

# Appellate Courts Split on Legal Challenges to State Laws Banning Certain Medical Treatments for Transgender Minors

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Public [debate](#) and [attention](#) has [focused](#) on whether certain medical treatments should be [available for transgender minors](#) to address a discordance between a person's [sex characteristics](#) and gender identity. A number of [states have passed laws](#) prohibiting specific treatments for minors, including puberty blocking medication ("puberty blockers"), hormones, and surgical procedures. Several states assert, among other things, that the treatments are too [experimental](#) and can have [potentially irreversible effects](#). Parents of transgender minors, among others, argue that these laws deny critical medical care to transgender minors and discriminate based on sex or transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment. Some [litigation](#) has also alleged that these laws violate state constitutions.

In cases challenging the laws of [Arkansas](#), [Alabama](#), [Tennessee](#), [Kentucky](#), [Indiana](#), and [Idaho](#), plaintiffs sought federal court orders to preliminarily enjoin these states from enforcing the laws until final resolution of the cases. Several lower courts granted these preliminary injunctions, in part based on the conclusion that the plaintiffs were likely to succeed on the merits of their equal protection claims. Three federal courts of appeals analyzed whether the lower courts had erred in their rulings and issued opinions reaching different conclusions. The Eighth Circuit upheld a preliminary injunction of Arkansas's law, while the Eleventh Circuit held that a district court erred in enjoining the Alabama law, and the Sixth Circuit reversed preliminary injunctions that were issued against the Kentucky and Tennessee laws. Two other appellate courts reviewed preliminary injunctions and issued orders without accompanying opinions as of yet. The Seventh Circuit, after hearing oral argument, [issued](#) a stay of the lower court's preliminary injunction against application of Indiana's law, meaning that the law can go into effect while the case proceeds. By contrast, the Ninth Circuit [denied](#) a motion to stay a preliminary injunction against Idaho's law, meaning that that law may not be enforced for now.

This Sidebar focuses on aspects of the appellate court opinions addressing whether plaintiffs are likely to prevail on their claims that the laws violate the Equal Protection Clause. The three courts that have issued opinions reached different conclusions on at least two important legal questions relevant to the issue: (1) whether the challenged laws amount to sex classifications within the meaning of the Equal Protection Clause, and (2) what standard of review a court should apply when analyzing these challenges. The

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courts' analyses of these questions are consequential, as the likelihood of a state action being upheld or invalidated under the Equal Protection Clause may turn significantly on how a court resolves them. These recent decisions not only dictate how lower courts within these circuits analyze such equal protection challenges, but also may inform other courts' approaches to similar equal protection challenges.

## Equal Protection Background

The Fourteenth Amendment's Equal Protection Clause [prohibits](#) states from denying individuals "the equal protection of the laws." In the most general terms, states must not classify or differentiate among similarly situated individuals in a manner that violates this constitutional guarantee. When analyzing an equal protection challenge, a court must first determine which legal standard to apply. The most deferential standard of equal protection review is [rational basis](#), under which a court will generally [uphold](#) a challenged classification as long as it is reasonably related to a legitimate government purpose. Courts [subject](#) classifications based on sex, however, to a more stringent standard—intermediate scrutiny. If intermediate scrutiny applies, the parties seeking to defend a sex-based classification must [show](#) an "exceedingly persuasive justification" or "important government interest" for classifying individuals based on sex and must demonstrate that the classification is "substantially related" to achieving that interest.

In equal protection challenges raised in another context—school restroom access—several [federal](#) appellate [courts](#) have concluded that laws prohibiting transgender individuals from access consistent with their gender identity amount to sex-based classifications subject to intermediate scrutiny. In addition, the Fourth and Ninth Circuits have held that transgender individuals [constitute](#) a [quasi-suspect class](#) for equal protection purposes—that is, a class of individuals who warrant heightened protection under the law—and that transgender-based classifications are subject to intermediate scrutiny on that basis.

