

VIRGINIA LAW REVIEW ONLINE

VOLUME 111

FEBRUARY 2025

38–63

SYMPOSIUM

GENDER DURING PREGNANCY, AND ABORTION AS GENDER-AFFIRMING CARE

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Pregnancy is an extremely gendered state in the United States. The physical ability to become pregnant is tied to biological, hormonal, and genetic factors associated with sex assigned at birth. But the societal and legal aspects of pregnancy are very gendered, from the type of maternity clothes available, to medical forms that ask questions in particular pronouns and roles, to the use of the phrase “pregnant woman” in most state statutes restricting or banning abortion. Almost all depictions of pregnancy involve a cisgender, femme-presenting woman, often with a husband or cisgender male partner. Healthcare providers are used to treating this type of patient. And courts and legislators often assume that this is the only type of pregnant patient when they are crafting laws about reproductive autonomy.

What does this mean for transgender men, masc-presenting women, gender nonconforming people, genderqueer people, nonbinary people, and other gender diverse people, or anyone who does not fit the aforementioned mold? Their experiences of pregnancy-related healthcare are necessarily shaped by both legal and cultural

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conceptions of pregnancy that are imbued with gendered assumptions, including about their reproductive healthcare needs. And, in turn, this gendering of pregnancy can cause gender diverse people to experience gender dysphoria during pregnancy.

This Essay explores how gender shows up in laws regarding reproductive rights. First, it highlights that gender diverse people often face discrimination in reproductive healthcare—whether they seek to carry a pregnancy to term or to terminate a pregnancy—and that discriminating against gender diverse pregnant people due to their gender identity violates federal law. Second, this Essay posits that, in some circumstances, terminating a pregnancy can constitute gender-affirming care. Part I traces the law’s approach to sex assigned at birth and gender during pregnancy and the effects that sexed and gendered assumptions within the law have on pregnant people who are not cisgender, femme-presenting women. Part II discusses the legal landscape for trans, nonbinary, gender nonconforming, and other gender diverse people trying to access reproductive healthcare. Part III explains the current state of the law and proposes that abortion can be lifesaving, gender-affirming care for some pregnant people.

INTRODUCTION

Reproductive healthcare has been the subject of continual debate, both in the forty-nine years that *Roe v. Wade*¹ was good law, and since *Dobbs v. Jackson Women’s Health Organization*² held in 2022 that abortion is not a constitutional right. In most discussions about reproductive freedom—including legal discussions—people who are pregnant are referred to as pregnant women or as female.³ And though transgender men, nonbinary people, and gender nonconforming people can be pregnant, the vast majority of laws and healthcare resources regarding reproductive rights assume, implicitly or explicitly, that the only people

¹ 410 U.S. 113, 153–54 (1973).

² 142 S. Ct. 2228, 2240–43 (2022).

³ Cf. Emily Barske, An Infusion of Inclusion into the News, NPR Public Editor (Feb. 18, 2022, 3:32 PM), <https://www.npr.org/sections/publiceditor/2022/02/18/1081846292/an-infusion-of-inclusion-into-the-news> [<https://perma.cc/8AE6-U9RF>] (discussing that most sources had used “pregnant women” to describe all pregnant people until recently, and explaining that NPR uses “pregnant people” when discussing all pregnant people and “pregnant women” when discussing a study or other source that is specific to women).

who are pregnant are cisgender women.⁴ This false assumption can and often does lead to disparate treatment in the provision of reproductive healthcare, from insurance companies that require a trans person to wait longer for fertility coverage to be triggered,⁵ to an intake form for new pregnant patients assuming that all patients are women.⁶

Sex and gender are now widely understood to be distinct concepts. Sex is typically described as a classification assigned at birth as male, female, or intersex that refers to biological and physical characteristics of a person, including genetics, hormones, genitalia, reproductive organs, and secondary sex characteristics.⁷ Sex has often been classified as either male or female, though the myriad factors that make up sex reveal that this binary is an overly simplistic description.⁸ Intersex people are born with one or more sex characteristics that fall outside of traditional concepts of male or female.⁹ So an intersex person might have a chromosomal sex that is traditionally understood as “male,” for instance, and “female” genitalia.¹⁰

In contrast to sex, gender refers to a spectrum of socially constructed roles, behaviors, and expectations.¹¹ Gender can refer to the experience of masculinity or femininity, as well as the experience of being nonbinary,

⁴ See *infra* Sections I.B, II.A, II.B.

⁵ Insurance company definitions of infertility often exclude transgender people who are receiving gender-affirming care. Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, Coverage and Use of Fertility Services in the U.S., KFF (Sept. 15, 2020), <https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/> [<https://perma.cc/4CE7-APXL>].

⁶ Bella Isaacs-Thomas, For Many Pregnant Trans People, Competent Medical Care Is Hard to Find, PBS News (May 26, 2021, 8:00 AM), <https://www.pbs.org/newshour/health/for-many-pregnant-trans-people-competent-medical-care-is-hard-to-find> [<https://perma.cc/4AQT-T37T>].

⁷ Sarah S. Richardson, Sex Itself: The Search for Male and Female in the Human Genome 14–15 (2013); Gender and Health, World Health Org., https://www.who.int/health-topics/gender#tab=tab_1 [<https://perma.cc/RUN6-DQGD>] (last visited Oct. 31, 2024); Carolyn M. Mazure, What Do We Mean by Sex and Gender?, Yale Sch. of Med. (Sept. 19, 2021), <https://medicine.yale.edu/news-article/what-do-we-mean-by-sex-and-gender/> [<https://perma.cc/UFZ3-DP3S>].

⁸ Richardson, *supra* note 7, at 14.

⁹ interACT: Advocs. for Intersex Youth, Intersex 101: Everything You Want to Know!, <https://interactadvocates.org/wp-content/uploads/2017/03/INTERSEX101.pdf> [<https://perma.cc/79HE-R3J3>] (last visited Oct. 31, 2024).

¹⁰ *Id.*; Richardson, *supra* note 7, at 127.

¹¹ Richardson, *supra* note 7, at 14; Gender, APA Dictionary of Psychology, Am. Psych. Ass’n, <https://dictionary.apa.org/gender> [<https://perma.cc/3RSP-JSGZ>] (last updated Nov. 15, 2023).

transgender, gender nonconforming, genderfluid, or another gender.¹² Gender identity refers to a person's internal concept of their gender, and gender expression is how a person presents their gender outwardly.¹³

Sex and gender were not widely seen as distinct categories until the 1970s.¹⁴ Accordingly, it is no surprise that case law about pregnancy prior to the 1970s conflated the two concepts, often using the terms “woman” and “she” to describe pregnant people. Yet case law over the past fifty years has largely still failed to distinguish sex assigned at birth from gender, assuming without explanation that all pregnant people are cisgender women.¹⁵ When discussing pregnancy, courts have largely ignored the existence of transgender men, gender nonconforming people, nonbinary people, and other non-cisgender women who can become pregnant.¹⁶ In doing so, courts both fail to accurately describe pregnancy and pregnancy-related discrimination when crafting case law—harming all pregnant people in the process—and they ignore the specific ways in which gender diverse pregnant people can experience harm from healthcare and legal systems that often operate as though gender diverse people do not exist.

Furthermore, reproductive healthcare access can be essential for gender diverse people. For some trans, gender nonconforming, and nonbinary people, prohibiting access to abortion prevents them from accessing care that would affirm their identity and reduce gender dysphoria, as well as potentially ameliorate discrimination from the many people and healthcare systems they would have to interact with while pregnant.¹⁷ The autonomy to have an abortion can be particularly important for gender diverse adolescents, who may face dysphoria during pregnancy at an age where they are simultaneously disproportionately likely to face harassment, violence, and depression.¹⁸ Intersex people can likewise experience dysphoria and distress during pregnancy, particularly if they

¹² American Psychological Association, *supra* note 11.

¹³ Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq> [<https://perma.cc/7AVR-HQ5W>].

