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Will the Denial of Gender Affirming Care for Transgender Youth Become the Law of the Land?

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On December 4, 2024, the U.S. Supreme Court is scheduled to hear *U.S. v. Skrmetti*[i], perhaps the most important trans rights case the justices have ever heard. The landmark case asks whether discrimination against people based on their gender identity[ii]violates the Constitution, a question the Court has never answered.

A decision against the trans plaintiffs in Skrmetti could potentially upend the entire legal framework protecting Americans from gender discrimination of all kinds and have a widespread impact on the availability of care for all youth, regardless of sex, nationwide.[iii]

Last year, on March 22, 2023, the Tennessee House of Representatives passed HB1, a law amending the Tennessee Code banning gender-affirming care for transgender minors with a diagnosis of gender dysphoria[iv]. The law also criminalizes healthcare providers who administer treatment for transgender youth. More than half of the United States – 26 states, in fact – have passed such bans in recent years.[v]

Tennessee's Law prohibits all medical treatments that allow a minor to identify with, or live as an individual inconsistent with their assigned sex, and treat the discomfort or distress from a discordance between their biological sex and asserted identity.[vi] Tennessee's ban does permit these same hormone medications when they are provided in a way that Tennessee considers "consistent" with a person's sex designated at birth. Tennessee's ban has now forced transgender youth who were being treated with puberty blockers and hormone therapy to halt all such care. Transgender teens are now forced to detransition and experience the unwelcome physical effects of puberty that may be mentally and physically debilitating and ultimately destructive, not to mention arduous to later change.

Skrmetti comes to the Supreme Court five years after the Court decided a case entitled *Bostock v Clayton County, Georgia*[vii]. The Court in Bostock ruled that the 14th Amendment to the U.S. Constitution[viii] (the "Equal Protection Clause") bars discrimination in employment based upon an individual's "sex," interpreting the word "sex" to include one's sexual orientation and gender identity. In its decision, the Court declared that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[ix]

The Skrmetti plaintiffs' argument opposing the ban created by Tennessee is based on already existing constitutional law; namely that Tennessee's ban restricting gender-affirming care for transgender adolescents is a clear example of discrimination on the basis of sex, making it a violation of the Equal Protection Clause of the 14th Amendment of the Constitution.

Tennessee's argument in support of the ban is based on the continuation of historical legal and moral traditions.[x] The state argues that the Court should ignore their own precedent in Bostock and pay no attention to the Equal Protection Clause; that the Court should expand on its ruling in *Dobbs v. Jackson Women's Health Organization,* which overturned *Roe v. Wade* and

permitted states to ban abortion. Skrmetti will be a major test for the Court; are they willing to stretch Dobbs to allow states to ban other health care? The court's ruling could serve as a stepping stone toward further limiting access to abortion, IVF, and birth control.[xi]

Although the decision that is ultimately issued by the Supreme Court in Skrmetti will be confined to Tennessee,[xii] it will have ramifications country-wide.

Potential Outcomes

There are a range of different outcomes that are foreseeable in a final ruling.[xiii]

A ruling in favor of the Skrmetti plaintiffs could return the case to the lower courts to apply the appropriate standard of review for improper sex-based classifications.

A ruling in favor of the Skrmetti plaintiffs that determines that the Bostock definition of "sex" applies, and that the Tennessee ban discriminates on the basis of sex (which violates the Equal Protection Clause), would result in the law being found to be unconstitutional and the Court would strike it down.

If the Court upholds the ban, the Tennessee law would remain in effect, depriving trans minors from receiving hormone therapy, greenlighting similar bans already enacted in other states, and potentially emboldening even more states to pass similarly restrictive laws and perhaps even more draconian bans.[xiv]

If the Court agrees that there is discrimination based on transgender status but that that does not fit within the definition of discrimination based on sex, there would be significant damage to any future case regarding transgender rights.

However the case is decided, it is likely to have a significant impact on how much deference courts give to bans on medical care to treat gender dysphoria.

Conclusion

Twenty-six (26) of the fifty (50) states in our union have banned youths from receiving essential medical care for gender dysphoria, throwing the lives of the young people in those states into shambles. What will happen in the months following the December 4th oral argument resulting in the Court's decision in Skrmetti we must all wait anxiously and expectantly.

