U.S. at 8; *see also* Powers v. Ohio, 499 U.S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

basis of gender" because "individual jurors themselves have a right to nondiscriminatory jury selection procedures."[188] The Supreme Court concluded that striking individual jurors because of their sex, even if one sex collectively is not treated worse than another, is a violation of the Equal Protection Clause.[189]

More recently, and perhaps most applicable here, in its *Fowler* decision, the Tenth Circuit refuted arguments that the Equal Protection Clause does not account for individualized sex discrimination claims raised by transgender plaintiffs seeking to strike down an executive order barring individuals from changing their sex designation on birth certificates.[190] The *Fowler* majority, responding to the dissent's contention that the only plausibly alleged purpose of the Executive Order was to disadvantage transgender people, noted that "the Supreme Court could have reached this same conclusion in *Bostock* and held that the employers intended to discriminate only based on transgender status, not sex."[191] Instead, the majority noted, *Bostock* held "that to discriminate on the basis of transgender status, 'the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.'"[192] The Tenth Circuit concluded that "the Policy here cannot discriminate against transgender people without, 'along the way,' intentionally treating them 'worse based in part on' sex."[193]

The same conclusion is warranted here. Although the statewide bans facially discriminate against transgender people as a collective, they also discriminate *individually* on the basis of sex under the Equal Protection Clause. A simple examination of these hypotheticals reveals that the laws discriminate against individual males and females despite their facially equal application to the sexes assigned at birth. The bans "cannot discriminate against transgender people without, 'along the way,' intentionally treating them 'worse based in part on' sex."[194] In light of the overwhelming case law that supports equal protection claims alleging individual discrimination, claims brought by transgender plaintiffs against statewide bans on gender-affirming care discriminate on the basis of sex despite their application to both boys and girls. The above analysis of *Bostock*'s sex discrimination reasoning reveals that state bans on gender-affirming medical care discriminate against transgender individuals on the basis of sex.

188. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140–41, 143 (1994).

189. *Id.* at 129–31, 146; L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 482–83 (6th Cir. 2023) (acknowledging that "sex-based peremptory challenges violate[] equal protection even though the jury system ultimately may not favor one sex over the other").

190. *See Fowler*, 104 F.4th at 788, 791.

191. *Id.* at 793.

192. *Id.* (citing Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020)).

193. *Fowler*, 104 F.4th at 793 (citing *Bostock,* 590 U.S. at 662).

194. *Id.*

CONCLUSION

Prior to the advent of government prohibitions on gender-affirming medical care, trans youth already faced alarming mental health challenges.[195] A comprehensive 2024 survey by the Trevor Project revealed that a staggering forty-six percent (46%) of transgender and non-binary youth seriously considered attempting suicide in the year preceding the survey, with twelve percent (12%) of LGBTQIA+ respondents actually attempting suicide.[196] Seventy-one (71%) of transgender and non-binary respondents reported symptoms of anxiety, and fifty-nine percent (59%) reported symptoms of depression .[197]

Rather than addressing the mental health crisis facing transgender adolescents, state legislatures have instead exacerbated it by enacting laws that discriminate against transgender adolescents by prohibiting them from engaging in medically necessary gender-affirming care. LGBTQIA+ advocates and parents of trans minors worry that these bans will worsen mental health outcomes and increase the rate of suicide for children.[198] State legislatures defend the bans by arguing that they treat transgender and cisgender minors equally. But that is the opposite of what they do. The bans intentionally and narrowly define the prohibited conduct to encompass behavior exclusively sought out by *transgender* individuals. While cisgender minors are permitted to engage in any gender-affirming care, transgender minors are denied access to nearly all gender-affirming medical interventions. By using conduct as a proxy for status, the bans facially discriminate on the basis of transgender status.

The bans also discriminate on the basis of sex. Utilizing the Supreme Court's interlocked sex discrimination reasoning in *Bostock v. Clayton County*,[199] we illustrate that the bans' trans-exclusive application requires doctors to engage in an invasive two-step identifying process in which sex becomes the key determinant of access. Each time an adolescent enters a doctor's office seeking gender-affirming care, a doctor must (1) determine if the care the minor seeks is "masculinizing" or "feminizing," and (2) identify the minor's sex assigned at birth. If the minor's sex conforms to the masculinizing or feminizing care they seek, the doctor is permitted to provide essentially any gender-affirming care desired. If the minor's sex does not conform to the care they seek, they are prohibited from accessing care. Examining well-established equal protection jurisprudence, this is discrimination on the basis of sex.

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195. *See* Daniel Breen, *First in the Nation Gender-Affirming Care Ban Struck Down in Arkansas*, NPR (June 20, 2023), https://perma.cc/7SYP-Z2E5.

196. The Trevor Project, *2024 U.S. National Survey on the Mental Health of LGBTQ+ Young People*, THE TREVOR PROJECT 2 (2024), https://perma.cc/2RNW-VYVD.

197. *Id*. at 6.

198. Kacie M. Kidd, Gina M. Sequeira, Taylor Paglisotti, Sabra L. Katz-Wise, Traci M. Kazmerski, Amy Hillier, Elizabeth Miller, & Nadia Dowshen, *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. OF ADOLESCENT HEALTH 1082, 1083 (2021).

199. Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

The gender-affirming care bans' focus on conduct, as opposed to status, is a tested and rejected method of discrimination. Over nearly three decades, the Supreme Court has rightfully refused to disaggregate LGBTQIA+ conduct from LGBTQIA+ status. The Court's mistake in its now-overruled *Bowers*[200] decision of allowing conduct-based discrimination against LGBTQIA+ persons should not be repeated. Proponents of the bans overmedicalize and hyper-doctrinalize what should be obvious to the courts. Allowing states to discriminate on the basis of conduct that is exclusive to transgender status is an invitation to discriminate against transgender people in all spheres of their lives. And when it comes to transgender adolescents, the stakes could simply not be higher.

200. Bowers v. Hardwick, 478 U.S. 186 (1986).