Georgia State University Law Review

Volume 40
Issue 1 *Fall 2023*

Article 11

2023

SB 140 - Treatment of Gender Dysphoria in Minors

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Recommended Citation

Kathleen Kassa & Alexander J. Merritt, *SB 140 - Treatment of Gender Dysphoria in Minors*, 40 GA. ST. U. L. REV. 127 (2023).
Available at: https://readingroom.law.gsu.edu/gsulr/vol40/iss1/11

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HEALTH

Regulation and Construction of Hospitals and Other Health Care Facilities: Amend Article 1 of Chapter 7 of Title 31 of the Official Code of Georgia Annotated, Relating to Regulation of Hospitals and related Institutions, so as to Prohibit Certain Surgical Procedures for the Treatment of Gender Dysphoria in Minors from Being Performed in Hospitals and other Licensed Healthcare Facilities; to Provide for Exceptions; to Provide for Violations; to Amend Article 1 of Chapter 34 of Title 43 of the Official Code of Georgia Annotated, Relating to the Georgia Composite Medical Board, so as to Prohibit Certain Surgical Procedures for the Treatment of Gender Dysphoria in Minors; to Provide for Exceptions; to Provide for Violations; to Provide for Legislative Findings; to Provide for Related Matters; to Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 31-7-3.5 (new); 43-34-15 (new)
BILL NUMBER:	SB 140
ACT NUMBER:	4
GEORGIA LAWS:	2023 Ga. Laws 6
SUMMARY:	The Act creates two new subsections in the Georgia Code which prohibit licensed physicians, hospitals, and related institutions from performing or otherwise providing certain forms of gender-affirming medical treatment—namely, surgical procedures and hormone replacement therapy—for minors in Georgia with gender dysphoria. In addition, the Act calls for

	the Georgia Composite Medical Board to promulgate and enforce rules and regulations regarding the prohibited forms of medical treatment, requiring such rules to contain various exceptions allowing such treatment. Such exceptions allow prohibited forms of treatment for: intersex minors; minors with partial androgen insensitivity syndrome; when such treatment is medically necessary; and when a minor began hormone replacement therapy prior to the date of the Act taking effect.[1]
EFFECTIVE DATE:	July 1, 2023

History

National Context

State bills focusing on transgender issues have been on the rise nationally since 2018, with over 400 bills introduced in 2023 alone.[2] Though these bills ranged in focus, many of the earlier bills mandated that transgender minors choose bathrooms and sports teams consistent with their sex assigned at birth.[3] More recent bills have increasingly focused on limiting or prohibiting gender-affirming care for minors experiencing gender dysphoria.[4] In 2023, over 130 state bills were

1. The language of the bill refers to gender affirmation surgery as "sex reassignment surgery," but this Peach Sheet shall refer to such treatment as "gender affirmation surgery" due to common usage.

2. Annys Shin, N. Kirkpatrick & Anne Branigin, *Anti-Trans Bills Have Doubled Since 2022. Our Map Shows Where States Stand.*, WASH. POST, https://www.washingtonpost.com/dc-md-va/2023/04/17/anti-trans-bills-map/ [https://perma.cc/4BLE-TP7Y] (May 19, 2023, 7:01 AM). In 2018, 19 state bills related to transgender issues were introduced nationally; that number rose to 25 in 2019, 60 in 2020, 131 in 2021, 155 in 2022, and more than 400 in 2023. *Id.*; Anne Branigin & N. Kirkpatrick, *Anti-Trans Laws Are on the Rise. Here's a Look at Where – and What Kind.*, WASH. POST (Oct. 14, 2022, 8:00 AM), https://www.washingtonpost.com/lifestyle/2022/10/14/anti-trans-bills/ [https://perma.cc/YN9W-V2Z2].

3. Branigin & Kirkpatrick, *supra* note 2.

4. *Id.*

introduced specifically related to gender-affirming care, with over twenty-two passed into law.[5] In 2023, Georgia lawmakers introduced two bills relating to gender-affirming care, Senate Bill (SB) 140 and SB 141, but only SB 140 was signed into law.[6]

Supporting Perspectives

In the findings supporting SB 140, the General Assembly notes that, over the past ten years, "[t]here has been a massive unexplained rise in diagnoses of gender dysphoria among children," and that "[g]ender dysphoria is often comorbid with other mental health and developmental conditions."[7] The General Assembly also notes that a "significant portion" of gender dysphoria in minors does not continue past early adulthood, although surgical and hormone treatments for gender dysphoria have permanent effects.[8] For these reasons, the General Assembly states that a growing number of people who received gender-affirming medical care as minors regret the decision as adults.[9] By prohibiting gender-affirming care with permanent effects, the General Assembly states that it is fulfilling its "obligation to protect children, whose brains and executive functioning are still developing, from undergoing unnecessary and irreversible medical treatment."[10]

The sponsor of SB 140, Senator Carden Summers (R-13th), introduced the bill after speaking with adults who regretted the

5. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights?impact=health&state= [https://perma.cc/4C4M-2THR] (June 9, 2023).

6. *Id.* Like SB 140, SB 141 would have banned surgery and hormone replacement therapy as gender-affirming treatment for minors. Maya T. Prabhu, *Senate Republicans Propose Limits on Medical Treatments for Transgender Children*, ATLANTA J.-CONST. (Feb. 9, 2023), https://www.ajc.com/politics/senate-republicans-propose-limits-on-medical-treatments-for-transgender-children/2QFUXIMM5NHFNDBIU7XI3FYLCA/ [https://perma.cc/A8EK-3JVS]. SB 141 would also have banned puberty blockers for minors and would have made it illegal "for health care providers to give transgender children any treatment that assists them in aligning with their gender identity." *Id.* This sweeping ban would have also prohibited school staff from keeping a child's transgender identity confidential from the child's parents. *Id.*; SB 141, as introduced, § 3, pp. 7–8, ll. 163–73, 2023 Ga. Gen. Assemb.

7. SB 140 (SCS), § 1, pp. 1–2, ll. 13–17, 2023 Ga. Gen. Assemb.

8. *Id.* § 1, p. 2, ll. 18–21.

9. *Id.* § 1, p. 2, ll. 22–26.

10. *Id.* § 1, p. 2, ll. 31–33.

gender-affirming care they received as minors, and he refined the bill by collaborating with other legislators and reviewing research on the topic.[11] Senator Summers emphasized that the purpose of the bill is to "give [minors] a pause" on making irreversible decisions before adulthood.[12] This focus is the reason the bill prohibits minors from receiving gender-affirming care with permanent effects (hormone replacement therapy and surgery), but does not include reversible care (puberty blockers) nor does the bill prevent those over the age of eighteen from seeking gender-affirming care.[13] Senator Summers drafted the bill to be less harsh than SB 141 and other states' bills, many of which prohibit puberty blockers or extend into adulthood, to balance individual autonomy while preventing minors from making irreversible decisions.[14]

Opposing Perspectives

SB 140 faced significant, and often emotional, opposition from members of the public, healthcare providers, and other legislators.[15] Opponents of SB 140 frame the bill as being motivated by a national, partisan movement aimed at walking back the rights of people who identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, or another minority gender or sexual orientation

11. Telephone Interview with Sen. Carden Summers (R-13th) (May 22, 2023) [hereinafter Summers Interview] (on file with the Georgia State University Law Review); Virtual Interview with Sen. Ben Watson (R-1st) (May 19, 2023) [hereinafter Watson Interview] (on file with the Georgia State University Law Review).

12. Summers Interview, *supra* note 11.

13. *See id.*; *see supra* note 6.

14. *See* Summers Interview, *supra* note 11.

15. *Gold Dome Scramble: Sports Betting Is Back on the Table, Plus an In-Depth Look at SB-140, Which Would Ban Most Gender-Affirming Care for Transgender Youth*, POLITICAL BREAKFAST FROM WABE (Mar. 17, 2023) [hereinafter *Gold Dome Scramble*], https://www.wabe.org/podcasts/political-breakfast/gold-dome-scramble-sports-betting-is-back-on-the-table-plus-an-in-depth-look-at-sb-140-which-would-most-ban-gender-affirming-care-for-transgender-youth/ [https://perma.cc/7R82-5YK2]. Patrick Saunders noted:

> There was a hearing this week in a House committee where nearly sixty people signed up for public comment on the bill. The audience spilled out of the at capacity hearing room. Some of the people who came out to speak in opposition to the bill were crying. You know, and afterwards, the chair of the committee, Representative Sharon Cooper, she was spotted hugging the crying mother of a transgender child after the vote to advance the bill.

Id. at 14:50. After the bill passed, over 500 medical professionals signed an open letter to the General Assembly opposing the bill. *Id.* at 21:57.

(LGBTQIA+).[16] Opponents of the bill see it as unnecessarily "singling out such a small and marginalized group of people," transgender minors, because it is rare for minors to receive hormone replacement therapy or gender affirmation surgeries, and many safeguards already exist for minors seeking gender-affirming care.[17] Opponents also state that the bill is not supported by evidence and contradicts medical consensus for established standards of care.[18] They expect that denying gender-affirming care to minors will result in "irreversible harm" to the mental health of transgender youth and increased self-harm and suicide—results that contradict the bill's stated goal of protecting children.[19]

Bill Tracking of SB 140

Consideration and Passage by the Senate

Senator Carden Summers (R-13th) sponsored SB 140, with Senator Ben Watson (R-1st), Senator Kay Kirkpatrick (R-32nd), Senator John F. Kennedy (R-18th), Senator Lee Anderson (R-24th), Senator Matt Brass (R-28th), Senator Jason Anavitarte (R-31st), Senator Billy Hickman (R-4th), Senator John Albers (R-56th), Senator Ed Setzler (R-37th), Senator Shawn Still (R-48th), Senator Brandon Beach (R-21st), Senator Russ Goodman (R-8th), Senator Sam Watson (R-11th), Senator Chuck Payne (R-54th), Senator Larry Walker, III (R-20th), Senator Blake Tillery (R-19th), Senator Brian Strickland

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16. *Id.* at 23:20; Virtual Interview with Anthony Kreis, Assistant Professor of Law, Georgia State University College of Law (May 25, 2023) [hereinafter Kreis Interview] (on file with the Georgia State University Law Review); Virtual Interview with Sen. Kim Jackson (D-41st) (May 18, 2023) [hereinafter Jackson Interview] (on file with the Georgia State University Law Review).