## Challenges to State Laws in Federal Appellate Courts

When analyzing the legal bases for the preliminary injunctions at issue, the appellate courts considering the challenges to the Arkansas, Tennessee, Kentucky, and Alabama laws differed on the applicable standard of review. The Eighth Circuit construed the Arkansas law as classifying individuals based on sex, held that intermediate scrutiny applied, and concluded it was likely that the plaintiffs would prevail on their claim. By contrast, both the Sixth and Eleventh Circuits held that rational basis review applied and that the challenged laws neither contained a sex classification nor targeted a quasi-suspect class. (The Sixth and Eleventh Circuits also [rejected](#) arguments [related](#) to the Due Process Clause of the Fourteenth Amendment, further discussion of which is beyond the scope of this Sidebar.)

### Eighth Circuit: *Brandt v. Rutledge*

The Eighth Circuit [affirmed](#) a district court's preliminary injunction of Arkansas's law banning "gender transition procedures" for minors, reasoning that the law was a sex classification that did not satisfy intermediate scrutiny. Arkansas's law [bans](#) procedures and drugs intended to remove or alter "physical or anatomical characteristics or features that are typical for the individual's biological sex" or "create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Specific medical services identified in the law [include](#) puberty blockers, "cross-sex hormones," and "gender reassignment surgery." Prohibited procedures do not [include](#) those for individuals "born with a medically verifiable disorder of sex development."

Reviewing the injunction, the Eighth Circuit [reasoned](#) that the law discriminates on the basis of sex because medical procedures permitted for minors of one sex are denied to minors of another sex. For instance, a minor born as a male can be prescribed testosterone, but a minor born as a female is not permitted to receive that treatment. The court thus viewed the law as subject to intermediate scrutiny. The

state's asserted [justification](#) for the law was its interest in protecting minors from "experimental medical treatment" and regulating medical ethics. The Eighth Circuit [concluded](#) that there was substantial evidence to support the district court's findings that the medical treatments were a recognized standard of care and "supported by medical evidence ... subject to rigorous study." The Eighth Circuit accordingly determined that the lower court was not wrong to conclude the law's prohibition was likely to fail intermediate scrutiny, as it was not substantially related to the state's interest in protecting minors from experimental treatment and regulation of medical ethics.

The full Eighth Circuit later [denied](#) a petition for rehearing en banc, with five judges dissenting from the denial and several others indicating that an appeal from a final judgment would offer the court a more comprehensive record to review. Following a trial in the case, the district court [entered](#) a permanent injunction against enforcement of the law, and that decision is now pending before the Eighth Circuit, which has granted a petition for an initial hearing en banc.

### **Eleventh Circuit: *Eknes-Tucker v. Governor of Alabama***

In contrast to the Eighth Circuit's analysis in *Brandt*, the [Eleventh Circuit](#) held that specific provisions of a similar [Alabama law](#) did not amount to a sex-based or quasi-suspect classification for equal protection purposes. The court concluded that the challenged provisions were "[best understood](#) as a law that targets specific medical interventions for minors," or as classifying [based on age](#), and that it was "[exceedingly likely](#)" that the provisions satisfied rational basis review.

The challenged provisions of Alabama's law prohibit any person from prescribing or administering "puberty blocking medication," "supraphysiologic doses of testosterone or other androgens to females," and "supraphysiologic doses of estrogen to males," when given "to attempt[] to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex as defined in this act." The law's other provisions, which were not challenged in the *Eknes-Tucker* lawsuit, include a prohibition of specific surgical procedures. The Alabama law defines a minor as a person under the age of 19, and defines sex to mean "[t]he biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles."