¹⁴ See Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 3 (2000).

¹⁵ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 135 (2007); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 589–91 (2016); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258–59 (2022).

¹⁶ See *infra* Sections I.B, II.B.

¹⁷ See *infra* Section III.B.

¹⁸ *Id.*

were subject to nonconsensual surgery during infancy that altered their body;¹⁹ banning abortion can be a similar removal of their agency. Even a cisgender woman whose gender presentation is such that she does not imagine herself as someone who would give birth could face gender dysphoria during pregnancy.²⁰ For anyone experiencing gender dysphoria or other threats during pregnancy, the ability to decide whether to carry a pregnancy to term can be lifesaving. And just like other gender-affirming healthcare that many cisgender people receive, such as breast implants and other plastic surgery, an abortion can constitute gender-affirming care.

This Essay reckons with the gendered nature of pregnancy in society, as reflected in the law. It discusses the extent to which legal sources tend to construct pregnancy as inherently tied to gender—in keeping with societal misconceptions about gender—and how, in doing so, the law fails to accurately capture pregnancy. It explains the logistical, legal, and social barriers to accessing reproductive healthcare for people who do not fit the outmoded sex and gender binaries, both when people want to become pregnant and give birth to a child, and when people learn they are pregnant and want to have an abortion. And with respect to abortion, the Essay explains why termination of pregnancy can be a form of gender-affirming care.

I. HISTORICALLY GENDERED CONCEPTIONS OF PREGNANCY

Societal conceptions of pregnancy have been bound up with misconceptions and stereotypes about gender throughout U.S. history, and the law has followed suit. Accordingly, the legal treatment of pregnancy has been underinclusive of sex discrimination and has largely ignored gender diverse people as people who can become pregnant.

¹⁹ Intersex people are underrepresented in research, but the studies that do exist suggest they struggle with gender dysphoria related to their condition and surgeries at significant rates. See Cynthia Kraus, *Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria*, 44 *Archive Sexual Behav.* 1147, 1155 (2015); Paulo Sampaio Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 *Nature Revs. Urology* 620, 623 (2012).

²⁰ See, e.g., Anna Malmquist, Johanna Wikström, Louise Jonsson & Katri Nieminen, *How Norms Concerning Maternity, Femininity and Cisgender Increase Stress Among Lesbians, Bisexual Women and Transgender People with a Fear of Childbirth*, 93 *Midwifery* art. no. 102888, at 5–6 (2021).

A. Historical Notions of Women as Domestic Beings

For much of history, women were relegated to domestic life as a mechanism for men to maintain power and control in the workforce, politics, and broader society. As one famous French historical figure stated, many thought of women as “nothing more than machines for producing children.”²¹ In the United States, the notion of women as child-bearers and child-rearers solidified during the latter half of the nineteenth century. As industrialization expanded, popular discourse separated men and women into different spheres, with men largely leaving the house to work and women consigned to the household and raising children.²² Emphasizing the responsibility of women for birthing and raising children also functioned as a form of social control throughout the nineteenth century and into the twentieth century, to ensure that women did not gain political and societal power. The idea of women as responsible for children and the family was deployed “to crush the aspirations of women for a life of her [sic] own.”²³

Despite shifts in the labor force after both the Civil War²⁴ and World War II,²⁵ notions of women as responsible for children persisted. Even during the latter half of the twentieth century, opponents of the Equal Rights Amendment argued that women’s natural role was to raise

²¹ Denise Z. Davidson, *France After Revolution: Urban Life, Gender, and the New Social Order* 22 (2007) (“Napoleon himself, in one of his characteristic statements, insisted that women ‘are nothing more than machines for producing children.’”).

²² Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 *Yale L.J.* 2117, 2126 (1996); Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 *Mich. J. Gender & L.* 1, 5 (2007). This narrative was largely focused on white middle-class households. John Fabian Witt, From Loss of Services to Loss of Support: the Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family, 25 *Law & Soc. Inquiry* 717, 727–28 (2000).

²³ Leta S. Hollingsworth, Social Devices for Impelling Women to Bear and Rear Children, 22 *Am. J. Socio.* 19, 19–20 (1916).

²⁴ World War II is often portrayed as the time during which women entered the workforce in the United States. But Black women played a critical role in the workforce and in community building following the Civil War. And it was quite common for low-income and working-class women of any race to work during the nineteenth and twentieth centuries as well. *A Nation Divided: Reconstruction*, N.Y. Hist. Soc’y: Women & the Am. Story, <https://wams.nyhistory.org/a-nation-divided/reconstruction/> [https://perma.cc/75XP-U6JT] (last visited Oct. 31, 2024); *Waged Industrial Work*, N.Y. Hist. Soc’y: Women & the Am. Story, <https://wams.nyhistory.org/modernizing-america/fighting-for-social-reform/waged-industrial-work/> [https://perma.cc/Q32Y-R4WA] (last visited Oct. 31, 2024).

²⁵ *Women and Work After World War II*, PBS: Am. Experience, <https://www.pbs.org/wgbh/americanexperience/features/tupperware-work/> [https://perma.cc/9W5R-MNRW] (last visited Oct. 31, 2024).

children.²⁶ And today, antiabortion state legislators and interest groups push for pregnant women to have children in almost any circumstance. As of October 2024, thirteen states have effectively banned abortion entirely, and another six states have severely restricted abortions, with gestational limits between the sixth and twelfth weeks of pregnancy.²⁷ Of the laws that prohibit abortion in those thirteen states, at least ten of them are gendered, specifically referring to pregnant women as though only cisgendered women could be pregnant.²⁸ And six of the abortion-ban states force pregnant people to give birth even when doing so would threaten their health.²⁹ After a ten-year-old in Ohio who was raped had to cross state lines to be able to terminate her pregnancy, a spokesperson for National Right to Life stated that she should have had to birth a child instead.³⁰ Some antiabortion public servants even continue to argue that women's bodies are "hosts" for having children.³¹

²⁶ Kogan, *supra* note 22, at 56.

²⁷ Abortion in the United States Dashboard, Oct. 2024, Kaiser Fam. Found., <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/> [<https://perma.cc/3SKA-Y98A>]. On November 5, 2024, a majority of Missouri voters voted for a constitutional amendment to establish a state constitutional right to abortion up until fetal viability. The amendment went into effect on December 5, 2024. Jason Rosenbaum, Missouri Voted to End One of the Country's Toughest Abortion Bans, NPR (Nov. 7, 2024, 5:22 PM), <https://www.npr.org/2024/11/07/nx-s1-5181893/missouri-voted-to-end-one-of-the-countrys-toughest-abortion-bans> [<https://perma.cc/QD7K-6675>].

²⁸ See Idaho Code Ann. § 18-622(2) (West 2023); Ind. Code Ann. § 16-34-2-1 (West 2024); Ky. Rev. Stat. Ann. § 311.772(3)(a) (West 2019); Tenn. Code Ann. § 39-15-213 (2023); Mo. Rev. Stat. § 188.017 (2022); Ark. Code Ann. § 5-61-303 (2019); Ala. Code § 26-23H-3 (2019); Miss. Code Ann. § 41-41-45 (2022); La. Stat. Ann. § 40:1061(C) (2022); Okla. Stat. Ann. tit. 63, § 1-745.33 (West 2022). Texas and South Dakota's bans refer to the pregnant person as "female." Tex. Health & Safety Code Ann. § 170A.002 (West 2022); S.D. Codified Laws § 22-17-5.1 (2005). West Virginia's ban does not appear gendered or sexed. W. Va. Code § 16-2R-3 (2022).

²⁹ Mabel Felix, Laurie Sobel & Alina Salganicoff, A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services, Kaiser Fam. Found. (June 6, 2024), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services/> [<https://perma.cc/2LY8-Z462>].

³⁰ Megan Messerly & Adam Wren, National Right to Life Official: 10-Year-Old Should Have Had Baby, Politico (July 14, 2022, 12:51 PM), <https://www.politico.com/news/2022/07/14/anti-abortion-10-year-old-ohio-00045843> [<https://perma.cc/U7RW-BZ5L>].