17. *Gold Dome Scramble*, *supra* note 15, at 15:25; Jackson Interview, *supra* note 16. Senator Jackson noted:

> [I]n those rare instances in which [gender affirming surgery] does happen, it happens for a reason. It happens because children have gone through a significant amount of work with psychologists and doctors and parents, but parents have to consent to it. And so to get to that point, there's already a lot of safeguards in place.

Id.

18. Jackson Interview, *supra* note 16; *Gold Dome Scramble*, *supra* note 15, at 21:15; *OPINION: An Open Letter to Gold Dome on Transgender Bill*, ATLANTA J.-CONST. (Mar. 16, 2023) [hereinafter Open Letter], https://www.ajc.com/opinion/opinion-an-open-letter-to-gold-dome-on-transgender-bill/S47QAWV6DZBSTNK4W5DJICFZH4/ [https://perma.cc/E9JY-226P].

19. Open Letter, *supra* note 18; Jackson Interview, *supra* note 16.

(R-17th), Senator Marty Harbin (R-16th), Senator Rick Williams (R-25th), Senator Clint Dixon (R-45th), and Senator Colton Moore (R-53rd) cosponsoring.[20] The Senate read the bill for the first time on February 13, 2023, and referred the bill to the Senate Committee on Health and Human Services.[21]

On February 23, 2023, the Committee favorably reported the bill by substitute.[22] First, the Committee amended language in Section 1, the legislative findings section, to include reference to hormone replacement therapy as gender-affirming treatment with "permanent and irreversible effects on children," in addition to gender affirmation surgery.[23]

Second, the Committee amended Section 2, relating to the regulation of hospitals and other healthcare facilities, to include hormone replacement therapies as a prohibited form of gender-affirming medical treatment for minors in hospitals.[24] The original version of the bill only prohibited gender affirmation surgeries or related surgical procedures "that are performed for the purpose of altering primary or secondary sexual characteristics."[25]

Third, the Committee amended Section 3, relating to the Georgia Composite Medical Board, to include hormone replacement therapy as a prohibited form of gender-affirming medical treatment by licensed physicians governed by the Georgia Composite Medical Board.[26] Specifically, the Committee added language similar to Section 2 to

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20. Georgia General Assembly, SB 140, Bill Tracking [hereinafter SB 140, Bill Tracking], https://www.legis.ga.gov/legislation/64231 [https://perma.cc/4LVV-N2MY].

21. *Id.*; State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023.

22. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023. The Senate Committee meeting contained public testimony from both supporting and opposing perspectives. *Compare* Video Recording of Senate Health & Human Services Committee Meeting at 39 min., 50 sec. (Feb. 22, 2023) [hereinafter Feb. 22, 2023 Senate Committee Video] (remarks by Francesca Ruhe, Georgia Youth Justice Coalition), https://vimeo.com/showcase/8821683/video/801336065 [https://perma.cc/T4Z4-VLHP] (opposing SB 140), *with id.* at 42 min., 10 sec. (remarks by Taylor Hawkins, Frontline Policy Action) (supporting the intentions behind SB 140).

23. *Compare* SB 140, as introduced, § 1, p. 2, ll. 20–21, 2023 Ga. Gen. Assemb., *with* SB 140 (SCS), § 1, p. 2, ll. 20–21, 2023 Ga. Gen. Assemb.

24. *Compare* SB 140, as introduced, § 2, 2023 Ga. Gen. Assemb., *with* SB 140 (SCS), § 2, p. 3, l. 44, 2023 Ga. Gen. Assemb.

25. SB 140, as introduced, § 2, pp. 2–3, ll. 39–42, 2023 Ga. Gen. Assemb.

26. *Compare* SB 140, as introduced, § 3, 2023 Ga. Gen. Assemb., *with* SB 140 (SCS), § 3, p. 3, l. 60, 2023 Ga. Gen. Assemb.

include hormone replacement therapies for minors as a form of prohibited treatment by licensed physicians.[27]

Fourth, the Committee added two new exceptions to Section 3 to account for the inclusion of hormone replacement therapy as a prohibited form of treatment.[28] The first exception allows gender-affirming treatment for minors with partial androgen insensitivity syndrome.[29] The second exception allows minors who are being treated with hormone replacement therapy to continue such treatment so long as their treatment began prior to July 1, 2023.[30]

The Senate read the bill for a second time on February 27, 2023.[31] On March 6, 2023, the bill was tabled, taken off the table, read for a third time, and voted on.[32] The Senate passed the Committee substitute on March 6, 2023, by a party-line vote of 33 to 22.[33]

Consideration and Passage by the House

Representative Josh Bonner (R-73rd) sponsored SB 140 in the House of Representatives.[34] The House read the bill for the first time on March 7, 2023.[35] The House read the bill for a second time on March 8, 2023, and referred the bill to the House Public Health Committee.[36] On March 15, 2023, the Committee favorably reported the bill by Committee substitute.[37]

27. SB 140 (SCS), § 3, p. 3, l. 60, 2023 Ga. Gen. Assemb.
28. *Compare* SB 140, as introduced, § 3, p. 3, ll. 57–63, 2023 Ga. Gen. Assemb., *with* SB 140 (SCS), § 3, pp. 3–4, ll. 61–70, 2023 Ga. Gen. Assemb.
29. SB 140 (SCS), § 3, p. 4, l. 68, 2023 Ga. Gen. Assemb.
30. *Id.* § 3, p. 4, ll. 69–70.
31. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023.
32. *Id.*; SB 140, Bill Tracking, *supra* note 20.
33. Georgia Senate Voting Record, SB 140, #192 (Mar. 6, 2023).
34. SB 140, Bill Tracking, *supra* note 20.
35. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023.
36. *Id.*; SB 140, Bill Tracking, *supra* note 20.
37. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023; SB 140, Bill Tracking, *supra* note 20. The House Committee meeting contained public testimony from both supporting and opposing perspectives. *Compare* Video Recording of House Public Health Committee Meeting at 1 hr., 34 min., 21 sec. (Mar. 14, 2023) [hereinafter Mar. 14, 2023 House Public Health Committee Video] (remarks by Jacob Hayes, Georgia resident), https://www.youtube.com/watch?t=1796&v=REs3xP8H-Wg&feature=youtu.be [https://perma.cc/6B29-NDC8] (opposing SB 140), *with id.* at 1 hr., 43 min., 47 sec. (remarks by Dr. Toni Kim, Pediatric Endocrinologist) (supporting SB 140).

The Committee made a single amendment concerning language in Section 3 of the bill, which addressed physician immunity from civil or criminal liability for performing any medical treatment prohibited under the bill.[38] In Section 3(c), the bill as passed by the Senate provided that:

> A licensed physician who violates this Code section shall be held administratively accountable to the [Medical Composite Board] for such violation but shall not be held civilly liable for damages to any person in any civil or administrative action or criminally responsible for injury, death, or loss to person or property on the basis that such physician did or did not comply with this Code section.[39]

The Committee stripped all the language following the administrative accountability portion in the amendment.[40] Specifically, Section 3(c) provided only that "[a] licensed physician who violates this Code section shall be held administratively accountable to the [Medical Composite Board] for such violation."[41]

After the Committee favorably reported the bill by substitute, the House read the bill for a third time on March 16, 2023.[42] On the same day, the House passed the House Committee substitute by a vote of 96 to 75.[43]

38. *Compare* SB 140, as passed Senate, § 3, p. 4, ll. 71–75, 2023 Ga. Gen. Assemb., *with* SB 140 (HCS), § 3, p. 4, ll. 71–72, 2023 Ga. Gen. Assemb.

39. SB 140, as passed Senate, § 3, p. 4, ll. 71–75, 2023 Ga. Gen. Assemb.

40. SB 140 (HCS), § 3, p. 4, ll. 71–72, 2023 Ga. Gen. Assemb.; Mar. 14, 2023 House Public Health Committee Video, *supra* note 37, at 2 hr., 5 min., 5 sec. (remarks by Rep. Jodi Lott (R-131st)).

41. SB 140 (HCS), § 3, p. 4, ll. 71–72, 2023 Ga. Gen. Assemb.

42. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023.

