

How to Fight Gender Ideology in the States

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Summary

*Restrictions on “gender affirming” procedures in states should **come first from a state medical board or other health** or medical authority overseen by the governor (as Florida has done), rather than from the legislature or attorney general. Legislative and/or legal action would then follow and would have a much greater chance of surviving court challenges in the long run.*

Gender ideology in our schools and culture is a profound threat to the health and well-being of our children. The medical targeting of children’s bodies is especially ghoulish. **In fighting this at the state level, many opponents’ instinct is to seek to ban it** (and related ideas like critical race theory) in schools and to criminalize “gender transition” procedures for minors outright through the legislature. But **the recent fate of such efforts in the courts exposes the risks of this strategy.**

At the other extreme, some state legislatures may be tempted to focus *only* on easy wins that poll well, **such as women’s sports and bathroom bills**. And in some purple states, these may be steppingstones to more robust efforts. But such bills target small, and less urgent, parts of the problem. And by themselves, they might **even serve to deflate the opposition needed** to stop the more devastating effects of gender ideology on children’s minds and bodies.

Stopping this assault on minors in the near-term requires a subtle policy response at the state level (reinforced, of course, by a public campaign). In the current environment—**with major medical institutions and the federal government supporting gender ideology**—many legal bans are **likely to get struck down** by courts. In some cases, these efforts may even backfire—leading to harmful legal precedents.

As a result, in 2023, bans should be narrowly tailored, and should, *where possible*, be justified by prior judgments from **state medical regulatory bodies** that challenge the scientific validity of such interventions.

Think of this as a policy “cocktail,” like a **drug regimen taken in a specific sequence, in which the whole is much greater than the sum of its parts**. The wider policy response should include a focus on both education and health care.

Legislatively, ingredients include a **parents’ rights in education bill**, a bill prohibiting compelled **speech**, a bill protecting a child’s given name, and a bill that strengthens the **private right of action** for those who receive gender transition treatments (like the [SAFE Act](#) in Arkansas and related [Help Not Harm model legislation](#)).

Targeting “gender affirming” procedures themselves, however, should come ideally first from a state **medical board** or other health or medical authority (as Florida has done), rather than from the legislature or attorney general. Legislative and/or legal action would then follow and would have a much greater chance of surviving court challenges in the long run.

This policy cocktail is not possible in many states, including many red states. But it should be feasible in six to ten states with Republican governors, a Republican-controlled legislature, and a state health apparatus under **the authority of the governor**.

A. Parents Rights’ Bills

Bills that focus on educational choice, parents’ rights, and protections of free speech can clog up the **school-to-sterilization pipeline** that currently exists, in which social transition—a psycho-social intervention—begins in school without the knowledge of parents. These can take effect even while the other segments of that pipeline—from puberty blockers to surgeries—are still open.

An [ideal educational bill](#) (or bundle of bills) should require accountability, transparency, and choice in schools, as well as a strong affirmation of parents’ rights. In particular:

- Parents rights should enjoy the highest level of protection: strict scrutiny (see the [Promise to America’s Parents](#))

- **Strong school choice**, in which educational dollars follow students rather than buildings. (Heritage prefers universal ESAs, which just passed in Arizona. See the Institute for Justice’s [model legislation](#).)
- **Guarantees of transparency** and accountability in all school materials, including but not limited to the official curriculum (See Florida’s “Parents Rights in Education”)
- Guarantee of parents’ priority and authority in education and medical treatment of children (See Florida’s “Parents Rights in Education”)
- “Given Name” laws that protect a parents’ rights to decide the name and pronouns of minor children in school (see [Heritage’s model legislation](#)).
- Private cause of action for parents whose rights are violated. This gives a private citizen statutory permission to bring a lawsuit against state actors. Legal rights need a remedy when those rights are violated.

B. A Bill protecting students from compelled speech, including “preferred pronouns”

See the Heritage Foundation’s [model legislation](#), for example, which targets compelled speech on race. Why is this needed? First, to protect the consciences of schoolteachers, students, and administrators who object to gender ideology. And second, because “social transition” in schools—with “preferred pronouns” and name changes—are often the first step in the process that leads to irreversible drug interventions and surgeries. Simply asking a child his or her preferred pronouns introduces the notion—central to gender ideology—that one could have a gender identity independent of one’s sexed body. This is itself a form of indoctrination.

C. Health care (legislative and health policy)

We look forward to the day when we can vanquish gender ideology from our culture and its institutions, and see justice done against the perpetrators of the quackery known as “gender affirming care.” But premature state legislative

attempts to criminalize it could backfire. As a result, states should think carefully before passing laws that criminalize transition procedures (as in Alabama) or legally define them as child abuse (as in Texas). The trial challenging the Alabama law is scheduled for November, and the Texas Supreme Court has already curtailed that state's AG action.