³¹ Sandhya Somashekhar & Amy B. Wang, Lawmaker Who Called Pregnant Women a 'Host' Pushes Bill Requiring Fathers to Approve Abortion, Wash. Post (Feb. 14, 2017, 4:36 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/02/14/oklahoma-bill-would-require-father-of-fetus-to-approve-abortion/?itid=sr_1_2f7aa70b-94e6-4f74-8c28-081b11e90c22.

At the same time, the association of women with birthing and caring for children has not translated into prioritizing healthcare for pregnant people. The maternal mortality rate in the United States is higher than that of many similar countries.³² And Black pregnant patients are three times more likely to die than white pregnant patients.³³

B. The Law's Treatment of Sex and Gender During Pregnancy

The assumption that women's purpose was to bear children was likewise reflected in state and federal case law during the late nineteenth century.³⁴ Courts in Pennsylvania and Maryland characterized women as natural caregivers for children.³⁵ They did not even frequently use the term "women," instead repeating the term "mother" over and over, presumably because "woman" and "mother" were virtually synonymous during this time period.³⁶ In the same period, concealment laws specifically made it a crime for a *woman* who gave birth to a child to then conceal that birth.³⁷ And this classification of women as vessels for child-birthing and -rearing continued into the early twentieth century. As the Oklahoma Supreme Court summarized in 1930, "[c]ourts know that mother love is a dominant trait in the heart of a mother, even in the weakest of women."³⁸

³² There is an ongoing debate between the Centers for Disease Control and the authors of a study published by the American Journal of Obstetrics and Gynecology about the maternal mortality rate in the United States. Yet no one disputes that Black pregnant people are far more likely to die than white pregnant people. Robin Fields, *What to Know About the Roiling Debate Over U.S. Maternal Mortality Rates*, ProPublica (Apr. 5, 2024, 5:00 AM), <https://www.propublica.org/article/what-to-know-maternal-mortality-rates-debate> [<https://perma.cc/JP9N-B2UB>]; Selena Simmons-Duffin, *How Bad Is Maternal Mortality in the U.S.? A New Study Says It's Been Overestimated*, NPR (Mar. 15, 2024, 4:27 PM), <https://www.npr.org/sections/health-shots/2024/03/13/1238269753/maternal-mortality-overestimate-deaths-births-health-disparities> [<https://perma.cc/B53S-9YXQ>].

³³ Simmons-Duffin, *supra* note 32.

³⁴ See, e.g., *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring, joined by Swayne & Field, JJ.) ("The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother.").

³⁵ Lucy Williams, *Making a Mother: The Supreme Court and the Constitutive Rhetoric of Motherhood*, 102 N.C. L. Rev. 395, 415 (2024).

³⁶ In fact, the Pennsylvania Supreme Court does not use the terms "woman" or "women" once in *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813).

³⁷ See, e.g., *State v. Ihrig*, 17 S.W. 300, 300 (Mo. 1891) ("[E]very woman who shall be delivered of a child . . . [who] conceal[s] the birth . . . shall be deemed guilty of a felony."); *Foster v. Commonwealth*, 75 Ky. (12 Bush) 373, 374 (1876) (explaining that it is a crime for a "woman" to conceal a birth).

³⁸ *Bruce v. Bruce*, 285 P. 30, 37 (Okla. 1930).

Courts and lawmakers continued to escalate this association between gender and pregnancy throughout the twentieth century, particularly as federal courts increasingly dealt with questions surrounding pregnancy and reproductive rights. Some local governments began recognizing transgender people and passing antidiscrimination laws that protected against anti-transgender discrimination during the 1970s;³⁹ Minneapolis became the first jurisdiction to do so in 1975.⁴⁰ Yet abortion-related cases at the federal level continued to implicitly assume that a pregnant person could only be a cisgender woman, using she/her pronouns and referring to the pregnant person solely as a potential mother rather than parent.⁴¹ State courts and legislatures likewise gendered pregnancy during this time.⁴²

In *Geduldig v. Aiello*, the Supreme Court explicitly ignored the distinction between sex assigned at birth and gender and held that classification on the basis of pregnancy is not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.⁴³ Specifically, the Court held that a disability insurance program in California could exclude pregnancy-related disabilities from coverage.⁴⁴ California defended the exclusion by appealing to gendered stereotypes about women, alleging that pregnancy and childbirth “‘often result in a decision to leave the work force.’”⁴⁵

In upholding the program’s exclusion, the Court posited that the program at issue did not discriminate based on sex because it divided employees into “pregnant women and nonpregnant persons,” and “[w]hile the first group is exclusively female, the second includes

³⁹ Katie Eyer, *Anti-Transgender Constitutional Law*, 77 *Vand. L. Rev.* 1113, 1122 (2024).

⁴⁰ *Id.*

⁴¹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 148–51 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844–46 (1992).

⁴² See, e.g., *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001) (regarding state law prohibiting “women” under seventeen years old from having an abortion without parental consent); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 817 (Cal. 1997) (referring to a pregnant minor as “her”).

⁴³ 417 U.S. 484, 496–97 (1974). Federal courts have largely not dealt with the fact that sex is a classification that is assigned at birth. See Richardson, *supra* note 7, at 12–15; Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 5 (2000). Accordingly, this piece refers to “sex discrimination” because courts refer to it that way, but perhaps a more accurate description would be discrimination based on sex assigned at birth.

⁴⁴ *Geduldig*, 417 U.S. at 497.

⁴⁵ Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19th Amend. Ed. *Geo. L.J.* 167, 192 (2020) (quoting Reply Brief for Appellant at 13, *Geduldig*, 417 U.S. 484 (No. 73-640)).

members of both sexes.”⁴⁶ *Geduldig* was decided in 1974, so it is not very surprising that the Court failed to recognize pregnant people who are not cisgender women. Still, the Court even refused to deal with the fact that the insurance program at issue covered disabilities that disproportionately affect men.⁴⁷ Further—assuming that the Court used “women” to mean people of the female sex—by the Court’s own admission, the program only excluded pregnant women, and it discriminated by ensuring that one group of people was denied its benefits.⁴⁸ But the Court failed to conceive of pregnancy discrimination as sex discrimination, and instead denied that there was sex discrimination afoot.⁴⁹

Federal laws likewise enshrined gendered notions about pregnancy that could make it difficult for gender diverse people to access reproductive healthcare even into the twenty-first century. The Affordable Care Act, as originally enacted, required covered employers to provide some benefits to “mothers” or an employee who is a “pregnant woman.”⁵⁰ These benefits often included programs—such as smoking cessation plans—that could have helped expectant parents of any gender, including pregnant people who are not women, though they were explicitly made available to women.⁵¹ Likewise, the Family Medical Leave Act often refers to benefits for “mothers.”⁵² Other statutes’ language is sufficiently ambiguous such that it may be hard for gender diverse people to access protection from discrimination; as one example, the Department of Education released its new Title IX rules in 2024 in part to clarify that Title IX prohibits discrimination based on gender identity because of a historical lack of clarity in the rules.⁵³

Federal laws regarding employment and education are evolving to better capture the reality that not only cisgender women can be pregnant. Though the 1978 Pregnancy Discrimination Act was focused on

⁴⁶ *Geduldig*, 417 U.S. at 496–97 n.20.

⁴⁷ See *id.* at 501 (Brennan, J., dissenting).

⁴⁸ *Id.* at 496 n.20 (majority opinion).

⁴⁹ *Id.* at 496.

⁵⁰ David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 *Colum. L. Rev.* 309, 342 (2019) (first citing 42 U.S.C. § 300gg-13 (2012); and then citing 42 U.S.C. § 1396d(bb)(1) (2012)); see also 42 U.S.C. § 1396d (definitions including references to “pregnant woman” and “mothers”).