43. Georgia House of Representatives Voting Record, SB 140, #243 (Mar. 16, 2023).

Final Consideration and Passage by Both Chambers

After the House passed SB 140, the House voted to immediately transmit the bill back to the Senate on March 16, 2023.[44] The vote passed by a 97 to 74 count.[45]

After the bill was transmitted back to the Senate, the Senate held floor debates on the bill. Senator Kim Jackson (D-41st), Senator Sally Harrell (D-40th), Senator Gloria Butler (D-55th), Senator Elena Parent (D-42nd), and Senator Harold Jones (D-22nd) offered a floor amendment that would strike hormone replacement therapy as a prohibited form of gender-affirming medical treatment under the bill.[46] However, the floor amendment was declared out of order after the Senate passed a motion to end floor debates, which foreclosed the offering of floor amendments and brought the bill to an immediate vote, passing by a vote of 31 to 20.[47] The Senate also voted not to table SB 140 by a vote of 30 to 21.[48]

The Senate agreed to the House substitute as amended by the House on March 21, 2023, and passed SB 140 as amended on the same day by a vote of 31 to 21.[49] The Senate sent the bill to Governor Brian Kemp (R) on March 22, 2023, and the Governor signed the bill into law on March 23, 2023.[50] The law went into effect on July 1, 2023.[51]

The Act

Section 1

Section 1 of the Act contains the General Assembly's findings, stating both the context and the motivations for the Act.[52]

44. SB 140, Bill Tracking, *supra* note 20.
45. Georgia House of Representatives Voting Record, SB 140, #244 (Mar. 16, 2023).
46. Failed Senate Floor Amendment to SB 140, introduced by Sen. Kim Jackson (D-41st) and others, Mar. 21, 2023.
47. Georgia Senate Voting Record, SB 140, #257 (Mar. 21, 2023).
48. Georgia Senate Voting Record, SB 140, #258 (Mar. 21, 2023).
49. Georgia Senate Voting Record, SB 140, #259 (Mar. 21, 2023).
50. State of Georgia Final Composite Status Sheet, SB 140, May 9, 2023.
51. SB 140, Bill Tracking, *supra* note 20.
52. 2023 Ga. Laws 6, § 1, at 6–7; *supra* notes 7–14.

Section 2

Section 2 of the Act adds a new Code section, Article 1 of Chapter 7 of Title 31, involving the regulation of hospitals and related institutions.[53] The new section prohibits institutions regulated under this Code section from providing gender affirmation surgeries or hormone replacement therapies to minors as treatment for gender dysphoria.[54] Section 2 notes that the exceptions provided in Section 3 also apply to Section 2.[55] Finally, Section 2 requires the Georgia Department of Community Health to establish sanctions, by rule and regulation, for facilities that violate this Section, up to and including revocation of the institution's operating permit.[56]

Section 3

Section 3 of the Act adds a new Code section, Article 1 of Chapter 34 of Title 43, relating to the Georgia Composite Medical Board.[57] The new Code section prohibits the provision of gender affirmation surgeries or hormone replacement therapies to minors as treatment for gender dysphoria.[58] The new Code section also requires the Georgia Composite Medical Board to adopt rules and regulations regarding these prohibitions and notes that any licensed physician who violates this Code shall be held administratively accountable to the Board.[59] Section 3 requires the Board's regulations to contain the limited exceptions that also apply to healthcare facilities governed by Section 2.[60] These exceptions allow for hormone replacement therapy and

53. 2023 Ga. Laws 6, § 2, at 7.

54. *Id.* (codified at O.C.G.A. § 31-7-3.5(a) (2023)).

55. *Id.* (codified at § 37-1-3.5(b)).

56. *Id.* (codified at § 31-7-3.5(c)); O.C.G.A. § 31-7-1(3) (2023) (defining "department" as the Georgia Department of Community Health).

57. 2023 Ga. Laws 6, § 3, at 7.

58. *Id.* (codified at O.C.G.A. § 43-34-15(a) (2023)). The Act does not indicate who is prohibited from performing these procedures. It may, however, be inferred from the language of subsection (c) that Georgia-licensed physicians are prohibited from performing such procedures. *See* § 43-34-15(c) ("A licensed physician who violates this Code section shall be held administratively accountable to the [Georgia Composite Medical Board] for such violation."); *see also* O.C.G.A. § 43-34-1(1) (2022) (defining "Board" as the Georgia Composite Medical Board).

59. 2023 Ga. Laws 6, § 3, at 7–8 (codified at § 43-34-15(b)-(c)).

60. 2023 Ga. Laws 6, §§ 2–3, at 7–8 (codified at §§ 37-1-3.5(b), 43-34-15(b)).

gender affirmation surgeries to be provided: (1) as "[t]reatments for medical conditions other than gender dysphoria or . . . sex reassignment where such treatments are deemed medically necessary"; (2) as "[t]reatments for individuals born with a medically verifiable disorder of sex development, including individuals born with ambiguous genitalia or chromosomal abnormalities resulting in ambiguity regarding the individual's biological sex"; (3) as "[t]reatment for individuals with partial androgen insensitivity syndrome"; and (4) as continued treatment for minors who began hormone replacement therapy prior to July 1, 2023.[61]

Analysis

This Act, though one of many similar laws across the country, has garnered national media attention.[62] Similar to the LIFE Act—the Georgia law signed in 2019 which sought to trigger a six-week abortion ban if the Supreme Court overturned *Roe v. Wade*—discussions around the Act concern its implications for healthcare access for members of the LGBTQIA+ community, particularly transgender people.[63] Because of these concerns, debate has revolved around the Act's constitutionality under both the United States and Georgia Constitutions.[64]

61. 2023 Ga. Laws 6, § 3, at 7–8 (codified at § 43-34-15(b)).

62. *See, e.g.*, The Associated Press, *Georgia Governor Signs Bill Banning Most Gender-Affirming Care for Trans Children*, NPR (Mar. 23, 2023, 4:59 PM), https://www.npr.org/2023/03/23/1165711935/georgia-bans-most-gender-affirming-care-trans-kids [https://perma.cc/BRD4-PUY5]; Maxime Tamsett, Pamela Kirkland & Jack Forrest, *Georgia's Governor Signs Ban on Certain Gender-Affirming Care for Minors*, CNN, https://www.cnn.com/2023/03/23/politics/brian-kemp-georgia-gender-affirming-care/index.html [https://perma.cc/WCJ6-VNSZ] (Mar. 23, 2023, 7:46 PM); Julia Mueller, *Kemp Signs Bill Banning Some Gender-Affirming Care for Transgender Youth*, THE HILL (Mar. 23, 2023, 5:07 PM), https://thehill.com/policy/healthcare/3915096-kemp-signs-bill-banning-some-gender-affirming-care-for-transgender-youth/ [https://perma.cc/GLC5-NE8Y]; Emma Hurt, *Georgia's Ban on Transgender Care for Minors Becomes Law*, AXIOS ATLANTA, https://www.axios.com/local/atlanta/2023/03/21/georgia-transgender-minor-healthcare-bill-approve [https://perma.cc/HSM2-PDG9] (Mar. 23, 2023); *see also Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, *supra* note 5.

63. *See* Michael G. Foo & Taylor L. Lin, *Persons and Their Rights*, 36 GA. ST. U. L. REV. 155, 178 (2019) ("Central to the [LIFE] Act's coverage in the media is criticism of the Act for . . . the implications the Act has for reproductive healthcare access and availability in Georgia.").

64. *See, e.g.*, Robbie Ottley, *Georgia's Gender-Affirming Care Ban is Flatly Unconstitutional*, GA. L. REV. BLOG (June 20, 2023), https://georgialawreview.org/post/2021-georgia-s-gender-affirming-care-ban-is-flatly-unconstitutional [https://perma.cc/Q3KC-WK5S].

Drafters of the Act expressed comfort with the Act's language and constitutionality.[65] However, based on how courts in other jurisdictions have analyzed similar gender-affirming care prohibitions, the Act may be vulnerable to constitutional legal challenges.[66] In almost every instance in which a similar law faced judicial scrutiny, the court granted either a preliminary or permanent injunction.[67] The Eleventh Circuit Court of Appeals is already slated to review a federal constitutional challenge brought against a Florida statute similar to the Act, and a federal district court in Georgia is preparing to do the same.[68]

The Constitutionality of SB 140

Trends in Litigation Across the United States

Of the similar laws banning gender-affirming care in other states, several laws are currently pending litigation.[69] Although these laws

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65. *See* Watson Interview, *supra* note 11.

66. In fact, a lawsuit has already been filed challenging the Act in federal court. *Federal Judge to Hear Request to Block Georgia's Gender-Affirming Care Ban*, FOX 5 ATLANTA (July 5, 2023), https://www.fox5atlanta.com/news/georgia-gender-affirming-care-ban-emergency-request-hearing [https://perma.cc/6N7G-AL4Z]. While the lawsuit seeks to permanently block the Act, there was also an emergency hearing to block enforcement of the Act temporarily throughout the duration of the lawsuit. Kate Brumback, *Parents of Transgender Youth Are Suing to Block Georgia's Gender-Affirming Care Ban*, ASSOCIATED PRESS (June 30, 2023, 9:37 AM), https://apnews.com/article/georgia-transgender-health-care-youth-lgbtq-lawsuit-63f4eef76b7b333a9c29ace476c49c07 [https://perma.cc/TAN4-MPBT]. On August 20, the District Court for the Northern District of Georgia granted a preliminary injunction to temporarily block the Act while it is litigated on its merits. *See generally* Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023). However, as of the time of this writing, the injunction's enforcement has been stayed until the District Court adjudicates a motion for reconsideration. *See generally* Order to Stay Preliminary Injunction, Koe v. Noggle, No. 1:23-CV-2904-SEG (N.D. Ga. Sept. 5, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/egpbmoyxkvq/09052023georgia.pdf [https://perma.cc/GXF7-XDWN]; *infra* note 98.

67. *See infra* notes 69, 72–73.

68. *See generally* Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848 (N.D. Fla. June 6, 2023) (order granting preliminary injunction), *appeal docketed*, No. 23-12159 (11th Cir. June 27, 2023); *see also Federal Judge to Hear Request to Block Georgia's Gender-Affirming Care Ban*, *supra* note 66.

