Case No. 21-2875

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DYLAN BRANDT, ET AL.,

Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:21-cv-00450-JM
The Honorable James M. Moody, Jr., District Judge

Brief of Plaintiffs-Appellees

Leslie Cooper
Chase Strangio*
James Esseks
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
Telephone: (917) 345-1742
lcooper@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
Attorneys for the Plaintiffs

Beth Echols, Ark. Bar No. 2002203
Christopher Travis, Ark. Bar No. 97093
Drake Mann, Ark. Bar No. 87108
Gill Ragon Owen, P.A.
425 W. Capitol Avenue, Suite 3800
Little Rock, AR 72201
Telephone: (501) 376-3800
echols@gill-law.com
travis@gill-law.com
mann@gill-law.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.
Attorneys for the Plaintiffs

Breean Walas, Ark. Bar No. 2006077
Walas Law Firm, PLLC
P.O. Box 4591
Bozeman, MT 59772
Telephone: (501) 246-1067
breean@walaslawfirm.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.
Attorneys for the Plaintiffs

Gary L. Sullivan, Ark. Bar No. 92051
Sarah Everett, Ark. Bar No. 2017249
Arkansas Civil Liberties Union Foundation, Inc.
904 W. 2nd Street Little Rock, AR 72201
Telephone: (501) 374-2842
Gary@acluarkansas.org
sarah@acluarkansas.org
Attorneys for the Plaintiffs

Garrard R. Beeney*
Jonathan J. Ossip*
Brandyn J. Rodgerson*
Alexander S. Holland*
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Telephone: (212) 558-4000
beeneyg@sullcrom.com
ossipj@sullcrom.com
rodgersonb@sullcrom.com
hollanda@sullcrom.com
Attorneys for the Plaintiffs

Laura Kabler Oswell*
Duncan C. Simpson LaGoy*
Sullivan & Cromwell LLP
1870 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 461-5600
oswell@sullcrom.com
simpsond@sullcrom.com
Attorneys for the Plaintiffs

*Admitted pro hac vice

SUMMARY OF THE CASE

The district court did not abuse its discretion when it preliminarily enjoined enforcement of a law that prohibits Dylan Brandt, Sabrina Jennen, and Parker Saxton—as well as other Arkansas youth—from receiving medical care that they, their parents, and their doctors agree is medically necessary to treat their gender dysphoria. This treatment, which is provided in accordance with medical protocols accepted by every major professional health association in the country, provides them with relief from the severe distress of gender dysphoria and enables them to thrive.

The law's sweeping ban on gender-affirming care puts Dylan, Sabrina, Parker, and other young people at risk of serious harm and violates their constitutional rights. The district court found, based on an extensive record, that gender-affirming care "may be medically appropriate and necessary to improve the physical and mental health of transgender people" and that withholding this care from the minor plaintiffs would cause them "irreparable physical and psychological harms." (Add. 9.) By singling out for prohibition only medical treatment related to gender transition, the Ban discriminates based on transgender status and sex, triggering heightened scrutiny. None of the State's proffered justifications for banning gender-affirming care is unique to the banned treatment, yet only this care is banned. The district court did not abuse its discretion in issuing an injunction. Plaintiffs-Appellees request 20 minutes of oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. 1331 because this case arises under the United States Constitution. This Court has jurisdiction to review the district court's July 21 and August 2, 2021 orders granting Plaintiffs' Motion for a Preliminary Injunction pursuant to 28 U.S.C. 1292(a)(1). (Add. 14, R. Doc. 64, at 13; Add. 1, R. Doc. 59.)