The Eleventh Circuit rejected the plaintiffs' assertion that the provisions classify based on sex because the law uses sex-based terms to criminalize certain treatments. The law refers to sex, the court decided, only because the medical interventions at issue concern physiological sex characteristics. "[I]t is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones . . . in specific terms *without* referencing sex in some way," the court observed. More significantly, the court reasoned that the challenged provisions [do not distinguish between men and women by denying an opportunity to one sex but not the other](#)—a key feature of sex-based classifications for equal protection purposes. Rather, in the court's view, the restrictions on puberty blockers and hormone treatment apply to all minors, regardless of sex. The appellate court also rejected the argument, adopted by the lower court, that a classification based on gender nonconformity "[indirectly classifies on the basis of sex](#)." The appellate court held that the lower court had relied on inapposite precedent to reach that conclusion, including [a Supreme Court decision](#) interpreting Title VII of the Civil Rights Act of 1964. That decision, the court reasoned, addressed a federal statute, not the different text and meaning of the Equal Protection Clause, and did not concern the regulation of medical treatments. The Eleventh Circuit also rejected the view that transgender persons constitute a [quasi-suspect](#) class distinct from sex.

The court did observe that the challenged provisions prohibit medical treatment for minors that only gender nonconforming or transgender individuals would want to undergo. Addressing that distinction, the court stated that the law would trigger heightened scrutiny if regulating medical treatment were "a pretext for invidious discrimination against such individuals." In the case before the court, however, "the district court did not find that Alabama's law was based on invidious discrimination." Nor did the challenged

provisions “further any particular gender stereotype.” Rather, the provisions, in the court’s view, refer to and “reflect[] biological differences between males and females.” In a concurring opinion, Judge Brasher agreed that rational basis review was the applicable standard but added that [even if intermediate scrutiny](#) applied to the challenged provisions of Alabama’s law, it was likely the state would satisfy that standard. The plaintiffs have [filed a petition](#) seeking en banc review of the panel decision.

### Sixth Circuit: *L.W. ex rel. Williams v. Skrmetti*

The Sixth Circuit reached a similar result in two separate cases where district courts granted preliminary injunctions against [Tennessee’s](#) and [Kentucky’s](#) laws addressing hormones and puberty blockers. After analyzing each injunction in [separate initial rulings](#), the Sixth Circuit later [issued](#) a decision reversing both injunctions. The [Tennessee](#) law bans certain medical treatments for minors that have the purpose of enabling identification with “a purported identity inconsistent with the minor’s sex,” or addressing “purported discomfort or distress from a discordance between the minor’s sex and asserted identity.” Prohibited medical treatments include puberty blockers, hormones, and surgery. Similarly, [Kentucky](#) bars medical providers from offering treatments “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.” Specifically prohibited treatments include puberty blockers, hormones, and surgery.

The Sixth Circuit [ruled](#) that the laws do not discriminate based on sex and thus were not subject to heightened scrutiny. In an opinion by Chief Judge Sutton, the panel majority [ruled](#) that the challenged provisions limit access to treatments for all children equally, “regardless of sex,” and [treat](#) “similarly situated individuals evenhandedly.” The “key to the constitutionality” of the Tennessee and Kentucky state laws, in the court’s [view](#), was “that they do not disadvantage ‘persons’ based on their sex.” Rather, whether these treatments are [available](#) to someone turns on “the age of the individual and the risk-reward assessment of treating this medical condition.” Pointing to Supreme Court equal protection cases that had found sex classifications, the Sixth Circuit [distinguished](#) the state laws at issue, concluding that they do not [prefer](#) one sex to another, [exclude](#) one sex and include another, or [distribute](#) burdens or benefits based on sex.

The plaintiffs [argued](#) that the laws do treat minors differently based on their sex—triggering heightened scrutiny—because, for example, while a boy with abnormally low testosterone levels could be treated with testosterone under the laws, a girl seeking to transition could not. The court rejected this [argument](#), pointing to *Dobbs v. Jackson Women’s Health Organization*, in which the Supreme Court determined that laws which regulate “a medical procedure that only one sex can undergo” (such as pregnancy) do not trigger heightened constitutional scrutiny. The Sixth Circuit [reasoned](#) that by “biological necessity,” these hormone treatments are procedures “that only one sex can undergo.” Overall, the court concluded that “the States treat boys and girls exactly the same for constitutional purposes—reasonably limiting potentially irreversible procedures until they become adults.” The court also [declined](#) to apply heightened scrutiny under the theory that transgender individuals constitute a quasi-suspect class. The court observed that neither the Supreme Court nor the Sixth Circuit has recognized transgender status as a quasi-suspect class, and the bar for recognizing a new quasi-suspect class is high.

