Are anti-LGBTQ laws legal? Alabama trans laws spark debate over Constitutional rights

Marc Ramirez
USA TODAY

Published 5:20 a.m. ET April 9, 2022

Key Points

- Alabama’s governor signed bills limiting transgender youth access to healthcare and sports.
- Last week, the DOJ reminded states of federal anti-discrimination obligations regarding such laws.
- A Human Rights Campaign attorney called Alabama's laws "breathtakingly cruel and cowardly."

Alabama Gov. Kay Ivey signed into law Friday bills blocking transgender youth from gender-affirming medical treatment as well as from participating on sports teams or using school restrooms that don't match their assigned sex at birth. The latter also bans the teaching of gender and sexual identity in kindergarten through fifth grades.

The Alabama medical treatment law is among the nation's most far-reaching, threatening doctors with up to 10 years in prison for prescribing puberty blockers or hormonal treatment to trans kids under 19.

The measures are the latest move from the conservative right in a growing national battle over health care for transgender youth and come as the Justice Department signaled last week it could take steps to stop states from passing similar laws.

"There are very real challenges facing our young people, especially with today’s societal pressures and modern culture," Ivey said in a statement. "I believe very strongly that if the Good Lord made you a boy, you are a boy, and if he made you a girl, you are a girl."

At least 20 states have passed measures involving gender-affirming health care, sports
participation or discussion of LGBT issues in schools, according to the Movement Advancement Project, an independent think tank in Boulder, Colorado.

Cathryn Oakley, state legislative director and senior counsel for the Human Rights Campaign, a national LGBTQ advocacy group, called Alabama's new laws “breathtakingly cruel and cowardly” and “the single most anti-transgender legislative package in history.” Groups on Friday vowed to quickly challenge the measures in court.

The national debate over transgender youth comes as more children than ever are identifying as transgender, raising questions about how families, schools and lawmakers respond to their care.

Last week, the U.S. Department of Justice issued a letter to states on legislation prohibiting gender-affirming care for transgender youth, reminding them of their federal anti-discrimination obligations.

The Justice Department, the letter said, has "a strong interest in protecting the constitutional rights of individuals who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender-nonconforming and in ensuring compliance with federal civil rights statutes."

Activists and some constitutional law attorneys framed the gesture as a powerful sign of support and said that at minimum, it warns lawmakers and legislatures pushing such laws that their efforts stand on shaky ground.

“This is a strong signal that they will not only be facing lawsuits from major public-interest organizations, as they have already, but that they will also likely have the weight of the federal government behind those efforts,” said Katie Eyer, a law professor at Rutgers University in Camden, New Jersey. “And that is obviously something that state governments should take stock of.”

Scott Skinner-Thompson, an associate professor of law at the University of Colorado in Boulder, said transgender youth and their parents “should be heartened” by the move.

“More than anything, it signals that the Justice Department is going to vigorously enforce federal laws that it interprets as protecting transgender rights,” Skinner-Thompson said.

The Justice Department’s letter advises states that laws and policies preventing individuals from receiving gender-affirming medical care could infringe on multiple...
constitutional and statutory protections prohibiting discrimination, including the 14th Amendment, the Affordable Care Act, Title IX of the Education Amendments of 1972 and the Americans with Disabilities Act, among others. The letter is signed by Assistant Attorney General Kristen Clarke of the department’s civil rights division.

In an accompanying release, the department said it issued the statement on March 31, International Transgender Day of Visibility, “in recognition of the contributions and accomplishments of transgender and gender-non-conforming people.”

More than 300 anti-LGBTQ laws have been introduced in 2022, according to Human Rights Campaign, and in recent years, lawmakers have increasingly targeted transgender youth on issues such as gender-affirming care or sports participation,

“These attacks we’re seeing on medical care for transgender adolescents are unconscionable,” said Ezra Cukor, a senior staff attorney for the Transgender Legal Defense & Education Fund, based in New York City. “So we applaud the DOJ for sending a warning.”

Shannon Minter, legal director for the National Center for Lesbian Rights, based in San Francisco, said the attacks on transgender youth mark a “genuine crisis” that made the Justice Department’s statement all the more significant.

“They’re sending the strongest possible message that these laws that single out transgender youth for various kinds of discrimination are unlawful,” Minter said.

**Courts back gender-affirming care for children**

Such legislative proposals continue to flourish despite facing troubles in court. For example, federal judges in Arkansas and West Virginia have temporarily blocked separate measures banning gender-affirming care for transgender youth and transgender participation in women’s sports.

“What we see with these laws is that when they actually get to court, they are almost inevitably struck down as unconstitutional,” Eyer said. “But in the meantime, there’s a lot of harm done to transgender youth in that state who have to live with fear and uncertainty and the lack of care that involves.”

Such statements and efforts from the Justice Department can have “a huge impact,” Eyer
said, noting similar gestures during the fight a decade ago for same-sex marriage equality and efforts in the 1950s and 1960s to enforce desegregation.

“It’s significant whenever the federal government takes a stance on the civil rights of a particular group,” she said. “The courts, the public and other actors take that kind of intervention seriously. The federal government simply has a set of resources at its disposal that aren’t available to private litigators.”

Eyer said the move is symbolically significant given that the U.S. Supreme Court hasn’t yet taken a definitive stance on the issue.

“Having the federal executive branch put their weight behind the idea that transgender folks have meaningful constitutional protections against discrimination is likely to put another thumb on the scales toward courts taking seriously these types of arguments,” she said.

Steve Sanders, a law professor at Indiana University, said the letter was significant because transgender youth represent a small minority with almost no voice or constituency to fight on its behalf beyond parents and advocacy organizations.

“This is a matter of a group being abused and scapegoated for political reasons with no way to fight back,” Sanders said. “So it’s appropriate for an organization with the moral authority of the Department of Justice to weigh in.”

Brian Soucek, a law professor at the University of California, Davis, said the department’s move, while not unexpected given its role and current makeup under a presidential administration that pledged commitment to LGBT rights – was warranted.

While a number of LGBT and civil-right organizations have already made similar arguments in their fights against such laws, “a lot of legislatures just don’t seem to care,” Soucek said. “So having the full force of the Department of Justice behind these interpretations of the law and ready to enforce it really does up the ante.”

'Testing what they can get away with'

The laws targeting transgender youth are part of a conservative agenda that includes legislation targeting abortion rights and public school education about racism.

Many such laws involve procedural quirks purposely designed to prevent their
constitutionality from being challenged, Soucek said, noting a recent Texas order authorizing citizen-driven bounty suits against those aiding or performing abortions, a measure that takes state enforcement out of the equation.

By experimenting with such procedures and banking on a conservative-leaning U.S. Supreme Court to change the law going forward, Soucek said, “I think people feel emboldened by a 6-3 court and are testing what they can get away with.”

Soucek noted some states have been aggressive in protecting LGBTQ rights, such as a California measure that bans state-funded travel to states that limit transgender rights.

Backlashes against perceived gains in social movements are not uncommon in U.S. history. Eyer noted that as support grew for laws allowing same-sex marriage, some states pushed back by enacting legislation aggressively prohibiting such unions.

“We see these laws at this moment are actually a sign of the increasing positive recognition that the transgender community is receiving," Eyer said. "Greater social acceptance has led to a backlash that has really burdened the most vulnerable corner of the community, which is transgender youth.”

*With information from The Associated Press.*