This Court does not have pendent jurisdiction to consider the district court's order denying Defendants' Motion to Dismiss because a decision on the preliminary injunction is not "inextricably intertwined" with a decision on the Motion to Dismiss. *Novus Franchising, Inc.* v. *Dawson*, 725 F.3d 885, 892 (8th Cir. 2013) (citation omitted); *see also Langford* v. *Norris*, 614 F.3d 445, 458 (8th Cir. 2010) ("[A]n otherwise nonappealable 'issue is inextricably intertwined' . . . only 'when the appellate resolution of the collateral appeal necessarily resolves the pendent claim [] as well.'" (citation omitted)). Defendants' reliance on *Angelotti Chiropractic, Inc.* v. *Baker*, 791 F.3d 1075, 1087 (9th Cir. 2015), is misplaced because there, the Ninth Circuit held that a decision granting a preliminary injunction and a decision denying a motion to dismiss overlap "'where a court determines that the plaintiff has no chance of success on the merits.'" (citation omitted). Here, Plaintiffs are likely to succeed on the merits of their claims, thus, the Court should not grant Defendants' request to exercise pendent jurisdiction over Defendants' Motion to Dismiss.

STATEMENT OF ISSUES PRESENTED

1. Did the district court correctly hold that Plaintiffs are likely to succeed on the merits of their claim that 2021 Ark. Act 626 (enacting ARK. CODE ANN. § 20-9-1501 through 1504) (the "Ban") violates the Equal Protection Clause by singling out for prohibition medical treatments for minors provided for purposes of "gender transition"?

Apposite authority: *Bostock* v. *Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020); *United States* v. *Virginia*, 518 U.S. 515 (1996); *City of Cleburne, Tx.* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Grimm* v. *Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

2. Did the district court correctly hold that Plaintiffs are likely to succeed on the merits of their claim that the Ban violates parents' due process rights by prohibiting them from seeking medically appropriate care for their children?

Apposite authority: *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979); *Kanuszewski* v. *Mich. Dep't of Health and Human Servs*, 927 F.3d 396 (6th Cir. 2019).

3. Did the district court correctly hold that Plaintiffs are likely to succeed on the merits of their claim that the Ban violates the First Amendment by prohibiting doctors from referring their adolescent patients to other health care providers to receive gender-affirming care?

Apposite authority: *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001); *Nat'l Inst. of Fam. & Life Advocs. ("NIFLA")* v. *Becerra*, 138 S. Ct. 2361 (2018); *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011).

4. Were the district court's findings supporting its conclusions that Plaintiffs would suffer irreparable harm if the Ban went into effect and that the balance of equities and public interest favored a preliminary injunction to maintain the status quo clearly erroneous?

Apposite authority: *Nken* v. *Holder*, 556 U.S. 418, 435 (2009); *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

STATEMENT OF THE CASE

I. Factual Background.

A. Medical Protocols for the Treatment of Adolescents with Gender Dysphoria.

"Gender identity" refers to a person's sense of belonging to a particular gender. (App. 93-94; R. Doc. 11-11, at 3-4.) Everyone has a gender identity. (*Id.*) People who have a gender identity that aligns with their sex assigned at birth are cisgender, while people who have a gender identity that does not align with their sex assigned at birth are transgender.[1] (App. 94; R. Doc. 11-11, at 4.)

Gender identity is not something that an individual can control or change.[2] (App. 94; R. Doc. 11-11, at 4.) "Treatment aimed at trying to change a person's gender identity and expression to become more congruent with sex assigned at birth has been attempted in the past without success" and with harmful effects, and is now considered unethical. (App. 677; R. Doc. 45-19, at 22; App. 855; R. Doc. 45-23, at 4.)

---

1 "Sex assigned at birth" refers to a person's sex designated at birth, usually based on genital anatomy. *See* App. 94; R. Doc. 11-11, at 4.

2 Contrary to Defendants' representation to this Court, medical associations do not "deny that gender identity (and thus transgender status) is an immutable characteristic" (Defs. Br. at 5), and none of the documents cited by Defendants supports this assertion. These associations recognize there is a biological component to gender identity (App. 789; R. Doc. 45-21, at 6), but, regardless of whether gender identity is biologically based, it cannot be changed. (App. 94; R. Doc. 11-11, at 4.)

