

Supreme Court's transgender care fight creates conservative 'reckoning' over parental rights

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Protesters of Kentucky Senate Bill SB150, known as the Transgender Health Bill, cheer on speakers during a rally on the lawn of the Kentucky Capitol in Frankfort on March 29, 2023. Timothy D. Easley/AP

(CNN) — Conservative groups have for years sought to reduce the government's sway over parents' childrearing choices, particularly when it comes to decisions about school and health care.



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But the Supreme Court's upcoming and potentially explosive transgender care case is dividing

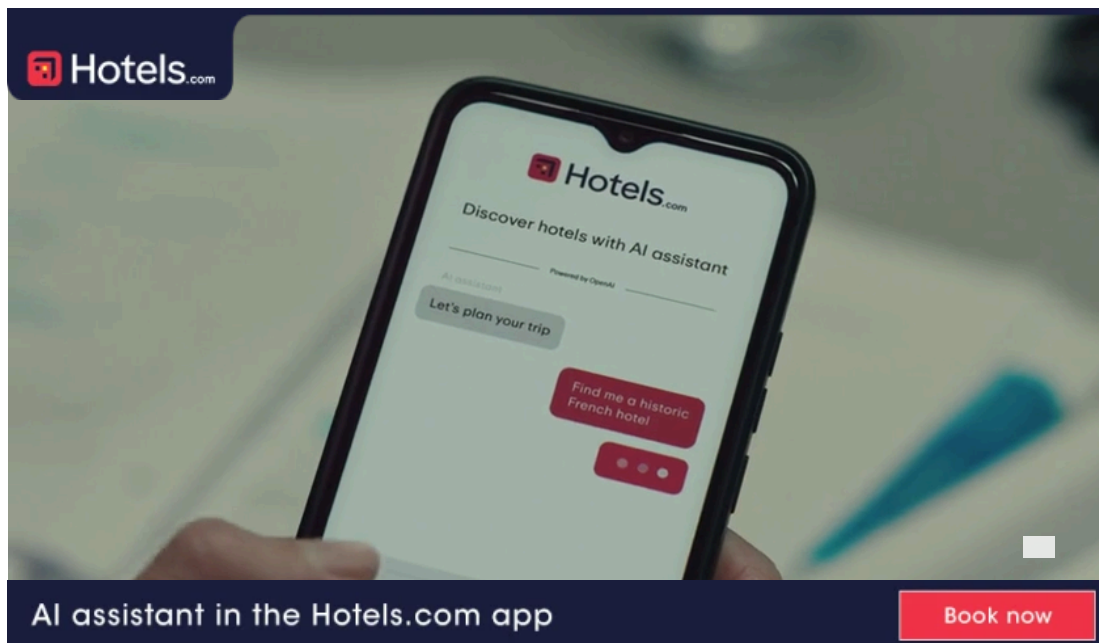
conservatives, with many of those same groups backing Tennessee's ban on puberty blockers and hormone treatments, which critics say injects the state into family medical decisions and overrides parental rights.

As a result, some notable conservatives are supporting the Biden administration's challenge of that law.

"Since when does a conservative say, 'The state knows what is best for my child,'" said former Virginia Rep. Barbara Comstock, an anti-Trump Republican who opposes Tennessee's law. "If you decide a state can do this, then it puts all parental decisions at risk of being overruled by the government."

The Supreme Court will hear arguments December 4 in the most important transgender rights case the justices have ever tackled, reviewing a Tennessee law enacted last year that bans gender-affirming care for minors and imposes civil penalties for doctors who violate the prohibitions. Gender-affirming surgeries are not at issue because a lower court tossed out a challenge to those procedures.

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Though the high court declined to consider the parental rights question when it took the case earlier this year, the debate is nevertheless playing out in briefings and may come up during the court's oral arguments.

The Biden administration appeal has landed on the court's docket at a moment when transgender rights have become a roiling culture war issue for Republicans, with President-elect Donald Trump denouncing "transgender craziness" and South Carolina Rep. Nancy Mace

attempting to ban transgender women from using women's bathrooms at the US Capitol and other federal buildings.