In the meantime, it is useful to ponder the following facts:

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Every major medical association including the American Academy of Pediatrics, the American Medical Association (the "AMA"), and leading world health authorities have supported gender affirming care as evidence-based care that transgender people should be able to access (i.e., medically necessary health care), and a best practice. The AMA itself has undertaken a myriad of studies indicating that the failure to provide gender-affirming care can lead to (among other things) dramatic increases in suicide attempts, as well as increased rates of depression and anxiety.

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While the Supreme Court will specifically address whether transgender youth can be banned from accessing hormone therapy, puberty blockers, and similar medications, the case does not address surgery for transgender youth, which is rarely performed[xv].

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The Court will only determine the challenge to Tennessee's transgender health care ban under the Equal Protection Clause of the Constitution. It will not decide that portion of the case that argues it is the due process right of parents to make health care

decisions for and with their children without governmental hindrance.

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The Supreme Court's determination to hear Skrmetti comes after a number of states have enacted restrictions on school sports participation for transgender people, bathroom usage and drag shows. At least 24 states now have laws barring transgender girls and women from competing in certain women's or girls' sports competitions. At least 11 states have adopted laws barring transgender girls and women from girls' and women's bathrooms at public schools and, in some cases, other government facilities[xvi].

If the Supreme Court agrees with Tennessee's ban, there is nothing stopping states from banning or restricting other kinds of health care – like what gets covered under Medicaid. A Supreme Court ruling endorsing Tennessee's ban just because it disagrees with who that treatment is being given to — would enable the government to control people's health decisions and enact other blatantly discriminatory policies.[xvii]

[i] Awaiting U.S. Supreme Court citation. Underlying proceedings (i) preliminary injunction granted in part and denied in part, L.W. v. Skrmetti, 679 F. Supp. 3d 668 (M.D. Tenn. 2023); and (ii) preliminary injunction stayed, L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023).

[ii] Transgender, is defined as "[a]n internal sense of being male, female or something else." American Psychological Association, 49 Monitor on Psychology, at 32.

[iii]https://www.vox.com/scotus/385198/supreme-court-transgender-united-states-skrmetti

[iv] As defined by the Mayo Clinic "gender dysphoria is different from simply not conforming to stereotypical gender role behavior. It involves feelings of distress due to a strong, pervasive desire to be another gender." https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262

[v] Over the past two years, the number of states with laws/policies denying gender affirming care has increased from four (4) to twenty-six (26) states (AL, AR, AZ, FL, GA, IA, ID, IN, KY, LA, MO, MS, MT, NC, ND, NE, NH, OH, OK, SC, SD, TN, TX, UT, WV, WY).

[vi]Tennessee-2023-HB0001-Chaptered.pdf

[vii] 140 S. Ct. 1731 (2020)

[viii] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[ix] See Bostock.

[x] That Tennessee has a duty to protect the bodily integrity and health of its residents, especially vulnerable individuals, particularly children, which duty includes the protection of such individuals from harmful and avant- garde medical impositions. And that Tennessee also has a responsibility to its residents to "hold steady, the law's proper and vital recognition of an objective sexed human nature . . . that male and female are not interchangeable constructs, but divinely ordained realities. See, https://tennesseestands.org/commentary/preserving-the-created-order-reflections-on-usa-v-skrmetti."

[xi]https://www.aclu-nj.org/en/news/supreme-court-case-trans-health-care-explained

[xii] The State of Kentucky is also a party to the case, so the Court's decision will effect Kentucky residents as well.

[xiii]https://yaledailynews.com/blog/2024/11/18/law-school-hosts-panel-on-how-united-states-v-skrmetti-puts-transgender-healthcare-on-the-line/

[xiv]https://lambdalegal.org/lw-v-skrmetti-faq/

[xv] A recent Journal of the American Medical Association showed 3,600 procedures for transgender patients ages 12 to 18 over the past decade; by contrast, 229,000 U.S. teens had surgical procedures to affirm their cisgender identities in a single year, including breast reductions for boys, or breast augmentation for girls.

[xvi]https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans

[xvii] Comments from Michael Ulrich, associate professor of health law, ethics and human rights at Boston University's School of Public Health and School of Law at https://19thnews.org/2024/10/how-the-supreme-court-case-on-trans-youth-could-affect-health-care-for-all-americans.