The lack of alignment between one's gender identity and sex assigned at birth can cause significant distress. (App. 95, 97; R. Doc. 11-11, at 5, 7.) "Gender dysphoria" is the diagnostic term for the distress that can result from incongruence between a person's gender identity and sex assigned at birth. (App. 94-95; R. Doc. 11-11, at 4-5.) To be diagnosed with Gender Dysphoria in Adolescents or Adults, the formal diagnosis in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. (*Id.*)[3]

Gender dysphoria is a serious medical condition that, if left untreated, can result in debilitating anxiety, severe depression, self-harm, and suicide. (*Id.*) The Endocrine Society and the World Professional Association for Transgender Health ("WPATH") have published widely accepted guidelines for the treatment of gender dysphoria. (App. 96; R. Doc. 11-11, at 6; App. 84; R. Doc. 11-9, at 2; *see also* App. 784; R. Doc. 45-21; App. 656; R. Doc. 45-19.) These guidelines are recognized as authoritative by the major medical and mental health professional associations in the United States,

[3] Contrary to Defendants' assertion, diagnosing gender dysphoria does not "hinge[] on sex-stereotypical behaviors." (Defs. Br. at 4.)

including the American Academy of Pediatrics and American Psychiatric Association. (App. 914-15; R. Doc. 51-1, at 4-5.)[4]

Under the WPATH Standards of Care ("SOC") and the Endocrine Society Guideline, treatment for gender dysphoria differs depending on whether the patient is a prepubertal child, an adolescent, or an adult. Before puberty, no surgical or drug interventions are indicated. (App. 97-98 R. Doc. 11-11, at 7.)[5] For youth who experience distress after the onset of puberty (*i.e.*, during adolescence), medical interventions may become medically necessary. (App. 97-98; R. Doc. 11-11, at 7-8, 12; App. 673-74; R. Doc. 45-19, at 18-19.)[6] Treatment decisions are individualized

---

[4] Defendants' assertion that the clinical practice guidelines issued by the Endocrine Society and WPATH are not "based on an evidence-based scientific research process" (Defs. Br. 15) is inaccurate. (App. 114-15; R. Doc. 11-12, at 6-7; App. 996–998; R. Doc. 51-3, at 5-7; App. 97; R. Doc. 11-11, at 7; App. 968; R. Doc 51-2, at 3.) The guidelines are developed through systematic processes for collecting and reviewing scientific evidence. (*Id.*) That these organizations also advocate on behalf of their patient populations is typical of professional medical organizations such as the American Diabetes Association. (App. 968; R. Doc 51-2, at 3.)

[5] Defendants claim that social transition among prepubertal children affects the likelihood of coming to identify with their sex assigned at birth. (Defs. Br. at 6.) This claim is not supported by evidence (App. 926-27; R. Doc. 51-1, at 16-17), but is also irrelevant, because the Ban does not affect non-medical interventions.

[6] Defendants incorrectly assert that treatment is unnecessary, because gender dysphoria will resolve—or desist—on its own. (Defs. Br. at 6.) But they rely on studies focused on *prepubertal* children (for whom medical interventions are not indicated); when gender dysphoria persists to the onset of puberty, desistance is rare. (App. 924-25; R. Doc. 51-1.)

based on the needs of the patient. (App. 96; R. Doc. 11-11, at 6; App. 666; R. Doc. 45-19, at 11.)

Clinicians who follow these prevailing protocols for the treatment of gender dysphoria do not steer the minor in any particular direction with respect to the minor's gender identity but, rather, through a "non-judgmental partnership with youth and families," facilitate "exploration" of the minor's gender, recognizing that medical "interventions are appropriate for some adolescents, but not for others." (App. 855; R. Doc. 45-23, at 4; App. 676-77; R. Doc. 45-19, at 21-22; App. 970; R. Doc. 51-2, at 5.) No minor is "actively encouraged to pursue a transgender identity," as Defendants claim. (Defs. Br. at 7).