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Tennessee, and many conservatives who support the state's position, argues parental rights aren't a factor in the case. After all, they say, states have a long history of regulating medicine for people of all ages.

"Even adults lack a substantive-due-process right to demand access to a particular medication," the state told the Supreme Court.

That lack of a right to certain drugs, the state claims, "dooms" the Biden administration's appeal.

Put up or shut up moment?

Conservative groups have lined up in federal courts to make nearly identical parental rights arguments in other cases. In one appeal that has been pending at the Supreme Court for months, a group of Wisconsin parents say their school district is violating parental rights by hiding transgender support plans – allowing students to change their pronouns and bathroom use without informing parents. Anti-abortion groups, meanwhile, have for years argued that parents must have a say in a minor's decision to end a pregnancy.



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Twenty-six GOP-led states – including Tennessee – have enacted bans on at least some form of gender-affirming care. But a few Republicans are bucking their party by focusing on the question of whether parents have a right, grounded in the 14th Amendment, to direct the

medical care of their children.

"It's a bit of a reckoning for the Republican Party," said Alex Lundry, who worked on Mitt Romney's 2012 presidential campaign and who signed a brief in the Tennessee case, along with dozens of current and former GOP elected officials and aides, opposing the state law. "You certainly have a lot of people on the right calling for more parental rights, particularly in the realm of education."

Also signing the brief were Republican state lawmakers in Iowa, Kentucky and Missouri; a former spokesperson for the Republican National Committee; and a former chief of staff to the late Sen. John McCain.

Brian Burgess, an appellate lawyer at the firm Goodwin Procter who helped write the brief, said that while transgender care has become "ideologically charged," there is a traditional conservative view toward medical decisions being a "judgment for families."

In another brief supporting the Biden administration, a group of law professors focus on the historic practice of families directing medical care for their children, citing the then-controversial decision some made to inoculate their children against smallpox in 18th century colonial America.

That brief, which is intended to appeal to the conservative justices' focus on history, is signed by Steven Calabresi, a conservative law professor at Northwestern University.

Yale Law professor William Eskridge, who co-authored the brief, described the Tennessee case as a "put up or shut up" moment for the court's emphasis on history.

"If you want to be a historical-focused court," Eskridge said, "look at the history."

Parental rights not absolute

Though it took the Biden administration's appeal over Tennessee's law, the Supreme Court did not grant a separate appeal from the transgender youth and families affected by the ban. That separate lawsuit specifically asked whether the state law violates the "fundamental right of parents" to make decisions about the medical care of their children.

It's not clear why the court granted the Biden administration appeal but not the similar case from the families, but one effect of that decision is that parental rights won't squarely be at issue when the justices take the bench on Wednesday.

In allowing the Tennessee ban to take effect last year, a divided 6th US Circuit Court of Appeals

brushed aside the parental rights arguments. Parents usually “do know what’s best for their children.” But, it added, “becoming a parent does not create a right to reject democratically enacted laws.”

Melissa Moschella, a professor of the practice in philosophy at the University of Notre Dame, said that parental rights are not absolute. Even adults, she noted, don’t have a right to take whatever medications they choose, because those treatments are regulated by the government.

“It’s not really about the state interfering in a parent’s decision,” Moschella said during a recent event organized by the conservative Federalist Society. “It’s about the state trying to protect parents and especially their children from a medical establishment that the state I think, with good reason, has judged corrupt.”

Those opposed to the bans point out that many of the same treatments are available for cisgender minors in Tennessee – for reasons other than gender dysphoria.

“Parents have looked me in the eye and have told me that but for this treatment, their child would be dead,” Ohio Gov. Mike DeWine, a Republican, said last year, explaining his veto of a similar ban. “These are gut-wrenching decisions that should be made by parents.”

Days later, Ohio’s Republican-controlled legislature voted to override the veto.

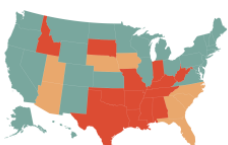
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