⁵¹ 42 U.S.C. § 1396d.

⁵² Fontana & Schoenbaum, *supra* note 50, at 338.

⁵³ *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33476 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

women,⁵⁴ in 2022, Congress passed the Pregnant Workers Fairness Act (“PWFA”). The Equal Employment Opportunity Commission’s final implementing regulations for the PWFA, released in 2024, make clear that pregnant workers of all sexes are entitled to reasonable accommodations for pregnancy at work.⁵⁵ Similarly, Title IX prohibits discrimination “on the basis of sex” in educational programs or activities that receive federal financial assistance.⁵⁶ The above-referenced 2024 Title IX implementing regulations make clear that sex discrimination encompasses pregnancy discrimination, stating that educational institutions cannot discriminate against students based on “current, potential, or past pregnancy or related conditions.”⁵⁷ In the final rule implementing those regulations, the Department of Education explicitly clarified that sex discrimination includes discrimination based on pregnancy or related conditions as well as discrimination based on gender identity, as noted above.⁵⁸ But several states challenged the rule in federal court and sought injunctive relief, and injunctions were granted in several states.⁵⁹ The Fifth and Sixth Circuits denied the federal government’s motions to stay the respective injunctions,⁶⁰ and in August 2024, the Supreme Court denied an emergency application by the federal government.⁶¹ On February 4, 2025, the Department of Education issued

⁵⁴ See 42 U.S.C. § 2000e(k) (defining “because of sex” to include discrimination on the basis of pregnancy and “women affected by pregnancy, childbirth, or related medical conditions” (emphasis added)).

⁵⁵ Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096 (Apr. 19, 2024) (to be codified at 29 C.F.R. pt. 1636); see also Deborah A. Widiss, *New Federal Law Ensures Pregnant Employees Can Get Support at Work*, Am. Bar Ass’n (Oct. 30, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/labor-and-employment-rights/pregnant-employee-support/ [https://perma.cc/9JVC-7XJF] (explaining that the PWFA helps “women (and other pregnant persons)” stay healthy and employed throughout pregnancy). The Pregnant Workers Fairness Act is currently enjoined in Louisiana and Mississippi. *Louisiana v. Equal Emp. Opportunity Comm’n*, No. 24-cv-00629, 2024 U.S. Dist. LEXIS 107308, at *41 (W.D. La. June 17, 2024).

⁵⁶ 20 U.S.C. § 1681(a).

⁵⁷ *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. at 33766.

⁵⁸ *Id.*

⁵⁹ *Tennessee v. Cardona*, No. 24-cv-00072, 2024 WL 3019146, at *1 (E.D. Ky. June 17, 2024); *Louisiana v. U.S. Dep’t of Educ.*, No. 24-cv-00563, 2024 WL 2978786, at *3 (W.D. La. June 13, 2024).

⁶⁰ *Louisiana ex rel. Murrill v. U.S. Dep’t of Educ.*, No. 24-30399, 2024 WL 3452887, at *1 (5th Cir. July 17, 2024); *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *1 (6th Cir. July 17, 2024).

⁶¹ *Dep’t of Educ. v. Louisiana*, 144 S. Ct. 2507, 2509 (2024).

a “Dear Colleague” letter to schools, advising them that the Office for Civil Rights now intends to enforce the Trump Administration’s 2020 Title IX rule.⁶² The 2020 rule and implementing regulations do not include the aforementioned clarification regarding pregnancy discrimination, nor do they make it clear that discrimination on the basis of gender identity constitutes sex discrimination.⁶³

And though Title IX and Title VII address pregnancy discrimination as a form of sex discrimination, the Supreme Court continues to refuse to recognize pregnancy as related to sex or gender discrimination at all when it comes to abortion. In *Dobbs*, the Court dismissed the argument that a right to abortion could stem from the Equal Protection Clause, citing *Geduldig*.⁶⁴ As reproductive rights and justice scholars have explained in detail, state abortion restrictions classify people by sex and thus would be subject to intermediate scrutiny under *United States v. Virginia*.⁶⁵ Yet in *Dobbs*, the Court cast aside the Equal Protection argument in a cursory mention, failing to recognize in *Dobbs* its own precedent regarding sex discrimination.⁶⁶

II. THE LEGAL LANDSCAPE IN ANTI-DISCRIMINATION LAW FOR PREGNANT, GENDER DIVERSE PEOPLE

As noted above, courts have often misconceived of the relationship between reproductive rights and pregnancy discrimination, and the Supreme Court has refused to acknowledge that restricting reproductive rights constitutes sex discrimination under the Equal Protection Clause.

⁶² Letter from Craig Trainor, Acting Assistant Sec’y for C.R., U.S. Dep’t of Educ., Dear Colleague Letter (Feb. 4, 2025), <https://www.ed.gov/media/document/title-ix-enforcement-discriminative-dcl> [<https://perma.cc/U9WV-5ZE4>]; see also Press Release, U.S. Dep’t of Educ., U.S. Department of Education to Enforce 2020 Title IX Rule Protecting Women (Jan. 31, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-enforce-2020-title-ix-rule-protecting-women> [<https://perma.cc/D86K-VY7K>].

⁶³ See U.S. Dep’t of Educ., Sex Discrimination: Overview of the Law, <https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law> [<https://perma.cc/ARL9-2JAV>] (last updated Jan. 31, 2025).

⁶⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974)).

⁶⁵ Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 69 (2022) (explaining that *United States v. Virginia*, 518 U.S. 515 (1996), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), together supersede *Geduldig*).

⁶⁶ *Dobbs*, 142 S. Ct. at 2245–46 (2022) (citing *Geduldig*, 417 U.S. at 496–97 n.20).

This error in logical reasoning affects all people who can become pregnant, but it is particularly detrimental to gender diverse people, who already face disproportionate societal discrimination during pregnancy.

A. Gender Diverse People and Pregnancy Discrimination

Transgender, nonbinary, genderqueer, and other gender diverse individuals face discrimination specific to pregnancy in ways that mirror and magnify broader discrimination against gender diverse people. The experience of pregnancy and pregnancy outcomes for gender diverse people are understudied, with gender diverse people sometimes left out of research on pregnancy entirely.⁶⁷ But the research that does exist reveals profound barriers to accessing reproductive healthcare, as well as frequent discrimination.

For instance, transgender people often face obstacles to accessing healthcare related to reproduction, including denial of insurance coverage for reproductive health screenings or hormone therapy.⁶⁸ In a 2018 study, less than half of surveyed obstetrician-gynecologists certified by the American College of Obstetricians and Gynecologists (“ACOG”) had training in LGBTQ+ health; providers who received training were significantly more likely to be comfortable treating transgender and gender nonconforming patients.⁶⁹ Transgender and other gender diverse individuals already face discrimination in healthcare settings writ large; one-third of transgender respondents in a survey reported having at least one negative experience with a healthcare provider related to being transgender.⁷⁰ It is no surprise, then, that when it comes to reproduction-related services, transgender and nonbinary pregnant people often face numerous obstacles to accessing healthcare, including but not limited to

⁶⁷ Julie Croll, Laura Sanapo & Ghada Bourjeily, LGBTQ+ Individuals and Pregnancy Outcomes: A Commentary, 129 *BJOG* 1625, 1626 (2022).

⁶⁸ See Sandy E. James et al., Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 95 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/82H6-BYW6>].

⁶⁹ Pooja K. Mehta et al., Lesbian, Gay, Bisexual, and Transgender Health: Obstetrician-Gynecologists’ Training, Attitudes, Knowledge, and Practice, 27 *J. Women’s Health* 1459, 1460–61 (2018).