The decision to initiate a medical intervention for adolescents with gender dysphoria is not made lightly or hurriedly and there is a rigorous assessment process that can take considerable time. (App. 938-40; R. Doc. 51-1, at 28-30; App. 970; R. Doc. 51-2, at 5; App. 679; R. Doc. 45-19, at 24.) The WPATH SOC provide that "[b]efore any physical interventions are considered for adolescents, extensive exploration of psychological, family, and social issues should be undertaken." (App. 679; R. Doc. 45-19, at 24.) And the WPATH SOC and the Endocrine Society Guideline emphasize the need to screen for and treat co-occurring conditions. (App. 685-86; R. Doc. 45-19, at 30-31; *see also* App. 791; R. Doc. 45-21, at 8.) The Endocrine Society Guideline's criteria for eligibility for puberty-delaying treatment include that the

adolescent's gender dysphoria has been "long-lasting and intense." (App. 97-98; R. Doc. 11-11, at 7-8; App. 793; R. Doc. 45-21, at 10.) The criteria for eligibility for hormone therapy include that the "adolescent has sufficient mental capacity to estimate the consequences of this (partly) irreversible treatment, weigh the benefits and risks, and give informed consent to this (partly) irreversible treatment." (App. 99-100; R. Doc. 11-11, at 9-10.) Additionally, parents must provide informed consent for all medical treatments for gender dysphoria for their minor children. (*Id.*; App. 117; R. Doc. 11-12, at 9; App. 999-1001; R. Doc. 51-3, at 8-10.)

When medical interventions are deemed appropriate, they are pursued in a staged process, from fully reversible (puberty delaying medication) to partially reversible (hormone therapy) to irreversible (surgery). (App. 679; R. Doc. 45-19, at 24.) Puberty-delaying medication, which is also used to treat non-transgender children with precocious puberty, pauses puberty at the stage reached when treatment is commenced. (App. 97-98, 101-02; R. Doc. 11-11, at 7-8, 11-12.) When used to treat gender dysphoria, puberty is not delayed beyond the typical age range for puberty, and if an adolescent discontinues treatment, endogenous puberty will resume. (App. 971; R. Doc. 51-2, at 6.)[7] This treatment gives an adolescent time to further understand their

[7] Defendants' contentions about special risks of the use of pubertal suppression to treat gender dysphoria are based on the erroneous assumption that puberty is delayed beyond the normal time period for puberty. (Defs. Br. at 6; App. 921-24; R. Doc. 51-1, at 11-14.)

gender identity before initiating any irreversible treatment and can drastically minimize dysphoria later in life and may eliminate the need for surgery. (App. 106; R. Doc. 11-11, at 16.) For some adolescents, it may become medically necessary to initiate puberty consistent with a patient's gender identity through gender-affirming hormone therapy. (App. 99; R. Doc. 11-11, at 9.) Transgender young men who have lived in their affirmed gender for a significant period of time may also receive medically necessary chest reconstruction surgery before the age of majority. (App. 101; R. Doc. 11-11, at 11.) Genital surgery is not recommended for minors. (*Id.*)

These medical interventions to treat adolescents with gender dysphoria have proven effective in scientific studies (App. 915-19; R. Doc. 51-1, at 5-9; App. 119-22; R. Doc. 11-12, at 11-14). They are not "experimentation" on youth as suggested by Ban's title. ARK. CODE ANN. § 20-9-1501 ("Save our Children from Experimentation (SAFE) Act"). (App. 994; R. Doc. 51-3, at 3.) The quality of the evidence supporting medical interventions for adolescents with gender dysphoria is comparable to the quality of evidence supporting many other medical treatments for minors. (App. 113-14, 115-16; R. Doc. 11-12, at 5-6, 7-8.)[8]

[8] The fact that use of these medications to treat gender dysphoria is off-label—not FDA-approved for this specific indication—does not mean the drugs are experimental, untested, or unsafe for this use. (App. 994–96; R. Doc. 51-3, at 3-5.) Off-label use is commonplace in medicine. (*Id.*)

Gender-affirming medical interventions are widely recognized in the medical community, including by the major professional medical associations, as medically necessary for the health and well-being of some adolescents suffering from gender dysphoria. (App. 96; R. Doc. 11-11, at 6; App. 118; R. Doc. 11-12, at 10.)[9] Though Defendants refer to what they deem an "international controversy" surrounding gender-affirming treatment, none of the countries referenced by Defendants has banned care to adolescents with gender dysphoria. (App. 951-55; R. Doc. 51-1, at 41-45.)

