



# Transgender Rights Post-*Skrmetti*: A State Law Approach

Allegheny County Bar Association  
LGBTQ+ Rights Committee  
2025 Bench Bar Presentation  
(1 Substantive CLE Credit)

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# Introductions

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# On the Basis of Sex

*United States v. Skrametti*, (Docket No. 23-477)

Question: Whether Tennessee's categorical ban on gender-affirming medical care for transgender minors violates the Equal Protection Clause under the Fourteenth Amendment.



# Background

## *United States v. Skrmetti*

- On March 22, 2023, Tennessee passed HB1, prohibiting medical care for minors diagnosed with gender dysphoria, including puberty blockers and hormone therapy.
- These same treatments were still permitted for minors with other diagnoses.
- Tennessee's stated interest was in "encouraging minors to appreciate their sex."  
Tenn. Code Ann. § 68-33-101(m).
- The US District Court for the Middle District of Tennessee issued an injunction to prevent the law from going into effect on July 1, 2023.



# Analysis

## *Transgender Status*

- Whether transgender individuals constitute at least a quasi-suspect class - four criteria:
  - The group has historically been discriminated against or have been subject to prejudice, hostility, or stigma.
    - (Justice Barrett questioned the existence of de jure discrimination against transgender individuals.)
  - They possess an immutable or highly visible trait.
  - They lack political power.
  - The group's distinguishing characteristic does not inhibit it from contributing meaningfully to society.



# Analysis

## *Sex Discrimination*

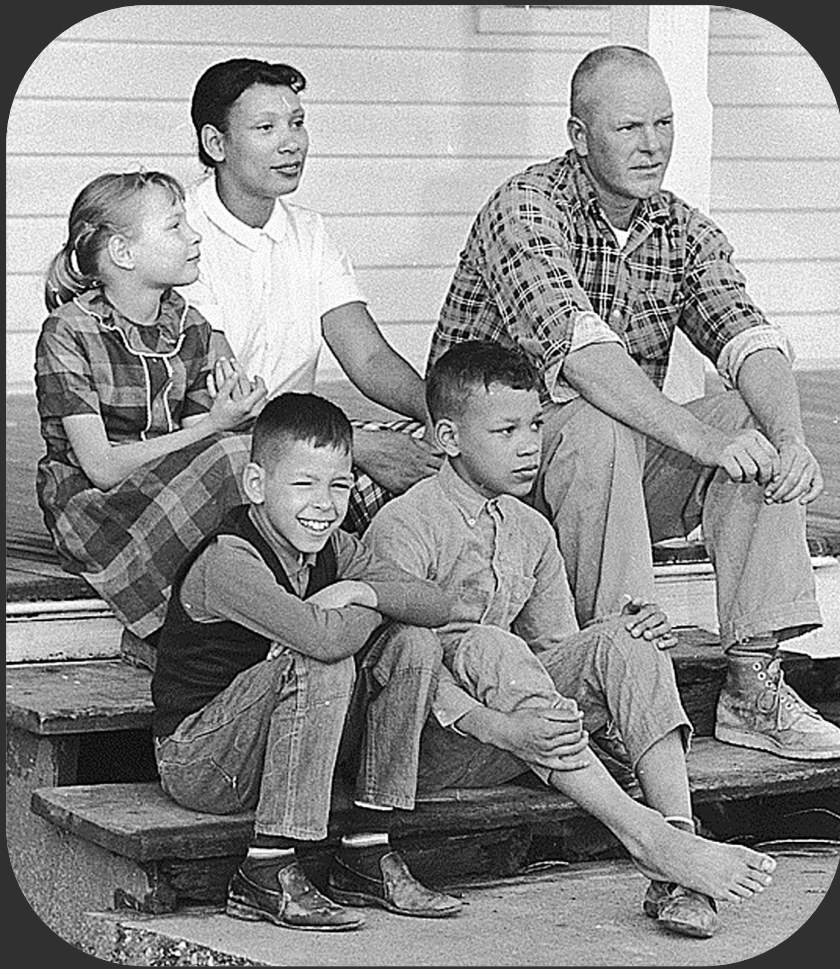
- Rational basis review versus heightened scrutiny
- Sex-based classification: can this law be applied without considering the sex of the patient?
- Or is it more like “using morphine to assist with suicide instead of managing pain” (as the Solicitor General for Tennessee claimed at oral argument)?
- Justice Alito invoked *Geduldig v. Aiello*, 417 U.S. 484 (1974) at oral argument to distinguish classifications based on sex from disability (which is not a quasi-suspect class).





