

INDEX

1. What are the courts saying?
2. What's the impact in the states?
3. Have federal appeals courts been unanimous on trans issues?
4. Will the Supreme Court take up a case on trans rights?
5. References

The 19th Explains: The groundwork for a Supreme Court case on gender-affirming care is being laid now

Published October 12, 2023



The legal battle around transgender rights has shifted dramatically. Here's why — and what could come next.

For much of 2023, federal judges were consistently [blocking bans](#) on gender-affirming care from taking effect. Siding with LGBTQ+ and civil rights groups, those judges repeatedly found that banning gender-affirming care is likely unconstitutional on the grounds of the equal protection and due process clauses of the 14th Amendment.

Now, the legal battle around transgender rights has shifted dramatically after two federal appeals courts rebuked those lower-court decisions by finding that gender-affirming care is not protected by the Constitution.

The 14th Amendment, which in the wake of the Civil War granted citizenship to Black Americans, is the basis for much of the country's federal civil rights and anti-discrimination statutes. Landmark legal cases on racial and gender discrimination have relied on the amendment's equal protection clause, which [requires](#) states to ensure equal protection for its citizens. The 14th Amendment's due process clause has been interpreted by the courts to protect rights not explicitly listed in the Constitution.

The conflicting decisions, and the questions they raise over the 14th Amendment and sex discrimination protections, may eventually propel a transgender rights case to the Supreme Court. Here's how the groundwork is being laid out in the courts now.

What are the courts saying?

The 6th U.S. Circuit Court of Appeals ruled in late September that gender-affirming care bans for trans youth must [remain in place in Kentucky and Tennessee](#) as lawsuits in those states continue. The 11th Circuit [ruled in August](#) via a three-judge panel that Alabama can enforce its gender-affirming care ban.

These decisions extend to all the states in their jurisdiction. The 6th Circuit decision directly impacts Ohio and Michigan alongside Kentucky and Tennessee, while Florida and Georgia are also bound by the 11th Circuit decision.

These two rulings both cite the Supreme Court case that ended the federal right to an abortion. The Supreme Court's decision in [Dobbs v. Jackson Women's Health Organization](#) argued that [abortion access](#) is not "deeply rooted" in the nation's history, and therefore not protected under 14th Amendment. Now, this same view is being applied to gender-affirming care.

The 11th and 6th Circuits also cite Dobbs, alongside a lesser-known Supreme Court case, to argue that gender-affirming care bans do not discriminate on the basis of sex.

The argument that banning gender-affirming care is not sex discrimination piggy-backs off of Dobbs' reference to the pregnancy discrimination case [Geduldig v. Aiello](#), said Ezra Ishmael Young, a civil rights lawyer and scholar. In [Geduldig](#), the high court [asserted](#) that excluding pregnant women from a state insurance program was not actually an exclusion based on gender, but based on physical condition.

When Dobbs cited that case, it revived a [long-ignored](#) piece of law. Lawyers and scholars had long seen the [Geduldig](#) case as no longer valid, Young said, since later cases undermined its findings. Then Justice Samuel Alito, who authored the [majority opinion for Dobbs](#), used [Geduldig](#) to argue that abortion bans are not sex discrimination.

Now, [Geduldig](#) is being used in federal appeals courts to argue that gender-affirming care bans do not target trans youth on the basis of sex.

Trans advocates and lawyers need to reach consensus on how to deal with [Geduldig](#), as well as how and whether sex discrimination should be used to defend gender-affirming care in court, Young said — too many conflicting approaches to fighting these bans will muddy the waters. Looking to women's rights groups dealing with the post-Dobbs legal landscape would be beneficial to the movement, he said.

"Trans advocates and women's rights advocates should be working closely together on things and trying to help each other flesh out their theories of how to talk about the Constitution, but that's not really happening," he said.

What's the impact in the states?

The 6th Circuit's ruling means that trans adolescents in Kentucky and Tennessee are being weaned off of their hormone treatments.

Although Tennessee's gender-affirming care ban includes a continuing care exception until March next year, that does not reflect the reality on the ground, said Sruti Swaminathan, a Lambda Legal staff attorney. Physicians are weaning trans adolescents off of their hormone treatments to avoid a sudden cut-off of treatment next spring, they said.

"In effect, everyone is winding down care until March 2024," said Swaminathan, who has helped to lead the legal group's fight against Tennessee's gender-affirming care ban. "These young people will continue suffering as a result of this type of decision in the 11th and in the 6th Circuit. There's an unwillingness to afford them the constitutional protections that they deserve."

