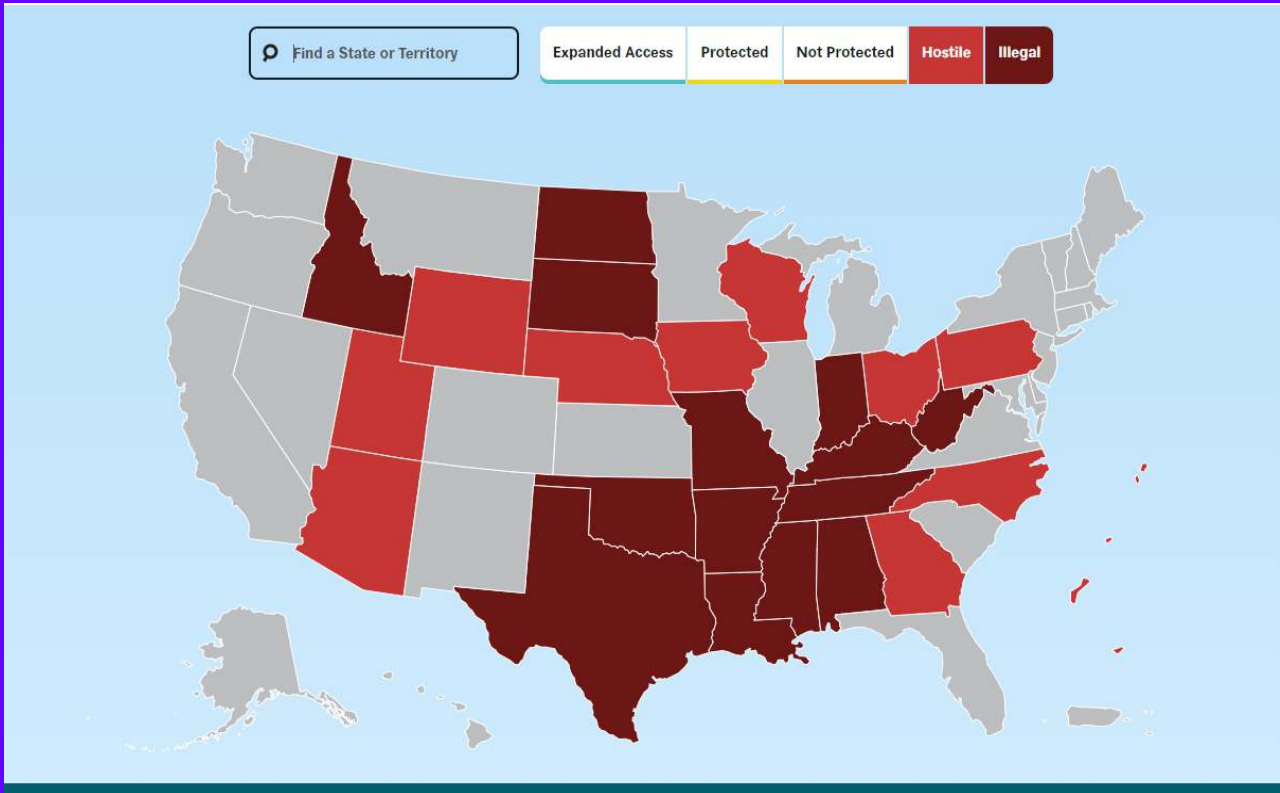


Confronting Cross-Border Restrictions to Gender-Affirming and Abortion Care

Lavender Law 2023

July 26, 2023

Abortion Access After *Dobbs*

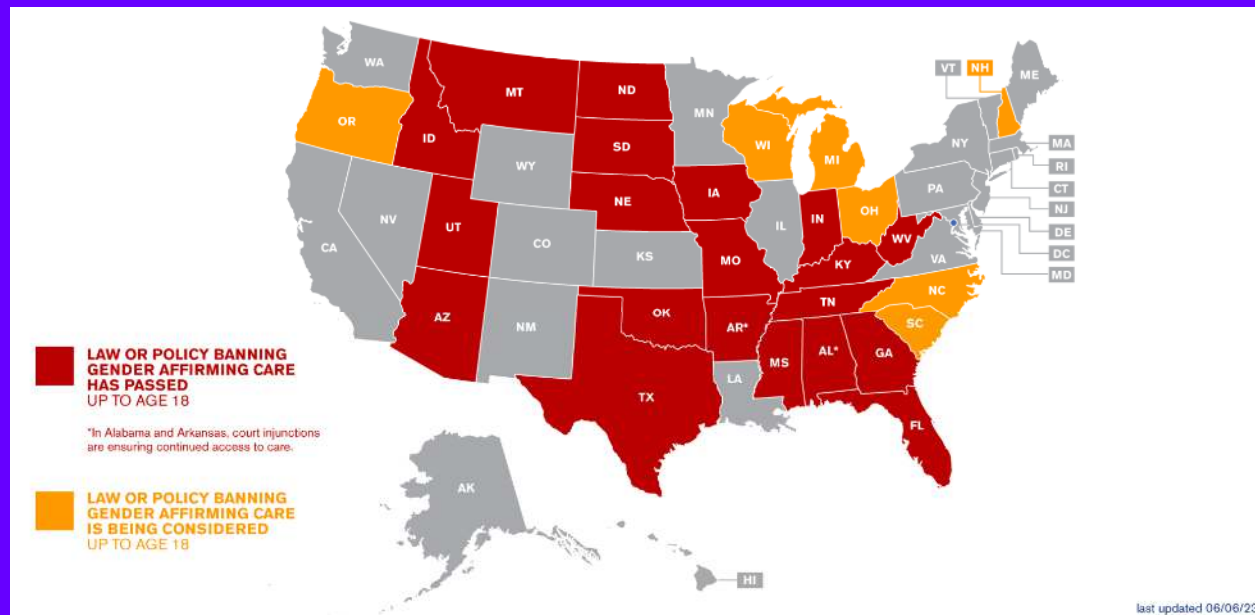


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Gender-Affirming Care Bans Impacting Youth



The New York Times

Fight or Flight: Transgender Care Bans Leave Families and Doctors Scrambling

Laws in 20 states have left the fate of clinics in doubt and families with transgender children searching for medical care across state lines.



By [Ernesto Londoño](#) and [Azeen Ghorayshi](#) Photographs by [Jamie Kelter Davis](#)

Ernesto Londoño reported from West Des Moines, Iowa, and Azeen Ghorayshi from New York.

July 6, 2023



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Remaking America: Crossing State Lines For Abortion Care

May 11, 2023 · 3:42 PM ET

TRANSGENDER RIGHTS

Families with transgender kids are increasingly forced to travel out of state for the care they need

At least 20 states have enacted laws restricting or banning gender-affirming care for trans minors

By Arleigh Rodgers and Michael Goldberg · Published 5 hours ago · Updated 5 hours ago



Next abortion battles may cross state borders

BY JOHN HANNA AND GEOFF MULVIHILL

Published 10:53 AM EDT, April 10, 2023



What We Will Cover

- Existing efforts to restrict residents from accessing GAC and abortion care across state lines
- Jurisprudential Review
- Practical considerations for care providers
- Opportunities for Proactive Collaboration

Carl Charles

(he/him/his), Lambda Legal

- Senior Attorney in the Southern Regional Office of Lambda Legal, located in Atlanta, Georgia.
- Litigates cases protecting and expanding federal civil rights protections for transgender people, including:
 - *Dekker v. Weida*, a federal lawsuit challenging Florida's Agency for Healthcare Administration's exclusion of Medicaid coverage for gender affirming healthcare;
 - *Fain v. Crouch*, a federal lawsuit challenging West Virginia's blanket exclusion of coverage for gender-confirming care in its state health insurance plans; and
 - *Kadel et al. v. Folwell et al.*, a federal lawsuit challenging North Carolina state officials for discrimination in state employee health care.
- Prior to joining Lambda Legal, Carl served as a staff attorney with the New York City Commission on Human Rights and before that, as a Skadden Fellow with the ACLU LGBT & HIV Project.





Corinne Green

(she/her/hers or they/them/theirs),
Equality Federation

- Policy & Legislative Strategist at Equality Federation tracking all LGBTQ-related legislation across the country and provides policy analysis and support to Equality Federation members.
- Harm reduction and queer rights activist from New Orleans, Louisiana.
 - Serves as the President of Louisiana Trans Advocates and Policy Coordinator for Equality Louisiana
 - Successfully fended off anti-LGBTQ attacks, helped write the Deep South's first trans-inclusive nondiscrimination executive order, and broadened access to the overdose reversal drug naloxone.
 - Serves on the board of National Harm Reduction Coalition.
- Prior to joining Equality Federation, she worked for Transgender Law Center, where she oversaw the passage and implementation of California's Gender Recognition Act, the country's largest expansion of access to nonbinary gender markers, and created the Protect Trans Health campaign to defend gender identity protections in the Affordable Care Act.