As with many medical treatments, pubertal suppression and hormone therapy can have potential risks, but, as with other medical care, treatment is not provided without informed consent. (App. 1001; R. Doc. 51-3, at 10; App. 98; R. Doc. 11-11, at 8; App. 970; R. Doc. 51-2, at 5.) None of the potential risks identified by Defendants is unique to gender-affirming medical treatments. The risks are present when these treatments are used to treat other conditions such as precocious puberty and polycystic ovarian syndrome. (App. 104-05; R. Doc. 11-11, at 14-15.) And these risks are rare when treatment is provided under the supervision of a clinician. (*Id.*)

Like many other interventions that are necessary to preserve a person's health, hormone therapy may have an impact on fertility, although many people are able to

[9] Remarkably, Defendants assert that care recommended by major medical associations actually increases the risk of self-harm and suicide. (Defs. Br., at 14-15.) This baseless claim relies on an online opinion piece and distortion of data about genital surgery for adults, which is not at issue in this case.

conceive children after receiving hormone therapy. (App. 104; R. Doc. 11-11, at 14; App. 972-73; R. Doc. 51-2, at 7-8; App. 1002-03; R. Doc. 51-3, at 11-12; App. 921-24; R. Doc. 51-1, at 11-14.) The WPATH SOC and Endocrine Society Guideline, therefore, provide that patients should be informed of this risk and provided information about fertility preservation before commencing treatment. (App. 104; R. Doc. 11-11, at 14.) Puberty-delaying medication and chest surgery do not affect fertility. (*Id.*; App. 972-973; R. Doc. 51-2, at 7-8.)

Defendants' *amici* assert that youth are not evaluated before initiating treatment and that adolescents who are influenced by peers or social media to adopt a transgender identity are being provided treatment they later regret. (Brief of Amici Curiae for Keira Bell at 13-15, (Doc. 5099324).) There is no evidentiary basis for these assertions. (App. 941-46; R. Doc. 51-1, at 31-36.) And as discussed above, under the well-established protocols, medical interventions are not provided unless and until a thorough mental health evaluation determines that the diagnostic criteria for gender dysphoria are met and treatment is medically necessary for the patient. To the extent there are doctors who are providing treatment "on demand" (Defs. Br. at 11), that would not comport with accepted protocols. And contrary to Defendants' suggestion, based on anecdotes, that regret following transition is common (Defs. Br. at 10), studies show that regret among patients who medically transition is extremely rare. (App. 927-31; R. Doc. 51-1, at 17-21.)

Defendants' *amici* also cite remarks by Drs. Marci Bowers and Erica Anderson to suggest that even providers of gender-affirming care support their position. This is false. The remarks referenced by *amici* expressed views about how to improve care—Dr. Bowers focused on the specific timing of initiating pubertal suppression and Dr. Anderson focused on ensuring robust mental health evaluations. Both clinicians fully support gender-affirming treatment for adolescents when indicated and oppose government attempts to restrict care. *See* Joint Letter from USPATH and WPATH, Oct. 12, 2021 (Drs. Bowers and Anderson among signatories), available at https://www.wpath.org/media/cms/Documents/Public%20Policies/2021/Joint%20WPATH%20USPATH%20Letter%20Dated%20Oct%2012%202021.pdf; Laura Edwards-Leeper and Erica Anderson, "The mental health establishment is failing trans kids," *Washington Post*, Nov. 24, 2021 (expressing "enthusiastic support" for the banned care and "disgust[]" at legislation trying to ban it).

B. The General Assembly's Passage of the Ban.

On March 29, 2021, the Arkansas General Assembly passed HB 1570, prohibiting healthcare professionals from providing "gender transition procedures" to anyone under eighteen or "refer[ring]" anyone under eighteen to any healthcare professional for such procedures. HB 1570 § 3.

The bill provided that healthcare professionals who treat or refer minor patients for care related to "gender transition" would be subject to discipline for unprofessional

conduct by the appropriate licensing entity or disciplinary review board and may be sued by the Attorney General or private parties. *Id*.