⁷⁰ Comm. on Gynecologic Prac. & Comm. on Health Care of Underserved Women, Am. Coll. of Obstetricians & Gynecologists, Committee Opinion No. 823: Health Care for Transgender and Gender Diverse Individuals, 137 *Obstetrics & Gynecology* e75, e78 (2021), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals> [<https://perma.cc/66C7-EGYH>].

barriers to accessing fertility preservation, birth trauma due to discrimination in the healthcare setting, and lack of abortion access.⁷¹ Gender diverse people also face pregnancy discrimination in non-healthcare settings, including in the workplace.⁷²

Additionally, gender diverse people face disproportionate levels of violence overall,⁷³ including sexual violence,⁷⁴ and those who do not blend or pass face increased risk.⁷⁵ Pregnancy can affect a gender diverse person's ability to blend, and therefore could increase their risk of becoming a victim of a hate crime.⁷⁶ That is not at all to say that all gender diverse people should blend. Some gender diverse people choose to blend because it affirms their identity, while others experience increased dysphoria or distress while blending,⁷⁷ and some people reject blending because they see it as accepting transphobia or embracing the idea that only trans people who pass can access safety from violence.⁷⁸ But for people who choose to blend while pregnant, it may increase their safety. For instance, at least one survey has noted that pregnant trans men who engaged in "passing" during pregnancy experienced decreased exposure to transphobic violence against them.⁷⁹ At the same time, passing "came at the expense of increasing dysphoria."⁸⁰

⁷¹ Croll et al., *supra* note 67, at 1626.

⁷² Complaint at 1, *Simmons v. Amazon.com Servs. Inc.*, No. MER-L-001578-20 (N.J. Super. Law Div. Sept. 4, 2020), *removed to federal court*, No. 20-cv-13865 (D.N.J. Oct. 5, 2020), and *dismissed pursuant to stipulation*, No. 20-cv-13865 (D.N.J. Aug. 6, 2021).

⁷³ Williams Inst., UCLA Sch. of L., *Transgender People Over Four Times More Likely Than Cisgender People to Be Victims of Violent Crime* (Mar. 23, 2021), <https://williamsinstitute.la.w.ucla.edu/press/ncvs-trans-press-release/> [<https://perma.cc/QC3J-9M5Q>].

⁷⁴ Off. of Just. Programs, U.S. Dep't of Just., *Responding to Transgender Victims of Sexual Assault* (June 2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html [<https://perma.cc/NVJ4-R5LV>].

⁷⁵ Akua O. Gyamerah et al., *Experiences and Factors Associated with Transphobic Hate Crimes Among Transgender Women in the San Francisco Bay Area: Comparisons Across Race*, 21 *BMC Pub. Health* art. no. 1053, at 11 (2021).

⁷⁶ Alexis Hoffkling, Juno Obedin-Maliver & Jae Sevelius, *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, 17 *BMC Pregnancy & Childbirth* art. no. 332, at 10 (2017).

⁷⁷ Sana Flynn & Nathan Grant Smith, *Interactions Between Blending and Identity Concealment: Effects on Non-Binary People's Distress and Experiences of Victimization*, 16 *PLoS One*, at 3 (2021).

⁷⁸ *Transgender and Nonbinary Identities*, Planned Parenthood, <https://www.plannedparenthood.org/learn/gender-identity/transgender> [<https://perma.cc/5U3V-JDQH>] (last visited Oct. 31, 2024).

⁷⁹ Hoffkling et al., *supra* note 76, at 10.

⁸⁰ *Id.*

*B. The Legal Landscape Regarding Pregnancy
Discrimination Against Gender Diverse People*

Today—as in the past—the law continues to put gender diverse people in a precarious position in terms of legal protections surrounding pregnancy. Societal and legal association of pregnancy with cisgender women occludes gender diverse people and their need for reproductive healthcare.⁸¹ Only in the last few decades have some legal sources acknowledged the existence of gender diverse people,⁸² but many courts continue to ignore their existence, and even acknowledgement of gender diverse people in the polity has not translated into protection from discrimination. At least one federal court has considered a case alleging that an employer engaged in pregnancy discrimination when Shaun Simmons, a transgender employee, sued Amazon, though that case was initially removed from state court and later settled without any substantive orders from the court.⁸³ Other than that case, to the author’s knowledge, federal courts have not explicitly considered pregnancy discrimination against gender diverse individuals for being gender diverse; accordingly, looking to other discrimination cases is the only method by which to parse the rights of gender diverse people experiencing pregnancy discrimination. Developing case law regarding discrimination against transgender people in some circuits suggests that gender diverse people could successfully seek the protection of federal law when they experience pregnancy discrimination, yet in other circuits the landscape is much more grim.

In *Bostock v. Clayton County*, the Supreme Court held that firing an individual for being gay or transgender violates Title VII of the Civil Rights Act of 1964.⁸⁴ The Court found that, because discriminating against an employee for being gay or trans necessarily involves discriminating against them based on sex, Title VII’s prohibition on sex discrimination encompasses discrimination against someone for being gay or transgender.⁸⁵ Since *Bostock*, several lower courts have utilized the same logical reasoning to find that other prohibitions on sex

⁸¹ See Jessica Clarke, *Pregnant People?*, 119 *Colum. L. Rev. F.* 173, 177 (2019).

⁸² See *supra* Section I.B.

⁸³ Complaint at 1, *Simmons v. Amazon.com Servs. Inc.*, No. MER-L-001578-20 (N.J. Super. Law Div. Sept. 4, 2020), *removed to federal court*, No. 20-cv-13865 (D.N.J. Oct. 5, 2020), and *dismissed pursuant to stipulation*, No. 20-cv-13865 (D.N.J. Aug. 6, 2021).

⁸⁴ 140 S. Ct. 1731, 1737 (2020).

⁸⁵ *Id.* at 1741.

discrimination under similar federal laws include protection against discrimination based on sexual orientation or gender identity, though other courts have done the opposite.

For instance, the Fourth and Seventh Circuits have both held that school policies that prohibit transgender students from using restrooms that align with their gender identity likely violate Title IX and the Equal Protection Clause of the Fourteenth Amendment,⁸⁶ while the Eleventh Circuit found a comparable school policy did not violate Title IX or the Equal Protection Clause.⁸⁷ And though both the Fourth and Ninth Circuits have struck down prohibitions on transgender girls playing girls' sports,⁸⁸ the state defendants in each case have filed petitions for writs of certiorari to the Supreme Court that are pending as of early February 2025.⁸⁹

The healthcare realm has especially significant ramifications for pregnancy discrimination against gender diverse people, and perhaps the most salient issue that is currently moving through the courts is gender-affirming care. Some states, such as Idaho and North Carolina, deny state health insurance coverage for gender-affirming care for gender diverse people.⁹⁰ Some state legislatures, including in Tennessee, Florida, and Alabama, have passed laws that ban gender-affirming healthcare for transgender adolescents.⁹¹ In *L.W. ex rel. Williams v. Skrmetti*, the Sixth Circuit held that Due Process Clause and Equal Protection Clause challenges to Tennessee's ban on gender-affirming care for adolescents were unlikely to succeed on the merits and therefore reversed an

⁸⁶ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020); *M.C. ex rel. A.C. v. Metro. Sch. Dist.*, 75 F.4th 760, 764 (7th Cir. 2023) (citing *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017)).

⁸⁷ *Kasper ex rel. Adams v. Sch. Bd.*, 57 F.4th 791, 800 (11th Cir. 2022).

⁸⁸ *Hecox v. Little*, 104 F.4th 1061, 1068 (9th Cir. 2024); *Jackson ex rel. B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 550 (4th Cir. 2024).

⁸⁹ Petition for a Writ of Certiorari, *Little v. Hecox*, No. 24-38 (U.S. July 11, 2024); Petition for a Writ of Certiorari, *West Virginia v. Jackson ex rel. B.P.J.*, No. 24-43 (U.S. July 11, 2024). On November 18, 2024, the Court denied a petition for writ of certiorari in *B.P.J.* that was filed by the West Virginia Secondary School Activities Commission. *Jackson ex rel. B.P.J. v. W. Va. Secondary Sch. Activities Comm'n*, 98 F.4th 542 (4th Cir. 2024), *cert. denied*, 2024 WL 4805904 (U.S. Nov. 18, 2024). The petition filed by the state of West Virginia remains pending.