Rabia Muqaddam

(she/her/hers), Center for
Reproductive Rights

- Senior Staff Attorney in U.S. Litigation at the Center for Reproductive Rights, headquartered in New York.
- Litigates reproductive rights cases across the country and currently serves as lead counsel in the challenges to the abortion bans and restrictions passed by the Oklahoma legislature in 2021 and 2022.
- Previously worked as a litigation associate at Dechert LLP and, during law school at Cornell, she was a president of the Cornell Law Students for Reproductive Justice, an online editor for the Cornell Law Review, and a participant in the LGBT Clinical programs.

Jennifer Pepper

(she/her/hers), CHOICES Center for Reproductive Health

- President and CEO of Choices: Center for Reproductive Health
- Previously worked as the Ryan White Program Administrator for Shelby County Government.
- Consultant for John Snow, Inc. where she provided countrywide training and technical assistance to various HIV planning councils.
- Passionately works on the frontlines of sexual and reproductive health and justice by providing advocacy and leadership to the communities she serves.



Callie Wells

(she/her/hers), Planned Parenthood Federation of America

- Policy Counsel focusing on state policy within the Public Policy, Litigation and Law Division at PPFA
- Provides strategic legal advice to Planned Parenthood affiliates about their proactive and legislative and administrative goals, and provides analysis and support, primarily on state legislation related to sexual and reproductive healthcare, including but not limited to access to abortion and contraception, sexual and reproductive health education, GAC, and Medicaid coverage.
- Previously worked as a healthcare regulatory associate at Manatt, Phelps & Phillips.



Existing Efforts to Restrict Travel Across State Lines for GAC and Abortion Care

How can hostile states try to restrict travel?

- Information Restrictions
 - Restricting websites containing information about where to obtain care out of state or, in the case of abortion, how to self-manage your care
 - Restricting websites that assist with scheduling or arranging out-of-state care
- Explicit Bans on Referrals
- Explicit Bans of Assistance to Travel
- Extraterritorial Application of Hostile State Law
 - Typically, through expansive interpretations of hostile state's inchoate liability statutes

What abortion travel restrictions have we seen enacted or proposed?

- AG Labrador Opinion Re: Idaho's Trigger Ban (rescinded)
 - Directly banned referrals out of state for abortion care
- ID HB 242
 - Makes it illegal to assist minor to travel across state lines to receive abortion care where it is legal if done with the intent to conceal the care from a parent or guardian
- TX HB 2690 (Similar bill in Iowa—H510)
 - Prohibits the provision of MAB drugs “to or from any person or location in this state” and providing information on how to obtain MAB. Violators are strictly and jointly and severally liable for wrongful death.
 - Declares the law of Texas applies to the use of MAB by a resident of Texas, regardless of where the use occurs
 - Creates private right of action for "interactive computer service" providers for MAB access or for providers/helpers
 - Prohibits funding an abortion, no matter where it is performed
- MO HB 1845 (2022)
 - Bans abortion performed on citizens of Missouri OR attempts to aid or abet abortions for Missouri citizens regardless of where the abortion occurs

What GAC travel restrictions have we seen enacted or proposed?

- **AR – HB 1570** – Enacted in 2021, explicitly banned referrals for GAC for minors. Currently subject to permanent injunction as violating the First Amendment.
- **MS – HB 1125** – Enacted in February 2023. Yet to be challenged. Prohibits any person from “knowingly engag[ing] in conduct that aids or abets the performance or inducement of gender transition procedures to any person under 18 years of age,” but indicates that this “subsection may not be construed to impose liability on any speech protected by federal or state law.”
- **IA – SF 538** – Enacted in March 2023. Yet to be challenged. Prohibits health care professionals from “knowingly engag[ing] in conduct that aids or abets the [banned GAC for minors],” but indicates that this prohibition “shall not be construed to impose liability on any speech protected by federal or state law.”
- **MT – SB 99** – Enacted in April 2023. Challenged in May. Prohibits any “individual or entity that receives state funds to pay for or subsidize the treatment of minors for psychological conditions, including gender dysphoria,” from using “state funds to promote or advocate the medical treatments prohibited” in the Act.

Any predications for next
legislative session?

Is there a constitutional right to travel? If so, what does it protect?

The Constitutional Right to Travel

- The "right to travel" is largely an implied right.
- Courts have identified various constitutional guarantees as the source of the right—Art. IV, Sec. 2 Privileges and Immunities Clause (the "Comity Clause"), 14th Amendment Section 1 Privileges or Immunities Clause, and 14th Amendment Substantive Due Process Clause.
- The contours of the right are less than clear, but the Supreme Court has recognized at least some aspects of the right as fundamental subject to strict scrutiny.
- In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court issued the most robust attempt to clarify the doctrine, articulating three core components.
- Justice Kavanaugh's concurrence in *Dobbs* states that he believes restrictions on travel for abortions would violate the right to travel.