On April 5, 2021, Governor Hutchinson vetoed HB 1570, because it creates "new standards of legislative interference with physicians and parents" and "puts the state as the definitive oracle of medical care, overriding parents, patients and healthcare experts," which "would be—and is—a vast government overreach."[10] Governor Hutchinson further noted that "denying best practice medical care to transgender youth can lead to significant harm to the young person—from suicidal tendencies and social isolation to increased drug use."[11] Within 24 hours, the General Assembly overrode the Governor's veto and passed the Ban into law, becoming (and remaining) the only law of its kind in the United States.

The Ban was one of at least twelve bills and resolutions that targeted transgender people during the 2021 Arkansas legislative session. *See* SB 347; SB 354; SB 450; HB 1749; SB 389; HB 1882; HB 1905; HB 1951; HR 1018; SR 7; SR 16. While the Ban was in the General Assembly, majorities in both chambers passed resolutions expressing their view that "gender reassignment medical treatments" are not "natural." HR 1018, 2021 Gen. Assemb., Reg. Sess. (Ark. 2021); SR 7, 2021 Gen. Assemb., Reg.

---

10 "Governor Asa Hutchinson Holds Pen and Pad Session with Local Media," April 5, 2021, at 9:16, 9:30 https://www.youtube.com/watch?v=9Jt7PxWkVbE.9:30.

11 *Id.* at 10:05.

Sess. (Ark. 2021). Some members of the General Assembly further expressed their personal and religious opposition to people being transgender.[12]

C. The Ban Inflicts Substantial Harm.

Many adolescents with gender dysphoria suffer extreme distress and elevated rates of anxiety, depression, and suicidal ideation. (App. 95; R. Doc. 11-11, at 5.) When they are able to access gender-affirming care, they experience significant improvement in mental health. (App. 97, 99, 106; R. Doc. 11-11, at 7, 9, 16; App. 915-19; R. Doc. 51-1, at 5-9; App. 119-22; R. Doc. 11-12, at 11-14.) If the Ban went into effect, it would require physicians to halt the provision of this care to adolescents, including those already receiving care, or face significant consequences, including the possibility of losing their medical license. For their patients, the discontinuation of treatment could result in a range of serious physiological and mental health consequences. (App. 107; R. Doc. 11-11, at 17.) Accordingly, forcing doctors to deny this care to their patients who need it would be a violation of the doctors' ethical obligations. (App. 85-86; R. Doc. 11-9, at 3-4; App. 89-90; R. Doc. 11-10, at 3-4.)

Families with the means to do so could move out of state to continue their children's treatment; however, this is not viable for many people, and even for those

---

[12] S. Floor Debate, 2021 Gen. Assemb. 93rd Sess., Mar. 10, 2021 at 2:19:12, https://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/2021 0310/-1/21305?viewMode=1#agenda_; *id*. at 2:24:59.

who are able, it comes with the cost of leaving their extended family, jobs, and community.

The Ban, if permitted to take effect, would inflict specific harms on the Plaintiffs in this action:

1. The Family Plaintiffs.

Plaintiffs Dylan Brandt, Sabrina Jennen, Parker Saxton, and Brooke Dennis (the "Minor Plaintiffs") are Arkansas minors who have been diagnosed with gender dysphoria and are currently receiving, or will imminently need, gender-affirming care that is prohibited by the Ban.

Dylan and Joanna Brandt (App. 5; R. Doc. 1, at 5.)

Jennen family, Sabrina is second from left (App. 5; R. Doc. 1, at 5.)