⁹⁰ See *M.H. v. Jeppesen*, 677 F. Supp. 3d 1175, 1182 (D. Idaho 2023), *motion to certify appeal denied*, No. 22-cv-00409, 2024 WL 1012986, at *9 (D. Idaho Mar. 8, 2024); *Kadel v. Folwell*, 620 F. Supp. 3d 339, 357 (M.D.N.C. 2022), *aff'd*, 100 F.4th 122 (4th Cir. 2024).

⁹¹ Brief for Respondents in Support of Petitioner at 1, *United States v. Skrmetti*, No. 23-477 (U.S. Aug. 27, 2024); Petition for a Writ of Certiorari at 4, 17, *Folwell v. Kadel*, No. 24-99 (U.S. July 26, 2024); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1210 (11th Cir. 2023).

injunction against the Tennessee law.⁹² The Tennessee statute at issue specifically allows gender-affirming care for minors who are not gender diverse, exempting the use of puberty blockers and hormones to treat conditions such as precocious puberty or physical injury, but it prohibits gender-affirming care for minors who are experiencing gender dysphoria.⁹³ Yet the Sixth Circuit concluded that there was no equal protection issue with the statute, even while acknowledging that it allowed gender-affirming care for cisgender adolescents but not for transgender adolescents.⁹⁴ The court then stated that the statute “does not prefer one sex over the other,”⁹⁵ ignoring the existence of intersex people entirely and ignoring that the law discriminates against gender diverse people by barring them from accessing gender-affirming healthcare and therefore engages in sex discrimination as defined by *Bostock*.⁹⁶

The Supreme Court granted the federal government’s petition for certiorari in *Skrmetti* in June 2024, and the Court heard oral argument on December 4, 2024.⁹⁷ The outcome of this case will not only reveal whether the Supreme Court is willing to acknowledge discrimination against transgender people in healthcare, but also whether the Court—consistent with its approach to sex discrimination broadly—will subject laws that discriminate against gender diverse people to heightened scrutiny.

III. SEX DISCRIMINATION AS INCLUDING PREGNANCY DISCRIMINATION AGAINST GENDER DIVERSE PEOPLE, AND RIGHTS FOR TRANSGENDER AND GENDER DIVERSE YOUTH

As mentioned *supra*, the law has wrapped pregnancy in gendered terms and norms. Meanwhile, many legislatures and courts alike have either ignored gender diverse people entirely or have failed to acknowledge that discrimination against gender diverse people is, necessarily, discrimination on the basis of sex. To rectify these errors, courts should

⁹² L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 491 (6th Cir.), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389, 389–90 (2023), and *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679, 2679 (2024).

⁹³ *Skrmetti*, 83 F.4th at 468–69.

⁹⁴ *Id.* at 480 (acknowledging that the law does not allow hormone therapy for adolescents experiencing gender dysphoria but does allow the treatment for other medical conditions).

⁹⁵ *Id.*

⁹⁶ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

⁹⁷ Transcript of Oral Argument at 1, *United States v. Skrmetti*, 144 S. Ct. 2679 (U.S. Dec. 4, 2024) (No. 23-477).

recognize that (1) gender diverse people who face discrimination *because* they are gender diverse have been subjected to sex discrimination, and (2) in light of the gendered nature of pregnancy, abortion can be one means of gender-affirming care for gender diverse people, particularly transgender youth who face a high risk of transphobia-related violence.

A. Pregnancy-Related Sex Discrimination Against Gender Minorities

Anti-discrimination law should protect gender diverse people from pregnancy discrimination as a form of sex discrimination. This sounds incredibly intuitive, but it is worth spelling out given circuit court holdings suggesting the opposite proposition. *Bostock* clarified that laws prohibiting discrimination on the basis of sex include protections for gender diverse people who experience discrimination because of their gender identity, given that discriminating against a gender diverse person because they are gender diverse necessarily involves discrimination “based on sex.”⁹⁸ *Bostock* held that an employer who fires a transgender employee because they are transgender has violated Title VII because the employer has “single[d] out” that employee to fire based in part on the employee’s sex.⁹⁹ In the same way, if an employer fires, demotes, or otherwise discriminates against a nonbinary pregnant employee because they are nonbinary, the employer has singled out that employee based in part on their sex and would be liable under Title VII.

The same logic applies to other statutes and regulations that prohibit discrimination on the basis of sex. Title IX prohibits sex discrimination, and as some lower courts have recognized, that prohibition encompasses discrimination against transgender people and other gender diverse people such as nonbinary and intersex people, consistent with *Bostock*.¹⁰⁰ Likewise, Section 1557 of the Affordable Care Act (“ACA”) prohibits discrimination in the provision of healthcare on the same grounds as Title IX¹⁰¹ and therefore protects transgender people from discrimination in reproductive healthcare. In fact, the Department of Health and Human Services released a final rule in 2024 making clear that the ACA protects

⁹⁸ *Bostock*, 140 S. Ct. at 1741.

⁹⁹ *Id.* at 1741–42.

¹⁰⁰ See, e.g., *M.C. ex rel. A.C. v. Metro. Sch. Dist.*, 75 F.4th 760, 770 (7th Cir. 2023) (noting that a more limited definition of discrimination based on sex could exclude intersex people as well as transgender people).

¹⁰¹ 42 U.S.C. § 18116(a) (2018).

against discrimination based on sexual orientation or gender identity,¹⁰² though the rule was enjoined after some states challenged it by claiming that it exceeds the agency’s authority under the Administrative Procedure Act.¹⁰³

What about pregnancy discrimination against gender diverse people under the Equal Protection Clause? While the Supreme Court rejected an Equal Protection Clause rationale for the right to abortion in *Dobbs*, the Court did so based on *Geduldig*, implying that pregnancy discrimination was not a form of sex discrimination.¹⁰⁴ As Professors Reva Siegel, Melissa Murray, and Serena Mayeri have highlighted, *Geduldig* was superseded by two cases—notably, both decided after *Planned Parenthood v. Casey*—making clear that anti-subordination principles apply to determine whether a law discriminates on the basis of sex, and classifications based on sex trigger heightened scrutiny under the Equal Protection Clause.¹⁰⁵

But furthermore, even as the law currently stands, with the Supreme Court misconstruing sex equality case law in *Dobbs*, gender diverse people experiencing pregnancy discrimination still have protection from discrimination under the Equal Protection Clause. When a gender diverse person experiences the type of pregnancy discrimination this Essay focuses on—that is, when they are discriminated against because they are a *gender diverse* person who is pregnant—they are necessarily being treated differently because of their status as a transgender, nonbinary, or other gender diverse person. Accordingly, they are being discriminated against on the basis of their assigned sex at birth, and this type of sex discrimination is still subject to heightened scrutiny under the Court’s equal protection jurisprudence. That is, to treat a gender diverse pregnant person differently from others, the government would need to demonstrate that this distinction is “substantially related to an important

¹⁰² Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522, 37571, 37574 (May 6, 2024).

¹⁰³ *Tennessee v. Becerra*, No. 24-cv-00161, 2024 WL 3283887, at *14 (S.D. Miss. July 3, 2024); see also *Florida v. Dep’t of Health & Hum. Servs.*, No. 24-cv-01080, 2024 WL 3537510, at *1 (M.D. Fla. July 3, 2024).

¹⁰⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974)).

¹⁰⁵ Siegel et al., *supra* note 65, at 75, 77, 80–81 (first citing *United States v. Virginia*, 518 U.S. 515 (1996); and then citing *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003)).

government objective.”¹⁰⁶ So even if *Geduldig* remains in force regarding pregnancy, if a pregnant gender diverse person is subject to discrimination because of their gender identity, they should be able to vindicate their rights under the Equal Protection Clause.¹⁰⁷

B. Protecting Gender Diverse People: Reproductive Healthcare and Abortion as Gender-Affirming Care

While the constitutionality of banning gender-affirming care for minors is currently pending before the Supreme Court in *Skrmetti*, mapping a more accurate description of sex and gender is a critical way to ensure that gender diverse people, including youth, receive protection from discrimination. This Section attempts to be a part of that conversation by briefly explaining why reproductive healthcare—including abortion—can be gender-affirming care for gender diverse pregnant people and why that care is particularly important for gender diverse adolescents.