Saenz v. Roe

- In *Saenz*, the Court struck down a California law that limited new residents to the welfare benefits they would have received in the State of their prior residence, for their first year in California because it violated the right to travel.
- The Court clarified that the right to travel embraces three components:
 - "the right of a citizen of one State to enter and to leave another State,"
 - "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and,
 - "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."
- The first two components offer potential claims against cross-border restrictions.

Component 1 - the right of a citizen of one State to enter and to leave another State

- Based on the cases cited in *Saenz* for the existence of this component—its source is likely in the 14th amendment, both privileges or immunities and substantive due process.
- Recognized in *Saenz* as fundamental, thus strict scrutiny is likely.
- There could be some challenges if the right is grounded in substantive due process, given the present hostility of members of the Court (e.g. Thomas) to substantive liberties. But, the cases supporting this right are firm that it is a foundational principle.
- How broad the right could be interpreted is the bigger question—actual restrictions on the right or more broadly as to impediments?

Component 2 – the right to be a "welcome" visitor

- This component is explicitly rooted in the Comity Clause and there is more case law.
- The Court has interpreted the effect of this to “remove[] from citizens of each State the disabilities of alienage in the other States” and “provide[] important protections for nonresidents who enter a State.” *Saenz*, 526 U.S. at 502.
- This is only subject to intermediate scrutiny—states need only have a “substantial reason” for discriminating against citizens from other states “beyond the mere fact that they are citizens of other States.” *Saenz*, 526 U.S. at 502
- Uncertainty remains, however:
 - unclear whether the Comity Clause considers both the actions of host states and home states alike or whether it is only directed at preventing discriminatory acts by host states.
 - unclear what is among the “privileges and immunities” protected by the Comity Clause
 - Unclear how intermediate scrutiny will operate with respect to different state interests.

Beyond *Saenz*, are there any cases that clearly present the question whether someone has a constitutional right to travel across state lines to receive medical care?

Are there any other doctrines that could be relevant in terms of a state's ability to enforce its laws extraterritorially?

Dormant Commerce Clause

- The Constitution grants Congress the power “[t]o regulate Commerce ... among the several States....” U.S. CONST. Art. I, § 8, cl. 3.
- In analyzing a dormant Commerce Clause challenge, a court must first determine which one of three sorts of claims to analyze: (1) claims that a state regulation facially discriminates in favor of state interests or against interstate commerce; (2) claims that a state law regulates extraterritorially; and (3) claims that a state regulation, although not discriminatory or impermissibly extraterritorial, unduly burdens interstate commerce. *See, e.g., Online Merchants Guild v. Cameron*, 995 F.3d 540, 552 (6th Cir. 2021).
- There are two primary analyses depending—*Pike* Balancing and the *Healy* analysis of extraterritoriality, which is available in some circuits.
 - Under the *Pike* balancing test, “State laws that ‘regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))
 - Only some circuits allow claims through the second analysis (extraterritoriality)--courts in the Fourth, Sixth, Seventh, Eighth and Ninth Circuits. In those circuits, in measuring a state law’s compliance with the dormant Commerce Clause’s prohibition on extraterritorial regulation, the “critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.” *Healy v. Beer Institute Inc.*, 491 U.S. 324, 336 (1989) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

National Pork Producers Council v. Ross, 143 S.Ct. 1142 (2023)

- In a fractured 5-4 opinion, the Court held that California's law prohibiting in-state sales of pork raised in inhumane conditions does not violate the dormant Commerce Clause.
- This could signal a weakening of the dormant Commerce Clause doctrine applied to laws that have the effect of regulating wholly out-of-state behavior and provides limitations for future dormant Commerce Clause claims under *Pike* balancing.
- Justice Kavanaugh explicitly mentioned abortion and contraception in his partial concurrence and dissent, noting that states might try to pass laws that penalize in-state activities of producers that do or do not pay for employees' contraception or abortion care. He voiced concern that the controlling opinion would allow states to "impose [their] moral or policy preferences" on external markets. He emphasized that there may be other constitutional basis for prohibiting that attempt to circumvent horizontal federalism norms.

How could the First Amendment be used to challenge some of these cross-border restrictions?