69. *See generall*y K.C. v. The Individual Members of the Med. Licensing Bd. of Ind., No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023) (order granting preliminary

vary in scope, all prohibit gender-affirming care in the form of hormone replacement therapy, puberty blockers, and surgery.[70] Surgery bans are likely to go unchallenged because gender affirmation surgeries for minors are rare and usually do not conform to accepted standards of care.[71] Therefore, this Peach Sheet's analysis will only focus on hormone replacement therapy since hormone blockers are not included in SB 140. Although only one law banning gender-affirming care for minors has been considered on its merits, all but one ban of hormone therapy have received preliminary injunctions in federal court due to their substantial likelihood of unconstitutionality.[72] Three of these preliminary injunctions received appellate review, with the Eighth Circuit Court of Appeals affirming one and the Sixth and

injunction); *Ladapo*, 2023 WL 3833848; L.W. *ex rel.* Williams v. Skrmetti, No. 3:23-cv-00376, 2023 WL 4232308 (M.D. Tenn. June 28, 2023) (order granting preliminary injunction); Doe 1 v. Thornbury, No. 3:23-cv-230-DJH, 2023 WL 4230481 (W.D. Ky. June 28, 2023) (order granting preliminary injunction); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *rev'd sub nom.* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (reversing district court's granting of a preliminary injunction).

70. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1139; *Ladapo*, 2023 WL 3833848, at *3; *K.C.*, 2023 WL 4054086, at *1; *Thornbury*, 2023 WL 4230481, at *1–2; *Williams*, 2023 WL 4232308, at *1–2.

71. Kreis Interview, *supra* note 16; Brandt v. Rutledge, No. 4:21-cv-00450-JM, 2023 WL 4073727, at *8–9 (E.D. Ark. June 20, 2023) (finding gender-affirming surgeries for minors are "extremely rare" and do not generally meet the standards of care); *Ladapo*, 2023 WL 3833848, at *4 (plaintiffs did not challenge the portion of the law related to surgeries); *K.C.*, 2023 WL 4054086, at *1 (plaintiffs lacked standing to challenge the portion of the law related to surgeries because no Indiana physician performs gender affirmation surgeries on minors); *Williams*, 2023 WL 4232308, at *4 (finding the plaintiffs do not have standing to challenge the provision of the law concerning surgeries because "any relief provided Plaintiff pursuant to the Motion will not impact SB1's ban on such surgeries").

72. *Brandt*, 2023 WL 4073727, at *1, *38 (granting a permanent injunction of the law, including surgeries, because the plaintiffs showed actual success on the merits and the harm to plaintiffs and the public interest outweighs the injury of the permanent injunction). All other district courts who considered the issue granted an injunction of the portion of the law related to puberty blockers and hormone replacement therapy but did not extend the injunction to surgeries. *Ladapo*, 2023 WL 3833848, at *16; *K.C.*, 2023 WL 4054086, at *1; *Williams*, 2023 WL 4232308, at *4, *36 (granting an injunction for portions of the law except those relating to surgery). In *Ladapo*, the court described the standard for a preliminary injunction:

> As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest.

Ladapo, 2023 WL 3833848, at *1.

Eleventh Circuit Courts of Appeals each overturning one.[73] Most courts' analyses primarily turned on whether these laws violate the Due Process and Equal Protection clauses of the Fourteenth Amendment.[74]

Constitutionality Under Federal Law

Due Process

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law."[75] This clause affords "heightened protection against government interference with certain fundamental rights and liberty interests."[76] If a court determines that a law infringes upon a fundamental right, the court applies strict scrutiny, the most stringent form of judicial review, which allows for infringement only if it is "narrowly tailored to serve a compelling state interest."[77] If a court determines that a law infringes upon a right that is not fundamental, the state is allowed to infringe upon that right if the state has a legitimate interest and a rational basis for passing the law.[78]

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73. Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022) (finding "the district court did not abuse its discretion" by granting a preliminary injunction based on the plaintiff's equal protection claim); L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 421 (6th Cir. 2023) (staying the district court's preliminary injunction to uphold the will of the legislature and to prevent the "irreparable harm from [Tennessee's] inability to enforce the will of its legislature"). The Eleventh Circuit recently held that the District Court for the Middle District of Alabama abused its discretion in granting a preliminary injunction for an Alabama law substantially similar to the Act. *See generally* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023).

74. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1144; *Brandt*, 47 F.4th at 661, 668; *Williams*, 73 F.4th at 412–13, 415; *Ladapo*, 2023 WL 3833848, at *7, *11; *Thornbury*, 2023 WL 4230481, at *1; *K.C.*, 2023 WL 4054086, at *4. *But see* Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *13–18 (N.D. Ga. Aug. 20, 2023) (analyzing the Act's constitutionality under the Equal Protection Clause of the Fourteenth Amendment but not the Due Process Clause of the Fourteenth Amendment).

75. U.S. CONST. amend. XIV, § 1.

76. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

77. *Id.* at 721.

78. *Id.* at 728. Though the rational basis analysis has grown more "teeth" in recent years, the standard of review is generally deferential towards legislatures and thus tends to find constitutional validity. *See* Duarte v. City of Lewisville, 858 F.3d 348, 354 (5th Cir. 2017) ("Rational basis review begins with a strong presumption of constitutional validity."). The court reasoned that because the law was being analyzed under rational basis review, not some form of heightened scrutiny, the court requires only a rational conceivable basis for the action. *Id.* at 355.

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Though the Due Process Clause protects many fundamental rights, a parent's interest in the "care, custody, and management of their children" is the most relevant to the Act, and this right of parental autonomy generally extends to making decisions about children's medical care.[79]

The determination of whether a right is fundamental, and therefore analyzed under the strict scrutiny framework, depends on how a court defines the right allegedly infringed upon by the law.[80] Opponents of laws prohibiting hormone replacement therapy as gender-affirming care have broadly conceptualized the right as parental autonomy in making medical decisions for their children or parental authority to treat their children with transitioning medications subject to medically-accepted standards.[81] However, supporters of these laws have asserted that: (1) hormone replacement therapy as gender affirming care is experimental and "parents have no fundamental right to treat their children with experimental medications," or that (2) a parent does not have a right to "insist on treatment that is properly prohibited on other grounds."[82] Thus far, all but two of the courts have applied intermediate scrutiny and determined that laws prohibiting hormone replacement therapy as gender-affirming care violate a parent's fundamental right to direct their child's healthcare decisions.[83]

79. Troxel v. Granville, 530 U.S. 57, 62 (2000); Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990); Parham v. J.R., 442 U.S. 584, 604 (1979) (finding that parents have a right to make medical decisions for their children "subject to a physician's independent examination and medical judgement").

80. *See* Lawrence v. Texas, 539 U.S. 558, 566–67 (2003) (discussing whether to define the right at issue as the right of homosexuals to engage in sodomy or as the right to intimacy between consenting adults within their home).

81. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1144 (M.D. Ala. 2022); Brandt v. Rutledge, No. 4:21-cv-00450-JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023).

82. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1145; Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023).

83. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 417 (6th Cir. 2023) (finding that the Tennessee law is unlikely to be found to violate due process because there is no parental right to receive new medical or experimental drug treatments for their children); Doe 1 v. Thornbury, No. 3:23-cv-230-DJH, 2023 WL 4230481, at *6 (W.D. Ky. June 28, 2023) (finding that the parents have a fundamental right under due process to choose healthcare for their children); *Brandt*, 2023 WL 4073727, at *36 (finding that the parents have a fundamental right to make healthcare decisions for their children). *Compare* Eknes-Tucker v.

The Act's survival under a due process challenge will thus hinge on how the reviewing court defines the right the Act allegedly infringes. If a court defines the right infringed by the Act narrowly—the right of parents to make medical decisions regarding "experimental treatment"—then the Act would likely be analyzed under a rational basis framework and subsequently upheld.[84] If the court defines the right more broadly and applies a strict scrutiny standard of review, the Act is unlikely to be upheld because it is not the least restrictive means available to meet Georgia's specified purpose of protecting children and preventing minors from making irreversible decisions.[85]

Marshall, 603 F. Supp. 3d at 1145–46, (finding that parents have a fundamental right to direct the healthcare of their children, and that gender-affirming care is not experimental), *with* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1222–23 (11th Cir. 2023) (holding that, while parents have a fundamental constitutional right to raise their children, this right is primarily related to education and religion and does not include the right to "direct a particular medical treatment for their child that is prohibited by state law").

84. *Williams*, 73 F.4th at 417 (defining the right as nonfundamental because it related to receiving new and experimental treatments, and finding that gender-affirming care falls under these categories because there is medical and scientific uncertainty and the hormone replacement therapy drugs are used off-label for gender-affirming care); Eknes-Tucker v. Governor of Ala., 80 F.4th at 1224 (stating that minors do not have a fundamental right to "transitioning medications subject to medically accepted standards" and that a parent's right "'to make decisions concerning the care, custody, and control of their children'" does not include the right to "receive new medical or experimental drug treatments") (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)). *But see Ladapo*, 2023 WL 3833848, at *5 (finding there is no rational basis for the state to categorically ban hormone replacement therapy because clinical evidence supports its effectiveness and use).

85. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1145–47 (finding the law does not pass strict scrutiny because there is no evidence "showing that transitioning medications jeopardize the health and safety of minors suffering from gender dysphoria" and the law is not the least restrictive means to achieve the state purpose); *Thornbury*, 2023 WL 4230481, at *6 (finding that the law does not pass strict scrutiny because there is significant evidence supporting the efficacy of gender-affirming treatments and a ban is not the "least restrictive means" available to achieve the law's stated purpose). Additionally, opponents may argue that the Act allowing some children to pursue the same treatments that are prohibited for transgender children undermines the rationale that children should not make irreversible decisions affecting their sex characteristics and gender presentation. Kate Sosin, *Intersex Surgery Is Condemned by the United Nations. Anti-Trans Bills Are Allowing It*, THE 19TH (Mar. 23, 2023, 10:00 AM), https://19thnews.org/2023/03/bills-gender-affirming-care-trans-intersex-youth/ [https://perma.cc/9DP5-U2SU]; *see supra* note 61. Previously, strict scrutiny was considered "strict in theory but fatal in fact." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("We wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Marshall, J., concurring)). However, even today, strict scrutiny offers the least deference to legislatures. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting) ("Deference is antithetical to strict scrutiny, not consistent with it.").