For a gender diverse person, the experience of pregnancy and giving birth could be an extremely physically and societally dysphoric and dangerous experience. A gender diverse person whose gender identity does not align with pregnancy can have dysphoric experiences throughout pregnancy and while giving birth, including, but not limited to, dysphoria related to discontinuing testosterone therapy, changes to their chest, and others reading their gender in a particular way due to the pregnancy.¹⁰⁸ Transgender men may also experience trauma due to vaginal birth,¹⁰⁹ particularly if they are encouraged to give birth vaginally in a healthcare

¹⁰⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.6 (1994); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (noting that heightened scrutiny requires a classification to be “substantially related to the achievement of [important governmental] objectives” (internal citations omitted)). In fact, applying this longstanding standard to gender diverse people was fairly uncontroversial until the last few years; in 2011, the Eleventh Circuit held that “discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

¹⁰⁷ In fact, the federal government made a similar argument in their brief before the Supreme Court in *Skrmetti*, explaining that *Geduldig* is inapposite and the Tennessee statute at issue is subject to heightened scrutiny because it prohibits medical care only for gender diverse people. See Brief of Petitioner at 26, *United States v. Skrmetti*, No. 23-477 (U.S. Aug. 27, 2024).

¹⁰⁸ Mari Greenfield & Zoe Darwin, *Trans and Non-Binary Pregnancy, Traumatic Birth, and Perinatal Mental Health: A Scoping Review*, 22 *Int’l J. Transgender Health* 203, 208–09 (2021).

¹⁰⁹ See *id.* at 207.

setting that is not trans friendly,¹¹⁰ and they may also experience chest-dysphoria while feeding after the birth.¹¹¹ As explained in Part I, legal and social sources can both cause and magnify this dysphoria by continually associating pregnancy with cisgender women and with binary notions of both sex and gender.¹¹²

Pregnancy can also create other dangers for gender diverse people. As noted in Part II, gender diverse people are disproportionately subject to violence and harassment, and some gender diverse people decide to blend to try to lessen their exposure to these attacks.¹¹³ Pregnancy can limit the ability of gender diverse people to “blend” or “pass,” and in doing so, can make them even more vulnerable to violence.¹¹⁴

The potential for pregnancy to lead to danger and dysphoria is particularly salient for gender diverse youth. Gender diverse youth, like adults, are disproportionately subject to harassment and violence,¹¹⁵ and transgender adolescents are more likely to experience psychological abuse, physical abuse, and sexual abuse compared to their cisgender peers.¹¹⁶ Transgender adolescents who were assigned female at birth have the highest likelihood of experiencing psychological abuse.¹¹⁷ And in schools that prevent them from using the restroom that aligns with their gender identity, transgender and nonbinary teens also face an even greater

¹¹⁰ See, e.g., Kayden Coleman, *Navigating U.S. Pregnancy Care as a Transgender Man*, Millie Clinic, <https://www.millieclinic.com/blog/kayden-coleman-trans-pregnancy> [https://perma.cc/UL9L-S4Q3] (last visited Oct. 31, 2024).

¹¹¹ See Greenfield & Darwin, *supra* note 108, at 209.

¹¹² This Essay does not mean to suggest that gender dysphoria during pregnancy is only experienced by trans or nonbinary people. Pregnancy can also be a dysphoric experience for cisgender women who are masc-presenting or who have a female partner, whether because the physical experience of pregnancy is foreign to their gender expression, due to societal notions of a pregnant couple, or innumerable other reasons related to the physical and social experience of pregnancy. See *supra* Part I (detailing how society genders pregnancy). For discussion of cisgender people experiencing gender dysphoria, see Yuqi Li and Lijun Zheng, *Validation of Two Measures of Gender Dysphoria/Incongruence in Transgender and Cisgender Populations in China*, 52 *Archives Sex Behav.* 1019 (2023).

¹¹³ See *supra* Section II.A.

¹¹⁴ See Hoffkling et al., *supra* note 76, at 10.

¹¹⁵ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 *Morbidity & Mortality Wkly. Rep.* 67, 69–70 (2019).

¹¹⁶ Brian C. Thoma, Taylor L. Rezeppa, Sophia Choukas-Bradley, Rachel H. Salk & Michael P. Marshal, *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, 148 *Pediatrics* art. no. e2020016907, at 1 (2021).

¹¹⁷ *Id.*

risk of sexual assault.¹¹⁸ Just like adults, gender diverse teens who are pregnant may be less able to blend (if they choose to) due to pregnancy, and could therefore face higher risks of violence. Additionally, transgender and nonbinary youth have high rates of suicidality and depression.¹¹⁹ In fact, roughly half of transgender, nonbinary, and genderqueer young people have considered suicide sometime in the past year.¹²⁰ Accordingly, transgender and nonbinary adolescents who experience gender dysphoria due to pregnancy may be particularly vulnerable and at risk of death.

In light of the risks for pregnant gender diverse teens and adults, the right to decide whether to have an abortion is extremely significant. The decision of whether to terminate a pregnancy or carry it to term is a fundamental, individual exercise of autonomy that is no longer enshrined in federal law post-*Dobbs*.¹²¹ The idea that every person has a right to reproductive freedom is not dependent on the argument that abortion is always life-saving care; it is, instead, derived from the idea that each person has the right to make decisions about their own body.¹²² At the same time, bodily autonomy can be health- and life-saving, as evidenced by the incredibly detrimental effects of abortion bans in several states that have resulted in permanent health consequences and death for pregnant and formerly pregnant people.¹²³

¹¹⁸ Edith Bracho-Sanchez, *Transgender Teens in Schools with Bathroom Restrictions Are at Higher Risk of Sexual Assault, Study Says*, CNN Health (May 6, 2019, 2:17 AM), <https://www.cnn.com/2019/05/06/health/trans-teens-bathroom-policies-sexual-assault-study/index.html> [<https://perma.cc/RAR5-52J7>].

¹¹⁹ Thoma et al., *supra* note 116, at 2.

¹²⁰ The Trevor Project, *2023 U.S. National Survey on the Mental Health of LGBTQ Young People 4* (2023), https://www.thetrevorproject.org/survey-2023/assets/static/05_TREVOR05_2023survey.pdf [<https://perma.cc/C2KM-YBGD>].

¹²¹ 142 S. Ct. 2228 (2022).

¹²² See generally Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. Rev. L. & Soc. Change 221 (2018) (tracing the histories and foundational ideals of both the reproductive rights and reproductive justice movements).

¹²³ For examples of the deleterious consequences of abortion restrictions on pregnant people, see *Zurawski v. State*, No. D-1-GN-23-000968, 2023 WL 11815888, at *2 (Tex. Dist. Ct. Aug. 4, 2023) (order granting temporary injunction), *rev'd*, 690 S.W.3d 644 (Tex. 2024). see also Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable*, ProPublica (Sept. 16, 2024, 5:00 AM), <https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death> [<https://perma.cc/44VF-6EBL>] (explaining that a state abortion ban delayed critical medical care for Amber Nicole Thurman, a mother who subsequently died from a treatable infection because of this delay in care).

Gender-affirming care is one vital way to exercise bodily autonomy, and given that pregnancy can be a gender dysphoric experience, abortion can be an important form of gender-affirming care for gender diverse people.¹²⁴ The ability to decide not to continue carrying a pregnancy, in light of the physical and social realities of pregnancy, can allow someone experiencing pregnancy-related gender dysphoria to exercise their right to bodily autonomy, not to mention free themselves from gendered expectations imposed by socially constructed notions of pregnancy.¹²⁵ Enabling gender diverse people, and all people, to have that choice can be health- and life-saving.