There are four key reasons to avoid leading with legislative bans:

- (1) Such laws are not likely to fare well when they come before courts, since many medical organizations and public health authorities treat "gender-affirming" procedures (social transition, puberty blockers, cross sex hormones, and "gender reassignment" surgery) as the proper standard of care.

See, for instance, the statement by the [American Academy of Pediatrics](#) and the federal [Department of Health and Human Services](#). When state laws prohibiting these procedures for minors are challenged, they create a dilemma for judges. **Courts will assume, plausibly, that official medical bodies, not legislatures,** should decide proper standards of medical care. So, what should be done when a state legislature prohibits procedures that the federal Department of Health and Human Services, and most medical bodies, endorse, and on which the same state's medical authorities have not issued a judgment? It's unlikely that courts, in that situation, will rule in favor of the legislature.

We might argue, rightly, that HHS and the American Academy of Pediatrics have been captured by ideologues and should not enjoy deference on such questions. But most judges will not know that the American Academy of Pediatrics is an advocacy organization. As a result, they will mistake AAP's support for gender transition procedures as an inference from scientific evidence, rather than an ideological preference.

Hence, few judges will want to rule in favor of a state legislature on a medical question when it contradicts putatively scientific organizations allied with federal (and possibly state) health authorities. **A wise policy strategy should avoid creating such a dilemma for courts if at all possible.**

(2) **Such bans make messaging awkward for opponents since they allow hostile media to frame the issue as a battle between** narrow minded religious zealots on one side and open-minded liberals and scientists on the other. For example, in the trial against the SAFE Act in Arkansas (the best such law), the ACLU has framed the law as an attack on the right of parents who want to “affirm” their child’s gender identity. Laws that criminalize these procedures prematurely will encounter an even tougher messaging challenge.

(3) If transition procedures are defined as child abuse (as in Texas) or made a felony (as in Alabama), then the government (and CPS) must insert itself between children and their parents. Obviously, parents don’t have the right to abuse or mutilate their children. **But this effort would not fit comfortably with a wider campaign to strengthen the protection of parents’ rights.** Worse, it allows gender ideologues to frame the controversy to their advantage, as we’ve seen in Texas.

(4) Defining these procedures as child abuse is risky at this stage because many parents seeking these treatments for their **kids aren’t abusive. Rather, they have been misled by experts** and authorities. Such parents are largely victims of gender ideology, not perpetrators. The Alabama and Texas approaches, if they survive legal challenges, have the benefit of catching “munchy moms” who wants to transition their children, but at the cost of punishing the parents who don’t fall into this category.

Thus, the best health care policies in the short run (in states where their possible) should focus on (1) **expanding the private right of action and statute of limitations for victims and (2) establishing a state health policy on standard of care that rejects (on empirical grounds) “gender affirming care.”**

Note that the SAFE Act/Help Not Harm approach prohibits without criminalizing these procedures and sets up a private right of action to enforce the prohibition. The SAFE Act in Arkansas may survive court challenges but would be much more secure if it enjoyed supportive “air cover” from a state medical authority that rejects or restricts “gender affirming care.”

This policy strategy does not advise naive deference to state health authorities—many of whom are compromised by gender ideology. Rather, we should support

judgments from health regulatory bodies in states where this is likely to succeed. **There are likely six to ten such states.** If, in 2023, six states implement the policy cocktail proposed here, they will be challenged by advocacy and the federal government. [But, in that case, it will be a battle between state and federal health authorities, over the scientific evidence itself. This is the fight we want.](#)

Ideally, the policy cocktail should include legislative and non-legislative ingredients:

- State health policy challenging “gender affirming care” by a state health board, commission, or surgeon general (See [Florida’s health policy](#) and independent [analysis](#), which has been followed by a [prohibition](#) on these procedures by the [state board of medicine and board of osteopathy](#).) Note that this has taken place through the state medical regulatory pathway, which is overseen by the governor, and not by the legislature.
- A law strengthening the private right of action and statute of limitations for victims (For example, one provision of Arkansas’ [SAFE Act](#), and section 5 of the related [Help Not Harm model legislation](#)). This changes market incentives by **putting both insurance companies and physicians on notice about the risks of future legal action against them.**

Bonus Laws and Policies

- State investigation of the use of puberty blocking drugs, cross-sex hormones, and “gender affirming” surgery on minors, under state consumer protection authority
- Save women’s sports laws, which require men to compete in men’s leagues. These actions tend to be politically popular, but don’t challenge the most egregious problems with gender ideology.
- Bathroom bills that restrict public bathrooms to biological sex.
- A state law prohibiting the falsifying of birth certificates such as change of biological sex. This will be an uphill battle in many states, which have

[already liberalized](#) their policies. But it's egregious that falsifying birth certificates in this way is now legal.

Resources

[Protecting Children and Families with Parents' Bills of Rights](#)

[Promise to America's Parents](#)

[Promise to America's Children](#)

[Help Not Harm model legislation](#)

[Florida Department of Health Report](#)

[Child & Parental Rights Campaign](#)

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