For now, the preliminary injunction preventing Alabama's gender-affirming care ban from going into effect is [still in place](#), at least until the 11th Circuit accepts or denies the request for a full court hearing. Georgia's [law](#), which allows trans youth who were already receiving hormone therapy prior to the law's enactment to continue getting that care, and does not impact puberty blocker treatments, is in full effect.

Have federal appeals courts been unanimous on trans issues?

Not every federal appeals court ruling in the last few years has been hostile to trans people — or has discounted 14th Amendment protections for trans people.

In August, the 9th U.S. Circuit Court of Appeals [upheld an injunction](#) that prevents Idaho from policing how trans students join school sports. A three-judge panel on the 9th Circuit found that because the sports ban likely violated the 14th Amendment, a district court did not abuse its discretion when it first blocked the ban from taking effect.

Separately, the 4th Circuit found last year that the Americans with Disabilities Act [extends protections](#) to people with gender dysphoria — arguing that a law excluding gender dysphoria and gender identity disorders would discriminate against transgender people as a class. This implicates 14th Amendment protections under the equal protection clause, Judge Diana Gribbon Motz [wrote](#) in the majority opinion.

In addition, the [8th Circuit](#) sided last year with a federal district court to block Arkansas' gender-affirming care ban. In that case, families of transgender youth [sued on the grounds](#) that Arkansas' ban violated the 14th Amendment by discriminating on the basis of sex and transgender status, as well as the right to freedom of speech in the First Amendment.

Most recently, the 11th Circuit [sided with a district court](#) to keep Florida's drag ban from taking effect. The case has been based largely on First Amendment grounds.

More rulings are on the horizon.

Right now, the full 4th Circuit is [considering](#) cases about government-sponsored insurance for adults receiving gender-affirming care — through a case regarding North Carolina's state employee health plan, and another case on whether West Virginia Medicaid should cover gender-affirming surgery.

District judges in Oklahoma and Florida have allowed gender-affirming care restrictions to take effect, citing the rulings in the 6th and 11th Circuit Courts. In Oklahoma — which does not have to follow precedent set by either of those courts — a ban on care for minors is back in place. In Florida, a judge allowed gender-affirming care restrictions for adults to remain in place.

Will the Supreme Court take up a case on trans rights?

The Supreme Court, which began a [new term](#) this month, has recently declined to get involved with several trans rights cases. Still, to transgender attorneys, a Supreme Court case addressing trans rights feels inevitable.

"They will at some point take up a case asking, how does, if at all, the 14th Amendment protect trans people?" said Young. "What's not clear is, what's going to be the context? ... It may or may not be care, and it may or may not be care for minors."

A case on health care for trans youth could make it to the Supreme Court, he said, since so many anti-trans laws target its availability. Many of the lawsuits regarding gender-affirming care bans are in the very early stages of litigation, Young said. Battles over preliminary injunctions, or efforts to stop laws from taking effect as lawsuits play out, are a long way away from a full trial.

Swaminathan sees a trans rights case getting to the Supreme Court in the near future, although they're not sure which policy issue the court would choose to take on — whether it's health care, restroom access, or school sports access.

"Given the number of contradicting opinions that have come out and interpretations of sex discrimination under the equal protection clause, I think there's going to be a case — maybe not this term, perhaps the term after — that SCOTUS will definitely hear," they said.

In recent cases regarding a [transgender student's bathroom access](#) and whether a [trans student can play in school sports](#), the Supreme Court has declined to intervene — granting wins to advocates. The high court's inaction this year protected the precedent that expands [Americans with Disabilities Act coverage](#) to those with gender dysphoria.

Anya Marino, director of LGBTQI equality at the National Women's Law Center, worries that public speculation about how the Supreme Court will address trans rights may incite panic among trans people during a time of widespread fear and [rising political attacks](#). But she also believes it's likely that the Supreme Court will, at some point, consider a case on trans rights.

Trans people watching these cases go through the courts, and who might be worried, should know that their fear is real — but there is still strength and courage to find in living fully as themselves, Marino said.

"Every day we dare to live authentically and unapologetically is an act of courage. It's an act of faith that our lives have meaning. And it's an act of defiance against those who intend to harm us," she said. "Don't lose hope. All of us in the movement are working our hardest to support you."

Cite This Page

References

1 Read the original article at <https://19thnews.org/2023/10/supreme-court-transgender-rights-gender-affirming-care>

Stay informed: Sign up for our weekly FactLetter

An Initiative of:



Contact us

A-Mark Foundation
530 Wilshire Blvd Ste 201
Santa Monica, CA 90401
info@amarkfoundation.org

Follow us

[Instagram](#) [X](#) [Facebook](#) [LinkedIn](#)

© 1997-2024 A-Mark Foundation.
This website is available for Fair Use.

Site by Loyal