Abortion as gender-affirming care seems particularly important for gender diverse youth. Given that they face higher risks of harassment, violence, depression, and suicide,¹²⁶ the dysphoria of pregnancy could be especially traumatic, or even life-changing, for a gender diverse teenager. Moreover—as evidenced by *Skrmetti*—gender diverse adolescents may have dramatically less access to other forms of gender-affirming medical care, either because they have less financial ability to access care, are raised in a family that is transphobic, or live in a state that does not have much of that healthcare available and/or has banned it for minors.¹²⁷ In light of this constrained access to other forms of gender-affirming care, adolescents’ ability to avoid a dysphoric experience due to pregnancy if they so choose is particularly important. Paradoxically, opponents of gender-affirming care are obsessed with potential future “regret” by transgender adolescents,¹²⁸ yet they are simultaneously unwilling to enable gender diverse adolescents to determine whether they want to have

¹²⁴ Not all minors had access to abortion even before *Dobbs*. In *Bellotti v. Baird*, the Supreme Court held that states could require pregnant minors to obtain parental consent for an abortion so long as they created a mechanism for minors whose parents refused to do so to seek a court’s authorization for an abortion, known as judicial bypass. 443 U.S. 622, 643–44 (1979). Post-*Dobbs*, many states that required either parental consent or judicial bypass have banned abortion, but several states in which abortion is legal still require parental involvement or judicial bypass as an alternative to parental consent. Sarah Horvath & Susan Frietsche, *Judicial Bypass for Minors Post-Dobbs*, 19 *Women’s Health* 1, 1–2 (2023).

¹²⁵ See *supra* Part I.

¹²⁶ The Trevor Project, *supra* note 120, at 4–9, 14–15.

¹²⁷ See Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (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/FGQ9-JF2M>].

¹²⁸ See Noa Ben-Asher & Margot J. Pollans, *Gender Regrets: Banning Abortion and Gender-Affirming Care*, 2024 *Utah L. Rev.* 763, 765, 769.

an abortion¹²⁹ based on their current, actual experience of pregnancy and their gender identity.

This Essay argues that abortion is gender-affirming care, but it does not mean to suggest that abortion is the only form of gender-affirming pregnancy care. Training healthcare workers to provide gender-affirming reproductive healthcare could greatly reduce factors that lead to dysphoric or traumatic birthing experiences, and societal notions of pregnancy can be reshaped to better reflect the broad spectrum of people who can become pregnant. And gender diverse people can be provided with greater autonomy in their pregnancy care. But in addition, gender diverse pregnant people—and all pregnant people—need the freedom to decide whether continuing a pregnancy and giving birth is the right choice for them. And particularly in light of societal oppression and gender dysphoria, abortion can constitute lifesaving gender-affirming care for some pregnant gender diverse people.

C. Beyond Current Laws and Jurisprudence

It important to recognize the limits of current laws and jurisprudence to be able to correct false assumptions and conflation of sex and gender while also understanding how discrimination against pregnant gender diverse people can be adjudicated in the current legal landscape. Even when lawmakers allow gender diverse people to pursue discrimination claims, their reasoning in doing so does not necessarily belie an accurate understanding of sex or gender.¹³⁰ Most pertinent to this Essay, courts and lawmakers have largely failed to recognize gender diverse people as part of the population that can become pregnant. As noted above, the Affordable Care Act, Pregnancy Discrimination Act, and Family Medical Leave Act all refer to mothers and pregnant women;¹³¹ these statutes do appear intended to include protection from discrimination for gender diverse people, but their language is sufficiently imprecise that administrative agencies have had to clarify their scope, spurring litigation.¹³²

¹²⁹ See *id.* at 765 (noting the similarities in invoking “regret” in the campaigns to ban both gender-affirming care and abortion).

¹³⁰ See Laura Lane-Steele, *Sex-Defining Laws and Equal Protection*, 112 *Calif. L. Rev.* 259 (2024).

¹³¹ See *supra* Section I.B.

¹³² See *supra* Section II.B.

And when courts are confronted directly with the question of discrimination against gender diverse people, they often misunderstand sex and gender such that their holdings—even if favorable to gender diverse people—have the propensity to cause legal issues. As Professor Laura Lane-Steele has highlighted, a court refusing to acknowledge transgender discrimination under Title IX conflated an equal protection challenge with a challenge to sexed bathrooms themselves. Additionally, even courts that have held that it *is*, in fact, an equal protection violation to prevent transgender students from using the restroom that aligns with their gender identity have also, at times, imprecisely utilized the term “sex” in ways that leave their holdings vulnerable to further attack.¹³³

These flaws are not limited to restroom cases or to courts that fail to expound on the meaning of “sex.” In *Hecox v. Little*—a case about an Idaho law that excludes “biological males” from female-designated sports teams—the Ninth Circuit accurately noted that the Idaho legislature’s concept of a binary “biological sex” failed to acknowledge the existence of intersex people, who “do not fit typical binary notions of male and female bodies.”¹³⁴ But the court then claimed that the Idaho law “affects one group of athletes only—transgender women.”¹³⁵ This platitude ignores the statement just before it noting that intersex athletes would also be affected, and it also fails to acknowledge that nonbinary athletes, genderqueer athletes, and other gender diverse athletes could be harmed by the state law. This and other cases, even if generally supportive of the principle that gender identity discrimination constitutes sex discrimination, leave a confusing and imprecise legal backdrop for future courts to wade through.

At the same time, understanding openings in the current legal landscape is critical to expanding rights for gender diverse pregnant people. Some courts have held that classifications due to reproductive biology or genitalia are subject to heightened scrutiny under the Equal Protection Clause.¹³⁶ Gender diverse pregnant people who are discriminated against for their gender identity or sex could utilize the

¹³³ Lane-Steele, *supra* note 130, at 281–95 (discussing the shortcomings of rationales used by courts in Title IX cases regarding discrimination against transgender students).

¹³⁴ *Hecox v. Little*, 104 F.4th 1061, 1076–77 (9th Cir. 2023) (quoting Brief of Amicus Curiae interACT: Advocates for Intersex Youth in Support of Plaintiffs-Appellees and Affirmance at 3–4, *Hecox*, 104 F.4th 1061 (9th Cir. 2023) (No. 23-35813)).

¹³⁵ *Id.* at 1077.

¹³⁶ See Jessica A. Clarke, *Sex Discrimination Formalism*, 109 Va. L. Rev. 1699, 1749 (2023) (collecting cases).

same logic to bring Equal Protection Clause claims, given that they are being treated differently for being pregnant *while* being gender diverse. Therefore, even if courts' descriptions of gender and/or sex are imprecise, echoing this because-of-sex approach—as invoked in *Bostock*, *Price Waterhouse v. Hopkins*,¹³⁷ and Equal Protection Clause cases—could allow gender diverse pregnant people to successfully seek anti-discrimination protections.

CONCLUSION

Gender diverse people seeking healthcare are in the spotlight before the Supreme Court this Term, as the Court decides whether to allow states to prohibit gender diverse minors from accessing gender-affirming healthcare. Meanwhile, gender diverse people throughout the country are experiencing pregnancy, and often facing dysphoric experiences as a result. We need to shift societal and legal notions that gender pregnancy, recognizing that people of all genders can and do become pregnant. And we need to enable all pregnant people to determine whether to carry their pregnancies to term. Abortion is one means of gender-affirming care that can enable gender diverse people to access reproductive autonomy. And writ large, reproductive healthcare providers must acknowledge the ways in which the experience of pregnancy can be dysphoric for transgender, gender-nonconforming, genderqueer, nonbinary, and other gender diverse people and can provide healthcare that supports people of all genders, free from discrimination.

¹³⁷ 490 U.S. 228, 251 (1989) (holding that sex stereotyping can be evidence of unlawful sex discrimination under Title VII).