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[86] Under the Equal Protection Clause, laws that create distinctions based on certain suspect classes are analyzed under some form of heightened scrutiny.[87] Among these suspect classes are sex-based distinctions, which are analyzed under intermediate scrutiny, and thus "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[88] Sex classifications may also include classifications based on sexual orientation or transgender status because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that

86. U.S. CONST. amend. XIV, § 1.

87. Craig v. Boren, 429 U.S. 190, 197 (1976). There are three standards of review in the Supreme Court's "tiers of scrutiny" approach. The first is "strict scrutiny," which is applied when analyzing any classification based on race or national origin, and state classifications based on citizenship status. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (explaining that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny'") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006) (explaining that "for an equal protection claim to trigger strict scrutiny, the plaintiff must allege that a government actor intentionally discriminated against him or her on the basis of race or national origin"). Classifications based on sex or gender—and sometimes transgender status—are analyzed under intermediate scrutiny. *Ladapo*, 2023 WL 3833848, at *9 (explaining that classifications based on transgender status "should trigger intermediate scrutiny" independent of any sex-based classification because the Supreme Court has "suggested heightened scrutiny might be appropriate for statutes showing 'prejudice against discrete and insular minorities'") (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). Rational basis review is used to analyze laws which do not classify on the basis of any of the previously mentioned suspect or quasi-suspect classes. *See, e.g.*, *Carolene Prods.*, 304 U.S. at 152 (holding that laws "affecting ordinary commercial transactions" are not unconstitutional unless they lack a rational basis, based on the "knowledge and experience of the legislators"); *see infra* note 90.

88. Craig v. Boren, 429 U.S. at 197. Under intermediate scrutiny, the state must offer an "exceedingly persuasive justification" for the law. United States v. Virginia, 518 U.S. 515, 571 (1996). The Supreme Court uses gender and sex interchangeably when addressing classifications under the Equal Protection Clause. Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011).

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individual based on sex."[89] In every case challenging a law similar to the Act, plaintiffs have claimed the laws made unconstitutional distinctions based on sex because they banned hormone replacement therapy specifically for transgender minors, and transgender status is based on biological sex and gender identity.[90]

Similar to the due process analysis, the determination of whether a law makes a classification based on transgender status, and therefore receives strict scrutiny, depends on how the court views and defines the classification.[91] Supporters of the laws characterize the distinction as one based on the purpose for seeking hormone replacement therapy or claim that there is no distinction because the prohibition applies equally to both males and females.[92] These justifications have not persuaded most courts, and most courts have found that the laws make

89. *Glenn*, 663 F.3d at 1316–19 (holding that discrimination "on the basis of . . . gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause" and applying intermediate scrutiny because the acts that define transgender people are those that contradict stereotypes of sex-specific and gender-specific behavior); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741–42 (2020). The *Bostock* court explained the relationship between sex and transgender status/gender identity:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id.

90. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1147; Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *9 (N.D. Ga. Aug. 20, 2023); L.W. *ex rel.* Williams v. Skrmetti, No. 3:23-cv-00376, 2023 WL 4232308, at *9 (M.D. Tenn. June 28, 2023); *Thornbury*, 2023 WL 4230481, at *2; K.C. v. The Individual Members of the Med. Licensing Bd. of Ind., No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086, at *7 (S.D. Ind. June 16, 2023); Brandt v. Rutledge, No. 4:21-cv-00450-JM, 2023 WL 4073727, at *2 (E.D. Ark. June 20, 2023); *Ladapo*, 2023 WL 3833848, at *8. The *Ladapo* court noted that transgender individuals should trigger intermediate scrutiny for another reason: they satisfy the *Carolene Products* test for identification as a suspect class under the Equal Protection Clause. *Id.* at *9. The *Carolene Products* Court noted that, among other situations, laws targeting "discrete and insular minorities" require heightened scrutiny because minority groups are often unable to use political processes to protect themselves. *Carolene Prods.*, 304 U.S. at 152 n.4.

91. *See Glenn*, 663 F.3d at 1316–17; *Bostock*, 140 S. Ct. at 1738–39.

92. *Williams*, 2023 WL 4232308, at *10 (describing defendant's claim that the relevant class is "individuals who want to receive the [banned treatment]"); *K.C.*, 2023 WL 4054086, at *8 (describing defendant's claim that the law does not make a sex-based distinction because it applies equally to males and females); *see also* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 808–09 (11th Cir. 2022) (holding that a school bathroom policy, which required students to use the school bathroom that conformed with the student's biological sex, classified on the basis of sex but did not discriminate on the basis of sex because the policy applied to both males and females).

classifications based on transgender status and, therefore, sex.[93] However, the Sixth and Eleventh Circuits broke from this trend and found no existing sex-based classification because the law applies equally to both males and females and because the Supreme Court has not yet included transgender people in protections from sex-based classification.[94]

Despite the circuit split on whether classifications based on transgender status constitute a sex-based classification, district courts in the Eleventh Circuit have determined that it does; therefore, classifications based on transgender status receive intermediate scrutiny.[95] However, the Eleventh Circuit, which is set to provide appellate review for any Georgia litigation against the Act in federal court, recently reversed a preliminary injunction for a law substantially similar to the Act.[96] None of the laws across the country that have been

93. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1147 (finding the defendant's claim that the distinction is based on the purpose of the procedure is flawed because the class of people seeking transition medications to affirm their gender identity "consists entirely of transgender minors"). The *Ladapo* court highlighted how a distinction based on sex is inherent to the law:

> [Defendants] say the challenged statute does not draw a line based on sex. But it does. Consider an adolescent, perhaps age 16, that a physician wishes to treat with testosterone. Under the challenged statute, is the treatment legal or illegal? To know the answer, one must know the adolescent's sex. If the adolescent is a natal male, the treatment is legal. If the adolescent is a natal female, the treatment is illegal. This is a line drawn on the basis of sex, plain and simple.

Ladapo, 2023 WL 3833848, at *8.

94. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1228 (11th Cir. 2023).

95. *Compare Williams*, 2023 WL 4410576, at *11, *with Brandt*, 47 F.4th at 672; *see supra* note 89.

96. *See supra* notes 72, 83–84. The Eleventh Circuit, *inter alia*, rejected the plaintiffs' argument that Alabama's Vulnerable Child Compassion and Protection Act (VCCPA) classified on the basis of gender nonconformity, although conceding that the VCCPA "restricts a specific course of medical treatment that . . . only gender nonconforming individuals may receive." Eknes-Tucker v. Governor of Ala., 80 F.4th at 1227–29. Instead, the court defined the classification as one based on specific medical interventions for minors and found that the law only referenced sex as the treatment is sex-based. *Id.* at 1228. Further, the court explains:

> The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other. . . ." By the same token, the regulation of a course of treatment that only gender nonconforming individuals can undergo would not trigger heightened scrutiny unless the regulation were a pretext for invidious discrimination against such individuals. And the district court did

challenged thus far have survived intermediate scrutiny, and courts that have considered the issue focused on suspect state reasoning, whether the means were narrowly tailored, and if the evidence supports the medical soundness of the therapies.[97] Whether the Act survives intermediate scrutiny from the Eleventh Circuit, assuming the court reviews the Act at all,[98] will hinge on how the court defines the classification at issue and if the court applies heightened scrutiny on similar fact-based inquiries.[99]

not find that Alabama's law was based on invidious discrimination.

Id. at 1229–30 (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022)). The court also distinguishes the context of the VCCPA from *Bostock*, which applied to Title VII, and *Brumby*, which applied to a specific fact pattern involving employment discrimination under the Equal Protection Clause. *Id.* at 1228–29.

97. Eknes-Tucker v. Marshall, 603 F. Supp. 3d at 1147–48; *Brandt*, 2023 WL 4073727, at *36 (finding no evidence to support the state's claim that gender-affirming care banned by the act is dangerous to minors or is experimental); *Ladapo*, 2023 WL 3833848, at *10 (finding the law to be motivated by purposeful discrimination); *K.C.*, 2023 WL 4054086, at *11–12 (finding the law is not a close means-ends fit); *see supra* note 85 for discussion of the Act's rationale and means/ends congruence.

98. As of the time of this writing, because of the Eleventh Circuit's decision in *Eknes-Tucker v. Governor. of Alabama*, the Georgia Attorney General has asked the District Court for the Northern District of Georgia to reconsider the preliminary injunction the court granted blocking the Act. *See generally* Motion for Reconsideration, Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 22, 2023). The Eleventh Circuit issued its decision in *Eknes-Tucker v. Governor of Alabama* the day after the Georgia district court granted the preliminary injunction for the Act. *See generally* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205. In response to the motion and *Eknes-Tucker v. Governor of Ala.*, the District Court stayed enforcement of the preliminary injunction until the motion is adjudicated. *See generally* Order to Stay Preliminary Injunction, Koe v. Noggle, No. 1:23-CV-2904-SEG (N.D. Ga. Sept. 5, 2023). The court will wait to adjudicate the motion because of the likelihood that the Eleventh Circuit will rehear the case en banc in *Eknes-Tucker v. Governor of Alabama*. *See id.* at 3–4 (explaining that "the prospect of adjudicating the motion for reconsideration . . . is also fraught, given the possibility on the horizon of rehearing in [*Eknes-Tucker v. Governor of Alabama*]"). A petition for en banc review was filed with the Eleventh Circuit on September 11, 2023. *See generally* Petition for Rehearing En Banc, Eknes-Tucker v. Governor of Ala., 2023 WL 5344981 (11th Cir. Sept. 11, 2023) (No. 22-11707), https://www.glad.org/wp-content/uploads/2023/09/2023-09-11-eknes-tucker-petition-for-rehearing.pdf [https://perma.cc/MK5T-7QRR].