# Heightened Scrutiny

- *Obergefell v. Hodges*, 576 U.S. 644 (2015): Reinforced that laws disadvantaging LGBTQ+ individuals face heightened scrutiny under equal protection analysis (specifically regarding marriage equality).
- *Bostock v. Clayton County*, 590 U.S. 644 (2020): Extended non-discrimination protections on the basis of sex to include to include sexual orientation and gender identity under Title VII.



# Rational Basis

- “The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.” *Loving v. Virginia*, 388 U.S. 1, 8, 87 S. Ct. 1817, 1821, 18 L. Ed. 2d 1010 (1967) (cited by Justice Jackson at oral argument).



# Rational Basis

- Whether the democratic process is the appropriate check on potentially discriminatory laws.
- “When you're 1 percent of the population or less, very hard to see how the democratic process is going to protect you” (Justice Sotomayor at oral argument).
- *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) signals a trend toward returning civil liberties to be decided by state legislatures.



# Pennsylvania Safeguards

Equal Rights Amendment

Equal Protection

Right to Privacy



## Pa. Const. art. I, § 28

*“Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”*

- Pennsylvania was the first state to amend its constitution with an ERA in 1971.
- The amendment passed with no opposition.
- Eliminated discriminatory laws affecting parentage, inheritances, employment, divorce, etc.
- Limited by *Fischer v. Department of Pub. Welfare*, 509 Pa. 293 (Pa. 1985) (holding that the 1982 Abortion Control Act’s Medicaid funding restriction did not violate Pennsylvania’s ERA).



## Pa. Const. art. I, § 26

*“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”*

- Pennsylvania has adopted the three-tiered means-end framework developed under federal Equal Protection case law, but
- Pennsylvania’s Charter affords broader protections than the federal Equal Protection Clause.
- Gender-based discrimination triggers “intense and unflinching judicial review” in Pennsylvania. *Hartford Accident & Indem. Co. v. Ins. Comm’r of the Commonwealth*, 482 A.2d 542, 548 (Pa. 1984) (striking sex-based insurance rates).



## Right to Privacy

*“Of all the precious privileges and prerogatives in the crown of happiness [...] none shines with greater luster [...] than the golden, diamond-studded right to be let alone.”*

*Commonwealth v. Murray*, 223 A.2d 102, 110 (1966).

- Under Article I, sections 1 and 8 of the state Constitution, Pennsylvania courts "have given greater weight to an individual's privacy interests" than federal courts when balancing against the government's interests. *Commonwealth v. Arter*, 151 A.3d 149, 158 (Pa. 2016) (citing *Commonwealth v. McCree*, 924 A.2d 621, 626–27 (2007)).



*Allegheny Reprod.  
Health Ctr. v. Pa.  
Dep't of Human  
Servs.* 309 A.3d  
808 (Pa. 2024)

- Reversed *Fischer* and restored Pennsylvania's ERA.
- Declared Pennsylvania's Medicaid exclusion of abortion coverage "presumptively unconstitutional."
- Remanded case back to Commonwealth Court.





## *Fischer v. Department of Pub. Welfare*

509 Pa. 293 (Pa. 1985)

- Pennsylvania Supreme Court held that a classification based on characteristics unique to one sex does not trigger the ERA, effectively ending what had up until that point been a robust development of case law under the ERA.
- Impact of *Allegheny Reprod. Health Ctr.* on sex-based classifications beyond abortion.
- Can *Bostock* be applied to Pennsylvania's ERA?



## *Edmunds* Analysis:

- (1) the text of the Pennsylvania constitutional provision;
- (2) the history of the provision, including Pennsylvania case law;
- (3) related case law from other states; and
- (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

*Com. v. Edmunds*, 526 Pa. 374, 390 (Pa. 1991)





## Against LGBTQ+ inclusion under ERA/Equal Protection

Regarding sexual orientation/marriage (pre-*Obergefell*):

- *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974)
- *Conaway v. Deane*, 401 Md. 219, 246 (Md. 2007)
- *In re Marriage Cases*, 43 Cal.4th 757, 837 (Cal. 2008)
- *Griego v. Oliver*, 316 P.3d 865, 880 (N.M. 2013)
- \**Doe v. Catholic Relief Servs.*, 484 Md. 640, 716 (Md. 2023) (did not fully incorporate *Bostock* because sex and gender identity were specifically provided for in the legislation, while sexual orientation was omitted)



## For LGBTQ+ inclusion under ERA/Equal Protection

Regarding sexual orientation/marriage:

- *Baehr v. Lewin*, 74 Haw. 530, 572 (Haw. 1993) (HRS § 572-1 (gay marriage ban) is based on a suspect category and subject to strict scrutiny)
- *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999)
- *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003)
- *Lewis v. Harris*, 188 N.J. 415, 457, 908 A.2d 196, 220-21 (2006)
- \**Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (striking down Pennsylvania's ban on same-sex marriage).