Applying rational basis review, the court concluded that the laws satisfied that standard. The Sixth Circuit [observed](#) that the “unsettled, developing, ... experimental[] nature of treatments in this area surely permits more than one policy approach.” The court [concluded](#) that the states “offered considerable evidence about the risks of these treatments and the flaws in existing research,” and the challengers’ disagreement with the states’ assessment of the risks and proper response was not sufficient to invalidate the laws on rational basis review. The court concluded by emphasizing that it did [not](#) doubt the existence of gender dysphoria or the value of providing “psychological and related care to children facing it,” but judges should exercise particular caution when asked to overrule or interfere with the policy decisions of legislatures in an evolving medical area. The panel decision drew a dissent from Judge White. Judge White [reasoned](#) that

the laws discriminate on the basis of sex and trigger intermediate scrutiny. Applying intermediate scrutiny, Judge White [concluded](#) that the laws “rested on improper generalizations about boys and girls” and that their apparent purpose of protecting minors was not served by the classifications.

## Seventh and Ninth Circuits

Although they have not issued opinions as of yet, the Seventh and Ninth Circuits have issued orders in cases reviewing preliminary injunctions against Indiana’s and Idaho’s laws, respectively. The Seventh Circuit [issued](#) a stay of the injunction against Indiana’s law after conducting oral arguments; by contrast, the Ninth Circuit [denied](#) a stay of the preliminary injunction against Idaho’s law and did so before hearing oral arguments. Idaho subsequently [sought](#) from the Supreme Court an emergency application for a stay of the decision pending appeal. The application primarily focuses on the breadth of the preliminary injunction, which [prohibits](#) the defendants from applying the law at all (including to non-parties). However, the [application](#) also asserts that if the Supreme Court concludes that review of the constitutional questions is “warranted now,” the Court should treat the application as a petition for certiorari before judgment.

## Considerations for Congress

The level of scrutiny that a court applies in an equal protection challenge can have crucial implications for the outcome of a case. A court that construes a ban on certain medical treatments for transgender minors as a sex-based classification, or that concludes transgender persons constitute a quasi-suspect status, is more likely to invalidate a challenged law. In addition, as federal courts continue to address equal protection challenges, it may be that this precedent develops differently depending on the specific context at issue. Among other things, the asserted government interest at stake in an equal protection case, and the strength of that interest, can vary from case to case. For instance, unlike the appellate court decisions addressing the [use of bathroom facilities](#) by transgender students, where the asserted government interest in denying access has been the protection of student privacy, the Eleventh Circuit in *Eknes-Tucker* found that the challenged Alabama provisions were supported by the state’s [compelling interest](#) in “safeguarding the physical and psychological well-being” of minors.

These considerations could have implications for federal statutes and regulations that may address discrimination against transgender individuals. Congress possesses authority to amend these statutes and to direct federal agencies in promulgating regulations that interpret them. For instance, [Title IX of the Education Amendments of 1972](#) prohibits discrimination “on the basis of sex” in federally funded education programs, subject to various statutory exemptions. [Section 1557 of the Affordable Care Act](#) prohibits discrimination on various bases in federally funded health programs. Two federal agencies issued Notices of Proposed Rulemaking on [Section 1557](#) and [Title IX](#) last year, proposing to construe these statutes to prohibit certain actions based on transgender status, including the denial of certain medical treatments. As equal protection precedent continues to develop, Congress could amend these statutes’ prohibitions or exceptions or direct agencies to amend their implementing regulations.

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