99. The same can be said if the Act were challenged under the Equal Protection Clause of the Georgia Constitution, because Georgia courts apply federal precedent in equal protection challenges. *See, e.g.*, Democratic Party of Ga., Inc. v. Perdue, 288 Ga. 720, 728, 707 S.E.2d 67, 74 (2011) (explaining that the Georgia Equal Protection Clause is "generally 'coextensive' with and 'substantially equivalent' to the federal equal protection clause, and that we apply them as one"). However, Georgia courts generally apply federal precedent more broadly than federal courts in "a number of other areas." *See id.* (acknowledging that Georgia applies federal precedent more broadly under the Georgia Constitution than federal courts apply it under the United States Constitution). The Georgia Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws." GA. CONST. art. I, § 1, para. 2.

Constitutionality Under Georgia Law[100]

The Act might not just be vulnerable to challenges under federal law but also to challenges under Georgia law—particularly under Georgia's Equal Protection and Due Process Clauses. The Due Process Clause of the Georgia Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law."[101] As they have under the U.S. Constitution, courts have interpreted Georgia's Due Process Clause to protect certain rights from infringement by the State.[102] In *Pavesich v. New England Life Insurance*, the Georgia Supreme Court held that a constitutional right to privacy is "derived from natural law" and "[guaranteed] to persons in [Georgia] both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law."[103] A key component of the Court's holding was the principle that "[l]iberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public."[104]

The *Pavesich* decision became the foundation of Georgia's substantive due process jurisprudence, as Georgia courts would later add

100. As previously mentioned, Georgia applies federal precedent in constitutional challenges brought under Georgia's Equal Protection Clause. *See supra* note 99. Therefore, this Peach Sheet's analysis will focus primarily on how the Act might fare if confronted with a challenge under the Due Process Clause of the Georgia Constitution. *See infra* notes 101–102.

101. GA. CONST. art. I, § 1, para. 1.

102. *See, e.g.*, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68, 71 (1905) (holding that the Due Process Clause of the Georgia Constitution protects a constitutional right to privacy).

103. *Id.* The United States Supreme Court would not expressly interpret the Due Process Clause of the Fourteenth Amendment to include any right to privacy until sixty years later. Griswold v. Connecticut, 381 U.S. 479, 484–87 (1965) (recognizing a right to marital privacy); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (recognizing a right to privacy for unmarried persons "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

104. *Pavesich*, 122 Ga. at 197, 50 S.E. at 70.

more rights to those protected by the right to privacy under Georgia's Due Process Clause.[105] Georgia has recognized the right to privacy as a "fundamental" constitutional right, one which must receive the most constitutional protection.[106] Like under the United States Constitution, courts use the strict scrutiny framework in analyzing state laws that allegedly infringe upon a fundamental right.[107] Furthermore, Georgia courts have generally interpreted Georgia's right to privacy more expansively than federal courts have interpreted the Fourteenth Amendment's right to privacy.[108]

This right to privacy is relevant to the Act's constitutionality because Georgia courts have broadly interpreted this right as protecting a person's ability to make their own decisions and live the life they choose.[109] Some Georgia courts have also interpreted the right to privacy as protecting a person's ability to make medical decisions about their own bodies.[110] More importantly, however, the right to privacy also protects the constitutional rights of adults in their role as

105. Powell v. State, 270 Ga. 327, 329, 510 S.E.2d 18, 21–22 (1998) (explaining that "[s]ince [*Pavesich*], the Georgia courts have developed a rich appellate jurisprudence in the right of privacy"); *see also id.* at 332, 510 S.E.2d at 23–24 (holding that Georgia's constitutional right to privacy protects an adult's ability to engage in consensual sexual activity); Zant v. Prevatte, 248 Ga. 832, 833, 286 S.E.2d 715, 717 (1982) (holding that the right to privacy protects one's ability to refuse medical treatment).

106. *See* Ambles v. Georgia, 259 Ga. 406, 408, 383 S.E.2d 555, 557 (1989) ("Fundamental constitutional rights are those that are recognized as having a value so essential to individual liberty in our society that their infringement merits careful scrutiny by the courts."); *see also Powell*, 270 Ga. at 332–33, 510 S.E.2d at 24 (explaining that state-imposed limitations on the right to privacy are constitutional only if they pass the strictest form of review).

107. *Compare Powell*, 270 Ga. at 332–36, 510 S.E.2d at 24–26 (applying strict scrutiny to a Georgia sodomy law), *with* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (explaining that the Due Process Clause of the Fourteenth Amendment "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement [satisfies strict scrutiny]").

108. *Powell*, 270 Ga. at 330–31, 510 S.E.2d at 22 ("It is clear from the right of privacy appellate jurisprudence . . . that the [right to privacy] guaranteed by the Georgia Constitution is far more extensive tha[n] the right of privacy protected by the U.S. Constitution . . . .").

109. *See, e.g.*, *Pavesich*, 122 Ga at 195–96, 50 S.E. at 70 (explaining that the right to privacy allows a person to "enjoy life in any way that may be most agreeable and pleasant" to them and that "[e]ach is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from his liberty").

110. *See, e.g.*, *Zant*, 248 Ga. at 833, 286 S.E.2d at 717 (allowing a prisoner to refuse emergency medical treatment calculated to save his life "by virtue of his right of privacy"); Georgia v. McAfee, 259 Ga. 579, 579–80, 385 S.E.2d 651, 651–52 (1989) (allowing a patient to remove his ventilator and end his own life where an accident left him quadriplegic and without any chance for improvement, under the rights to refuse medical treatment and to be free from pain); *in re* L.H.R., 253 Ga. 439, 446, 321 S.E.2d 716, 722–23 (1984) (holding that the right to refuse medical treatment, when in terminal condition, is not limited to just adults, but is also available to parents of a terminally ill infant).

parents.[111] Because the Act restricts both the medical decisions minors may make about their own bodies as well as a parent's ability to direct medical care for their children, both rights are implicated in the Act. However, because minors already face limitations on bodily autonomy, parental rights likely have the stronger constitutional claim.

Georgia courts have interpreted the right to privacy as protecting parents' "constitutional right . . . to the care and custody of their children."[112] This right is "fiercely guarded" and "should be infringed upon only under the most compelling circumstances."[113] Though parental rights are an independent interest the Georgia Constitution protects, parental rights also "derive[] from privacy rights inherent in the constitution," making them a component of the right to privacy.[114] Regardless of the theory under which they are analyzed, state laws that infringe upon a parent's constitutional rights are analyzed under strict scrutiny, just like any other fundamental right.[115]

Georgia courts have been clear that "the state may interfere with a parent's right to raise his or her child only when the state acts to protect the child's health or welfare and the parent's decision would result in harm to the child."[116] This means that such laws must satisfy two elements: (1) having the overall goal of protecting the health or welfare of the child, and (2) showing that the parent's decision would actually cause harm to the child.[117] For example, in *Brooks v. Parkerson*, the Georgia Supreme Court addressed a grandparent visitation statute which guaranteed visitation rights to grandparents for grandchildren if they followed statutory procedure.[118] The Georgia Supreme Court held that the law was an unconstitutional infringement on parental rights

111. *See infra* notes 112–113.

112. Clark v. Wade, 273 Ga. 587, 596, 544 S.E.2d 99, 106 (2001); *see also* McCollum v. Jones, 274 Ga. App. 815, 819, 619 S.E.2d 313, 318 (2005).

113. *Clark*, 273 Ga. at 596–97, 544 S.E.2d at 106; *see also* Nix v. Dep't of Hum. Res., 236 Ga. 794, 795, 225 S.E.2d 306, 307 (1976) ("There can scarcely be imagined a more fundamental and fiercely guarded right than the right of a natural parent to its offspring.").

114. Brooks v. Parkerson, 265 Ga. 189, 192, 454 S.E.2d 769, 772 (1995).

115. *See Clark*, 273 Ga. at 596–97, 544 S.E.2d at 106–07 (explaining that the state's interest must be "compelling" to withstand strict constitutional scrutiny).

116. *Id.* at 597, 544 S.E.2d at 106.

117. *Brooks*, 265 Ga. at 193, 454 S.E.2d at 772–73 (explaining that both elements must be present for a state law to defeat strict scrutiny).

118. *Id.* at 190, 454 S.E.2d at 770–71.

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because the statute failed both of the required elements.[119] First, "insufficient evidence" existed to show that grandparents' visitation with grandchildren "always promotes the child's health or welfare."[120] Second, the statute failed to require a showing of harm to the child in order for a grandparent to obtain visitation rights.[121] The Georgia Supreme Court addressed a similar situation years later in *Patten v. Ardis* and came to an identical result.[122]

There are not many cases dealing with parental rights and medical decision-making for the child. However, the Georgia courts have spoken to the issue at least twice before.[123] First, in *In re L.H.R.*, the Georgia Supreme Court addressed a terminally ill infant patient who was in a chronic vegetative state.[124] The court specifically addressed the question of whether the parents could make the decision to end their child's dying process due to the infant's incapacity to make that decision for themselves.[125] The court held that the parents could make that decision for their child.[126] Importantly, the court recognized "the importance of the family in our society," especially "when the patient is a child."[127] The court provided that the law "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[128] Accordingly, the court reasoned that "the decision whether to end the dying process is a personal decision" for those who bear legal responsibility for the patient, because, in part, the right of parents to speak on behalf of their child "is so imbedded in our

119. *Id.* at 194, 454 S.E.2d at 773 (holding that "the statute in question falls short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered").