# Against LGBTQ+ inclusion under ERA/Equal Protection

Regarding gender identity specifically:

- *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686 (Iowa 2022) (discrimination on the basis of sex did not include transgender status under the Iowa Civil Rights Act (where “gender identity” is separately enumerated)).
- *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023) (statute restricting minors from accessing gender affirming care based on “age and procedure, not sex or gender nonconformity,” subject to rational basis review.
- *State v. Loe*, 692 S.W.3d 215 (Tex. 2024) (did not incorporate *Bostock* under the Texas ERA to permit restriction on gender affirming care for youth).



## For LGBTQ+ inclusion under ERA/Equal Protection

Regarding gender identity specifically:

- *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704 (D. Md. 2018) (analyzed transgender classification under intermediate scrutiny)
- *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) (incorporates *Bostock* into the Minnesota Human Rights Act (MHRA))
- *Rouch World, LLC v. Department of Civil Rights*, 510 Mich. 398 (2022) (incorporates *Bostock* into Michigan's Elliott-Larsen Civil Rights Act (ELCRA))
- \**Cross v. State*, 2024 MT 303 (Mont. 2024) (upholding preliminary injunction on trans healthcare ban under right to privacy)

# Policy Considerations

## Priorities under Pennsylvania law:

**Decisional autonomy, bodily integrity, and the doctrine of self-determination.** See *Brown v. Unemployment Comp. Bd. of Review*, 276 A.3d 322, 333 (Pa. Cmmw. Ct. 2022) (also codified in the Health Care Agents and Representatives Act, 20 Pa.C.S. § 5423(a), which provides "a statutory means for competent adults to control their health care.")

## Impacts:

- Public health
- Economic benefits
- Youth and families
- Schools and curricula

# Applicability

*within modern Pennsylvania law*

- Pennsylvania Human Relations Act (PHRA)
  - Adopted in 1955; amended in 1969 to include discrimination based on sex.
- Pennsylvania Fair Educational Opportunities Act (PFEOA)
  - Adopted in 1961; amended in 1972 to include discrimination based on sex.



# Applicability

*within modern Pennsylvania law*

- *Hartman v. City of Allentown*, 880 A.2d 737 (Pa. Commw. Ct. 2005):
- In determining whether Allentown could enact an anti-discrimination ordinance to include sexual orientation and gender identity, the court held that the Pennsylvania Human Relations Commission (PHRC) “is entitled to some deference in its interpretation of the PHRA.”
- The PHRC submitted briefs and oral argument in support of finding that the ordinance is “entirely consistent with the PHRA” and that the “public policy of the PHRA and the Commonwealth is served, not violated, by the Ordinance.”



# Applicability

*within modern Pennsylvania law*

- In 2023, the PHRC defined “sex” to include “sex assigned at birth, gender identity or expression, differences in sex development and affectional or sexual orientation” in the PHRA and PFEOA. 53 Pa.B. 3188.
- This portion of this final-form rulemaking was drafted to be consistent with how the term “sex,” as used in Title VII and Title IX, have been interpreted by state and federal courts.





# Recent Challenge

- *South Side Area School District, et al. v. Office of the Governor of the Commonwealth of Pennsylvania and Pennsylvania Human Relations Commission* (Filed 3/6/2025)
- Challenges the PHRC's 2023 expanded definition of sex under the non-delegation Doctrine and ERA.
- Claims language in *Allegheny Reprod. Health Ctr.* opinion "articulated that the term "sex" as used in Article 1, Section 28 [ ] is defined as either male or female."



## Schools as a Battleground

- Part of a broader anti-trans strategy
- Gender-based discrimination
  - *Nicole B. v. Sch. Dist. of Philadelphia*, 661 Pa. 638 (2020).
- Sports
  - *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024), as amended (June 14, 2024).
  - *Gaines v. National Collegiate Athletic Association*, 1:24-cv-01109, (N.D. Ga.).
- Locker rooms/bathrooms
  - *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).
  - *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).



# Schools as a Battleground

- Curricula
  - *Tatel v. Mt. Lebanon Sch. Dist.*, 752 F. Supp. 3d 512 (W.D. Pa. 2024).
  - *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024).
- Parental rights - substantive due process
  - Historical versus contemporary application
  - *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023).
  - *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist., Wisconsin*, 95 F.4th 501 (7th Cir. 2024), cert. denied.

# Importance

*of state-level protections going forward*

- Planning for post-Skrmetti
- Federal policy trends/executive orders
- State legislative trends
- Lack of other state and local protections
- Accessibility (PHRC/PGH CHR)

## Questions?





**Thank You**