- Conduct v. Speech Continuum
- Brandt v. Rutledge Ruling
 - Ban on referrals was impermissible speech restriction
 - Court relied on the legislature's drafting failures
- Free Speech Exceptions
 - "Facilitating a crime"

The Conduct-Speech Continuum

- Pure Speech
 - Laws that regulate pure speech are generally subject to strict scrutiny under the First Amendment
 - There are exceptions. One potentially relevant exception here is for speech that facilitates a crime.
- Conduct that Implicates Speech
 - Laws that regulate conduct that incidentally burden speech will be subject to some, but not vigorous scrutiny (e.g., laws restricting sexual harassment or discrimination may incidentally burden speech, but they regulate conduct)
 - *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) is the Supreme Court's most recent articulation of the distinction between pure speech regulations and those that regulate speech only incidental to their regulation of conduct.
- Inherently Expressive Conduct
 - Conduct that is both intended to convey a particularized message and it is likely that the message will be understood by those viewing the conduct is generally subject to intermediate scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968).
 - Prime example of inherently expressive conduct is flag burning.

Where do referrals lie on the continuum?

- *Brandt v. Rutledge*: Federal district court in Arkansas permanently enjoined AR's ban on referrals for GAC for minors based on its finding that the law violated the healthcare professionals' First Amendment rights.
 - The district court determined that the law regulated speech, not conduct, despite the State's contention that the ban is meant to prohibit a physician from writing a "treatment order." The law failed to define "refer" and therefore would have "effectively ban[ned] providers'] ability to speak to patients about these treatments because the physician is not allowed to tell their patient where it is available."
 - The district court also found that the law was a "content and viewpoint-based regulation of speech because it restricts healthcare professionals from making referrals for 'gender transition procedures,' only, not for other purposes," and therefore was presumptively invalid.

Where does financial and other logistical support lie on the continuum?

- Unclear. Could be viewed as inherently expressive conduct receiving some First Amendment protection or simply conduct receiving no protection at all.

How has the patchwork of restrictions across the country affected the provision of abortion and GAC?

What are some of the major compliance concerns for providers in access states?

Cross-Border Compliance

- Biggest issues that have arisen relate to care that could be contemplated as occurring in both an access state and a ban state.
 - Medication abortion.
 - GAC
- Thus far, we have not seen the kind of arbitrary enforcement one might have expected post-*Dobbs*, but there remains concern about hostile enforcers attempting to use their bans to come after providers on the theory that some banned care is taking place in the ban state.
 - The risks of such hostile enforcement vary state to state based on underlying state law principles of criminal liability and extraterritorial enforcement of criminal law, the scope of inchoate liability statutes like aiding and abetting or conspiracy, and the scope of the underlying state law bans, among other things.
- Compliance measures have encompassed a wide array of options relating to reducing contacts between access state providers and ban states, documenting reliance on an understanding of where care takes place, and counseling patients on how to manage cross-border care, among others.

How are the challenges abortion rights and trans rights communities face similar? How can this inform our collaboration?

Common threats; Opportunities to Unite

- Abortion advocates and LGBTQ+ advocates face common challenges and have opportunities to work together:
 - Both movements have seen the pattern of targeting minors first, and then expanding those restrictions to adults.
 - Abortion providers have long faced "TRAP" restrictions that do not ban care but attempt to make it extremely difficult to provide care. We expect to see growing TRAP-like restrictions on GAC providers.
 - Both movements seek to advance fundamental rights to liberty, including bodily autonomy, and equality.
 - Many providers offer both abortion and GAC.
 - Both movements face common aggressors relying on common religious ideology as a sword to deny other rights.
 - Abortion rights advocates have lessons learned to share about TRAP restrictions and restrictions on minors.
 - LGBTQ+ advocates have made strong gains under theories of equality.
 - Principles of intersectionality call on us to work together.

What legal claims could support both trans rights and abortion rights?

- 14th Amendment Privileges and Immunities
 - Freedom of Movement
- 14th Amendment Due Process
 - Parental Autonomy
 - Bodily Autonomy
- 14th Amendment Equal Protection
- First Amendment
 - Speech

As a provider of both abortion and GAC, what are the other practical ways these advocacy groups could work together to improve access?

The key factor: will it improve access in haven states?

- Repealing any existing restrictions
- Funding for providers or patient navigation
- Insurance coverage (private and public requirements, with implementation)
- Access for vulnerable communities (minors, immigrants, incarcerated folks)
- Shield provisions, which aim to protect:
 - provider licensure
 - medical malpractice insurance coverage
 - reproductive health related medical records
 - also aim to "shield" patients and providers by stating non-compliance with subpoenas, investigations, threats of extradition, use of court resources for reproductive health related prosecutions