120. *Id.*

121. *Id.* at 194, 454 S.E.2d at 773–74.

122. *See generally* Patten v. Ardis, 304 Ga. 140, 816 S.E.2d 633 (2018) (holding the authorization of the visitation award to grandparents unconstitutional when done over a fit parent's objection and in the absence of a clear and convincing showing of harm to the child).

123. *See generally in re* L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984); Velez v. Bethune, 219 Ga. App. 679, 466 S.E.2d 627 (1995).

124. *In re L.H.R.*, 253 Ga. at 439, 321 S.E.2d at 718.

125. *Id.*

126. *Id.* at 446, 321 S.E.2d at 722–23.

127. *Id.* at 445, 321 S.E.2d at 722.

128. *Id.*

tradition . . . that it has been suggested that the constitution requires that the state respect the parent's decision in some areas."[129]

The Georgia Court of Appeals further supported this reasoning in *Velez v. Bethune*.[130] There, the court addressed similar facts as in *In re L.H.R.*, except in *Velez*, the physician unilaterally decided to end the terminal minor patient's life, allegedly without the parent's consent.[131] The court allowed one of the claims to proceed to trial because the doctor "had no right to decide, unilaterally, to discontinue medical treatment even if . . . the child was terminally ill and in the process of dying," and because "[t]hat decision must be made with the consent of the parents."[132]

Georgia's expansive interpretation of the right to privacy leaves the Act vulnerable to a parental rights challenge under the Georgia Constitution.[133] Like under a federal challenge, the Act would likely be struck down if a court found it to infringe upon parents' fundamental right to raise their children and applied a strict scrutiny

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129. *Id.* at 445–46, 321 S.E.2d at 722–23.

130. *See generally* Velez v. Bethune, 219 Ga. App. 679, 466 S.E.2d 627 (1995).

131. *Id.* at 679–80, 466 S.E.2d at 628–29.

132. *Id.* at 680, 466 S.E.2d at 629.

133. Opponents of the Act might argue that, like the Georgia Supreme Court, the Georgia General Assembly has displayed respect for parental rights as recently as 2022. During the COVID-19 pandemic, the General Assembly passed the Unmask Georgia Students Act (UGSA), which prohibited public and charter schools from creating or enforcing mask mandates on school property unless the rule allowed for parents or guardians to exempt their child or children from the rule. 2022 Ga. Laws 23, § 1, at 23 (titling SB 514 the "Unmask Georgia Students Act"); O.C.G.A. §§ 20-2-59(b)(1)-(2), -2077(a)-(b), -779.2(a), -2094(a)-(b) (2022). The UGSA provided that parents do not have to give any reason to exempt their child or children from a rule. *See, e.g.*, § 20-2-779.2(a) ("A parent or guardian [electing to exempt their children from the rule] shall not be required to provide a reason or any certification of the child's health or education status."). The legislature justified the bill using parental rights, saying that "parents were in the best position to make health decisions for their children." Ty Tagami, *Georgia Senate Votes to Let Parents Opt Kids Out of School Mask Mandates*, ATLANTA J.-CONST. (Mar. 1, 2022), https://www.ajc.com/education/georgia-senate-votes-to-let-parents-opt-kids-out-of-school-mask-mandates/GCQ2T72UHBAD5NNOSEB2MCLSQE/ [https://perma.cc/8A7C-EV7Q]. Georgia Senator Clint Dixon (R-45th) sponsored the bill in the Senate and told the Senate Committee on Education and Youth that "[p]arents are the best decision-makers when it comes to the health and education of their children." *'Unmask Georgia Students Act' Passes Georgia General Assembly*, 11ALIVE, https://www.11alive.com/article/news/politics/unmask-georgia-students-act-passes-georgia-general-assembly/85-e4987d05-0764-4a1c-81a5-e47d0f7de9a2 [https://perma.cc/GU8C-5APZ] (Mar. 25, 2022, 11:23 PM). Therefore, the General Assembly was aware of a Georgia parent's constitutional rights—particularly with regards to their child's health and medical decisions—when it voted to pass SB 140. Thus, opponents of the Act might argue that the General Assembly is selectively picking when to trust parents with decision-making authority for their children, thus providing further evidence of discrimination against transgender people.

framework.[134] The Act has been described as restricting parents' ability to exercise their judgment for the wellbeing of their children by removing "all parental and familial choice in pursuing gender-affirming care for transgender minors" and negating "all forms of consent offered by youth, parents, guardians or family members."[135] Furthermore, while the Act states a duty to protect the welfare of children, opponents of the Act are skeptical.[136]

In order for the Act to withstand constitutional scrutiny under Georgia law, two elements must be met. The first requirement is that the Act promotes the health or welfare of children and thus is justified as an intrusion into the decision-making abilities of parents.[137] The second requirement is that without state interference with parental decision-making, the health or welfare of children in Georgia would be harmed.[138] If a lawsuit over the Act reached the Georgia Supreme Court, the Court would be confronted with a question about the scope of parental rights under the Georgia Constitution.[139]

134. *See supra* notes 84–85.

135. *SB 140: Georgia's Ban on Gender Affirming Care*, ACLU GA., https://www.acluga.org/en/campaigns/sb-140-georgias-ban-gender-affirming-care [https://perma.cc/V8SV-B7JL]; *see* Kreis Interview, *supra* note 16 (arguing that there is a strong parental rights claim under Georgia law because, "if the state has recognized a constitutional right to [end the life of one's terminally ill child who was on artificial life support], then certainly the state's constitutional doctrine should recognize the ability of parents to save their children from deep psychological distress").

136. *See* 2023 Ga. Laws 6, § 1, at 7; *see also* Mar. 14, 2023 House Public Health Committee Video, *supra* note 37, at 1 hr., 47 sec. (remarks by Rep. Michelle Au (D-48th)) (arguing that the Act actually hurts the welfare of transgender children, rather than helps); Jackson Interview, *supra* note 16.

137. *Compare* Watson Interview, *supra* note 11 (discussing the evidence and criteria used to set the parameters of the Bill), *and* Summers Interview, *supra* note 11 (justifying the Act as a way of giving children time to further consider the life-changing decision of transitioning), *with* Jackson Interview, *supra* note 16 (opposing the Bill because it arguably hurts the welfare of children more than it helps).

138. *See supra* note 121.

139. It is difficult to predict how *Eknes-Tucker v. Governor of Alabama* might affect how a Georgia court would analyze the Act under a state claim. This is primarily due to the unresolved nature of cases in the Eleventh Circuit—specifically *Koe* and *Ladapo*—and how the doctrine will ultimately be applied. Furthermore, Georgia courts may disagree with how federal courts apply the doctrine and interpret the Georgia Constitution differently. Because of this uncertainty, this Peach Sheet does not analyze its effect on Georgia constitutional interpretation.

Potential Effects of SB 140

If the Act survives federal and state constitutional scrutiny, the Act could have a significant effect on the transgender community and their healthcare providers.

On Transgender Youth and Their Families

Around 8,500 Georgia teens (aged 13–17) identify as transgender—about 1.18% of Georgia youth.[140] Transgender youth are significantly more likely than their cisgender peers to have "poor mental health outcomes, including depression, anxiety, and suicidal ideation and attempts."[141] Receiving hormone replacement therapy as a minor has been shown to decrease risk of these poor outcomes, and being denied care can have tragic consequences.[142] Parents of transgender youth believe that denying their children care would result in their child's misery, self-harm, or even death.[143] These parents may feel that they have no choice but to move to a state where their child can access

140. JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, UCLA SCH. OF L. WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 9 (June 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/Q3WL-8UDE].

141. Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David J. Inwards-Breland & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN, no. 2, Feb. 25, 2022, at 2.

142. Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/ [https://perma.cc/AKA7-EHBV]; Erin Digitale, *Better Mental Health Found Among Transgender People Who Started Hormones as Teens*, STANFORD MED. NEWS CTR. (Jan. 12, 2022), https://med.stanford.edu/news/all-news/2022/01/mental-health-hormone-treatment-transgender-people.html [https://perma.cc/X4SH-U98K]. Researchers at Stanford University found that:

> Compared with members of the control group, participants who underwent hormone treatment had lower odds of experiencing severe psychological distress during the previous month and lower odds of suicidal ideation in the previous year. Odds of severe psychological distress were reduced by 222%, 153% and 81% for those who began hormones in early adolescence, late adolescence, and adulthood, respectively.

Id.

143. *See generally* Kacie M. Kidd, Gina M. Sequeira, Taylor Paglisotti, Sabra L. Katz-Wise, Traci M. Kazmerski, Amy Hillier, Elizabeth Miller & Nadia Dowshen, *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. ADOLESCENT HEALTH (2021).

gender-affirming care.[144] Beyond its effect on transgender youth and their families, the Act has the potential to affect the Georgia economy as parents "decide that Georgia is no longer safe, welcoming, and supportive place of their families" and choose to move elsewhere.[145]

Although many supporters of laws banning gender-affirming care for youth cite risk of regret or retransition as negative consequences, studies show these events happen infrequently.[146] Supporters of the measure also express concern that the data about the long-term effects of receiving gender-affirming care in adolescence is sparse or unreliable, however, multiple large-scale studies and the consensus of major medical organizations indicates otherwise.[147]

On Medical Professionals

In September 2022, the World Professional Association for Transgender Health (WPATH) published the most recent standards of care for transgender and gender-diverse people, which include standards for gender-affirming care and, more specifically, standards of care for gender-diverse minors.[148] In short, the standards of care

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144. *Id.* at 6–8.

