

Supreme Court Takes Up Trans Care Ban In Tennessee, With Potentially Huge Impacts

Monday morning, the Supreme Court announced it would take up a case involving gender-affirming care for transgender youth in Tennessee. The case could have huge impacts nationwide.



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On Monday morning, the Supreme Court **announced** it would take up whether gender-affirming care bans for transgender youth violate equal protection rights under the U.S. Constitution. The case under consideration involves the gender-affirming care ban in Tennessee, where the **6th Circuit Court of Appeals** allowed the ban to take effect. The court **ruled** that transgender people do not have equal protection rights under the Constitution, citing the Dobbs decision overturning abortion and *Geduld Aiello*, a ruling on pregnancy discrimination that has gained new traction in conservative courts targeting transgender individuals. Regardless of how the Supreme Court decides, the eventual ruling could have far-reaching impacts on transgender people across the United States; a ruling from this case could potentially be applied to many other laws targeting transgender individuals as well.

The announcement that the court would hear the case came on the **second anniversary** of the Dobbs decision, which ruled against abortion rights nationwide. One component of that decision was the *Glucksburg* test, which claimed that equal protection rights must be “deeply rooted in this nation’s history and traditions.” Notably, many things commonly found to be unconstitutional and atrocious, such as segregation and anti-miscegenation laws, are “deeply rooted” in American history and traditions. In the Tennessee 6th Circuit Court **decision**, which the Supreme Court is now taking up, the majority of justices similarly used the *Glucksburg* test to deny transgender youth in the state equal protection, ruling, “This country does not have a ‘deeply rooted’ tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children.”

The 6th Circuit decision being considered by the Supreme Court also relied on *Geduldig v. Aiello*, a 1974 ruling which determined that pregnancy discrimination is **inherently sex discrimination** because it does not “classify on sex,” but rather, on

pregnancy status, and that pregnancy status was not a proxy for sex in equal protection claims. Of that particular ruling, the 6th Circuit court stated:

“The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext designed to effect an invidious discrimination against the members of one sex or the other.’” *Dobbs*, 142 S. Ct. at 2245–46 (quoting *Geduldig*, 417 U.S. at 496 n.20). No such pretext has been shown here. If a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny, as in *Dobbs*, a law equally applicable to all minors, no matter their sex at birth, does not require such scrutiny either.”

It is important to note, however, that other courts have recently found such arguments to be faulty. For instance, the argument that there is no “deeply rooted” right to gender-affirming care was countered by a recent [Idaho ruling](#) which stated, “The parents’ fundamental right to care for their children includes the right to choose a particular medical treatment, in consultation with their healthcare provider, that is generally available and accepted in the medical community. And the Court has no difficulty concluding that such a right is deeply rooted in our nation’s history and traditions and implicit in our concept of ordered liberty.” Though the Supreme Court [limited the Idaho ruling](#), it did so only on the basis of the scope of preliminary injunctions and did not consider the constitutionality of the ban. Notably, though, the Supreme Court is [not taking up](#) the parental rights/due process claim.

As for arguments put forward using *Geduldig v. Aiello*, the 6th Circuit’s rationale was recently contradicted by a [4th Circuit ruling](#) on state coverage bans of transgender care. This ruling rejected the applicability of *Geduldig* to gender-affirming care bars stating, “Thus, while *Geduldig* held that pregnancy is not a proxy for sex, it did not hold that a characteristic of a subset of a protected group cannot be a proxy for that group... gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it. The excluded treatments aim at addressing

incongruity between sex assigned at birth and gender identity, the very heart of transgender status.” The court also ruled that determining what treatments would be banned for a transgender person “literally cannot be done— without inquiring into patient’s sex assigned at birth and comparing it to their gender identity.”

Perhaps the most important decision likely to come out of the Supreme Court case will be the determination of what level of scrutiny judges should apply to transgender youth and potentially all transgender people. The eventual ruling could have profound impacts on a wide array of laws affecting transgender people, from bathroom bans to prohibitions on adult care. The 6th Circuit ruling hinted at the latter, denying equal protection rights “for adults or children.” A broad decision against heightened scrutiny for transgender people could pave the way for several states to implement openly discriminatory policies without challenge.

Those who are looking to find signals for what the justices will decide may have trouble doing so. Justices such as Roberts and Gorsuch have, in the past, sided with transgender people when it came to discrimination under employment law, stating that one cannot discriminate on the basis of gender identity without also discriminating on the basis of sex in the *Bostock v. Clayton County* decision. That decision has since been used to overturn many other kinds of discriminatory policies towards transgender people by applying similar rationale. If those justices decide on this case using the same logic, a 5-4 decision in favor of transgender people appears to be a possibility. On the flipside, many have speculated that Gorsuch may decide against protecting transgender care, siding with the 6th Circuit’s rationale in the wake of the *Dobbs* decision allowing for bans on abortion.

One of the few times Gorsuch has opined on laws targeting transgender people since *Bostock* was during a recent debate over EMTALA protections in Idaho. EMTALA mandates that hospitals cannot deny emergency lifesaving care, including emergency abortions. In that debate, Gorsuch and Barrett questioned whether Congress could regulate state medical care laws, including those concerning abortion and transgen

care. However, it was unclear whether they would side against or in favor of the constitutionality of trans care bans under an equal protection analysis.

The decision to take up the case indicates that the fight for transgender rights will be reaching a pivotal moment soon. The case is expected to be argued in the fall, around the same time as the United States presidential elections, where transgender rights issues continue to emerge. Both the election and whatever decision the Supreme Court reaches could lead to seismic shifts in the landscape around the rights of transgender people in the United States.

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Ellen Adele Harper Ellen Adele Harper's Substack Jun 24

By the Goddess, let's all keep our fingers crossed. It was trans folks who started Compton's and Stonewall. Maybe it'll be trans folks who start the revolution.

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Talia Perkins Talia Perkins Jun 24

Here's hoping for a ruling however narrow that prohibits state prohibition or interference with needed medical care.

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