145. Katie Burkholder, *LGBTQ Groups Condemn Passage of SB 140 in Georgia Legislature*, GA. VOICE (Mar. 22, 2023), https://thegavoice.com/news/georgia/lgbtq-groups-condemn-passage-of-sb-140-in-georgia-legislature/ [https://perma.cc/U5L4-D7MG].

146. Kristina R. Olson, Lily Durwood, Rachel Horton, Natalie M. Gallagher & Aaron Devor, *Gender Identity 5 Years After Social Transition*, 150 PEDIATRICS, no. 2, Aug. 2022, at 4–5.

> Our observation that few youth who have begun medical intervention have retransitioned to live as cisgender is consistent with findings in the literature. Several studies reporting on outcomes among transgender youth receiving blockers and gender-affirming hormones have reported relatively low rates of regret or stopping treatment, which are potential indicators of retransition, though stopping treatment can occur for other reasons as well (e.g., side effects), as can regret (e.g., experiences of transphobia).

Id.

147. *See* Stephen B. Levine & E. Abbruzzese, *Current Concerns About Gender-Affirming Therapy in Adolescents*, 15 CURRENT SEXUAL HEALTH REPS. 113, 118 (2023). *But see* Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, SCI. AM. (May 12, 2022), https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows/ [https://perma.cc/Q2Q8-BK65].

148. *See generally* E. Coleman, A. E. Radix, W. P. Bouman, G. R. Brown, A. L. C. de Vries, M. B. Deutsch, R. Ettner, L. Fraser et al., *Standards of Care for the Health of Transgender and Gender Diverse*

recommend that healthcare professionals provide access to gender-affirming care for gender-diverse minors.[149]

Dozens of major medical associations have endorsed gender-affirming care for gender-diverse minors, including, *inter alia*, the American Medical Association (AMA), the American Academy of Pediatrics (AAP), the American Association of Clinical Endocrinology (AACE), the Pediatric Endocrine Society (PES), the World Health Organization (WHO), and the American Psychiatric Association (APA).[150]

The enactment of the Act into law may lead to unintended consequences for not just transgender youth in Georgia, but also the Georgia medical community. First, as a result of the enactment of the Act, physicians in Georgia may no longer provide certain treatments for transgender minors that would normally be prescribed in standards of care or professional guidelines.[151] Furthermore, if a Georgia physician decides to provide such treatments to conform with these professional standards, the scope of their potential professional and legal liability is large. The Act provides that "[a] licensed physician who violates [Code section 43-34-15] shall be held administratively accountable to the [Georgia Medical Composite Board] for such violation," meaning that physicians could lose their medical licenses or suffer other forms of professional discipline for providing

People, Version 8, 23 INT'L J. TRANSGENDER HEALTH S1 (2022). A synopsis of the most recent standards of care are available. *See generally* Tonia Poteat, Andrew M. Davis & Alex Gonzalez, *Standards of Care for Transgender and Gender Diverse People*, 329 JAMA 1872, 1872, 1874 (2023). While the standards recommend that gender-affirming care be available to transgender and gender-diverse minors, the standards still recommend the inclusion of certain safeguards so that minors are well-educated in the decisions they make. *See, e.g.*, *id.* (suggesting that "[a]t least 6 months of exogenous hormone therapy before gender-affirming surgery is optimal, but not mandatory," and that "[c]hildren and adolescents require a multidisciplinary approach, which considers developmental stage, neurocognitive function, language skills; offers mental health support; discusses risks and benefits of social transition; and includes parental/guardian involvement in [gender-affirming medical and surgical treatments] in almost all situations").

149. Poteat et al., *supra* note 148, at 1874 (discussing the scope of the updated standards of care).

150. *Medical Association Statements in Support of Health Care for Transgender People and Youth*, GAY & LESBIAN ALL. AGAINST DEFAMATION (June 21, 2023), https://glaad.org/medical-association-statements-supporting-trans-youth-healthcare-and-against-discriminatory/ [https://perma.cc/NJY7-TRTF] ("At least 30 leading professional medical associations have issued statements supporting health care for transgender people and youth.").

151. Poteat et al., *supra* note 148, at 1872.

treatments that are prescribed in the standards of care.[152] Second, because the General Assembly intentionally struck language from the Act that would have shielded physicians from civil and criminal liability, physicians would be subject to potential criminal charges and civil lawsuits for providing treatments that are prescribed in the standards of care.[153] Thus, the Act may force Georgia physicians to choose between adhering to the standards of care or breaking the law.[154]

Furthermore, the Act may have an unintentional chilling effect on physician presence in Georgia. According to standards from the federal Health Resources & Services Administration, only three counties in Georgia have enough physicians to treat the population.[155] Because there are 159 counties in Georgia,[156] that means 156 counties suffer from physician shortages.[157] More specifically, data show that one out of every three Georgians lives in an area with a primary care shortage.[158] Governor Brian Kemp (R) created the Healthcare Workforce Commission in 2022 to address the ongoing healthcare

152. *See supra* note 58; O.C.G.A. § 43-34-15(c) (2023) ("A licensed physician who violates this Code section shall be held administratively accountable to the [Georgia Medical Composite Board] for such violation.").

153. *See supra* notes 38–41.

154. Scott J. Schweikart, *What's Wrong With Criminalizing Gender-Affirming Care of Transgender Adolescents?*, AMA J. ETHICS (June 2023), https://journalofethics.ama-assn.org/article/whats-wrong-criminalizing-gender-affirming-care-transgender-adolescents/2023-06 [https://perma.cc/H43A-XJYB]; *see* Jacob Kanter & Greg Mercer, *Law Enforcement Officers and Agencies*, 39 GA. ST. U. L. REV. 105, 121–23 (2022) (discussing the potential unintended consequences resulting from a Georgia law which allowed the Georgia Bureau of Investigation authority to investigate claims of election fraud). Like with the Act and Georgia-licensed physicians, this GBI bill left poll workers without any legal protections in their roles, thus creating a situation where they would have to choose between adhering to election law and giving into political pressure. *See id.* at 23 (discussing poll workers who have "'had their lives ruined by simply trying to perform the essential functions of the job'"). Related to the issue of medical standards of care, physicians may also be violating their professional ethical obligations when they are unable to provide gender-affirming care to patients. *See generally* Greg Mercer, *First, Do No Harm: Prioritizing Patients over Politics in the Battle over Gender-Affirming Care*, 39 GA. ST. U. L. REV. 479 (2022) (discussing the role of medical ethics in policy and healthcare decisions regarding gender-affirming care).

155. Sofi Gratas, *Nearly Every Georgia County Faces a Shortage of Primary Care Providers*, GA. PUB. BROAD., https://www.gpb.org/news/2023/01/17/nearly-every-georgia-county-faces-shortage-of-primary-care-providers [https://perma.cc/X3KM-EW4F] (Jan. 18, 2023, 8:41 AM).

156. *Georgia*, U.S. CENSUS BUREAU, https://www.census.gov/geographies/reference-files/2010/geo/state-local-geo-guides-2010/georgia.html#:~:text=There%20are%20159%20counties%20in%20Georgia [https://perma.cc/9WCQ-BCS9].

157. Gratas, *supra* note 155.

158. *Id.*

workforce shortage in Georgia, which existed even before the Act's enactment.[159] The Commission's final report emphasized the need to maximize the healthcare workforce.[160] Though uncertain, this shortage may get worse as physicians could choose to leave the state because of the legal landscape for gender-affirming care in Georgia.

Conclusion

Gender-affirming care for minors continues to be a contentious issue nationally, and the Act brought the topic to the forefront in Georgia. Supporters of the Act feel it is necessary to protect children and to ensure minors do not make irreversible decisions about their bodies until they are competent adults. Conversely, opponents of the Act feel that the Act harms an already vulnerable group, conflicts with established medical standards of care and, thus, is antithetical to its stated purpose of protecting children.

Discussion around the Act primarily hinges on its constitutionality. Like similar laws across the country, the Act faces constitutional challenges. These challenges will hinge on how courts construe the rights at issue and interpret the conflicting evidence presented by both sides.[161] Whether under the United States or Georgia Constitutions, the issues the Act and similar laws present give courts across the country an opportunity to address the constitutional protections of transgender and gender-diverse people and to readdress the scope of parental rights under state and federal law.

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159. *Id.*

160. *Id.*

161. Even courts in the Eleventh Circuit have conflicting conclusions on the Act and laws similar to the Act. Specifically, each district court has held that there is a substantial likelihood that these laws violate either the Equal Protection Clause, Due Process Clause, or both, but the Eleventh Circuit has come to a different conclusion. *Compare* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1138 (M.D. Ala. 2022) (holding that there is a substantial likelihood that Alabama's VCCPA is unconstitutional); Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *25 (N.D. Ga. Aug. 20, 2023) (holding that there is a substantial likelihood that SB 140 violates the Equal Protection Clause of the Fourteenth Amendment); *and* Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *10–11 (N.D. Fla. June 6, 2023) (holding that the plaintiffs were likely to succeed on both equal protection and due process claims), *with* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1210–11 (11th Cir. 2023) (vacating the preliminary injunction and holding that the district court's "determination that the plaintiffs have established a substantial likelihood of success on the merits cannot stand").

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https://readingroom.law.gsu.edu/gsulr/vol40/iss1/11