Donnie and Parker Saxton (App. 7; R. Doc. 1, at 7)

Dennis family, Brooke is on the far right (App. 6; R. Doc. 1, at 6)

Dylan, Sabrina, and Parker's lives have all been positively transformed by their gender-affirming treatment. Dylan has been on hormone therapy for over a year and has developed secondary sex characteristics typical of teenage boys. (App. 54; R. Doc. 11-1, at 3.) The treatment has alleviated his depression and social anxiety and allowed him to become a confident, happy teenager. (*Id.*) Parker's gender dysphoria was so severe after puberty began that he wore multiple sports bras at a time to try to conceal his body. (App. 76; R. Doc. 11-7, at 2.) Since starting testosterone, Parker "has been the most himself and in the best mood since he was seven years old." (App. 81; R. Doc. 11-8, at 3.) Prior to starting treatment, Sabrina saw no future for herself; she was depressed and engaged in self-harm. (App. 61; R. Doc. 11-3, at 1.) Since starting hormone therapy, she has "become genuinely happy and confident for the first time since [she] can remember." (App. 62; R. Doc. 11-3, at 2.) Sabrina's parents are fearful

about what would happen to their daughter if she had to stop treatment. (App. 65; R. Doc. 11-4, at 2.) They cannot bear to lose the happy and thriving daughter Sabrina has become and to return to constant concern about her safety. (*Id.*)

Brooke Dennis is 9. Last year she told her parents she is a girl, but her mother testified that "Brooke always knew who she was." (App. 70; R. Doc. 11-6, at 1.) She has experienced distress from gender dysphoria and is anxious about puberty. (App. 69; R. Doc. 11-5, at 2; App. 71; R. Doc. 11-6, at 2.) In consultation with Brooke's doctors, her parents intend to start puberty suppression when puberty begins, which could happen at any time. (App. 72; R. Doc. 11-6, at 3.)

All of the family plaintiffs have long-standing, close ties to their extended families, schools, jobs, and communities in Arkansas. (App. 55; R. Doc. 11-1, at 4; App. 56; R. Doc. 11-2, at 1; App. 63; R. Doc. 11-3, at 3; App. 66; R. Doc. 11-4, at 3; App. 73; R. Doc. 11-6, at 4; App. 77; R. Doc. 11-7, at 3; App. 82; R. Doc. 11-8, at 4.) But Joanna Brandt, Aaron and Lacey Jennen, Donnie Saxton, and Amanda and Shayne Dennis (the "Parent Plaintiffs") have no choice but to uproot their families and leave Arkansas if the Ban goes into effect. (App. 59-60; R. Doc. 11-2, at 4-5; App. 66; R. Doc. 11-4, at 3; App. 73; R. Doc. 11-6, at 4; App. 82; R. Doc. 11-8, at 4.)

2. The Doctor Plaintiffs.

Drs. Michele Hutchison and Kathryn Stambough (the "Doctor Plaintiffs") treat patients at the Gender Spectrum Clinic at Arkansas Children's Hospital, which

provides healthcare to youth with gender dysphoria. (App. 83; R. Doc. 11-9, at 1; App. 88; R. Doc. 11-10, at 2.) The clinic currently serves about 160 patients. (App. 84; R. Doc. 11-9, at 2.) Dr. Hutchison knows from clinical experience that the Ban would significantly and severely compromise her patients' health. (App. 85-86; R. Doc. 11-9, at 3-4.) Shortly after the Ban was introduced, Dr. Hutchison's office received calls from numerous families, panicking, because their children were expressing suicidal thoughts at the prospect of losing the healthcare they rely on for their well-being, and four of the clinic's patients—and three other transgender adolescents—were hospitalized after suicide attempts. (*Id.*)

Given the penalties attached to the Ban, if it takes effect, Drs. Hutchison and Stambough would not be able to treat their patients with gender dysphoria in accordance with the accepted medical protocols. (App. 85; R. Doc. 11-9, at 3; App. 89; R. Doc. 11-10, at 3.) Being forced to deny their patients medically necessary care that can be lifesaving for some patients violates the tenets of their profession by leaving their patients to suffer needless pain. (App. 86; R. Doc. 11-9, at 4; App. 90; R. Doc. 11-10, at 4.)

II. Procedural History.

Plaintiffs filed a complaint and moved for a preliminary injunction to enjoin enforcement of the Ban, because it violates the equal protection and free speech rights of all Plaintiffs and the Parent Plaintiffs' substantive due process rights. Plaintiffs

supported their motion with extensive evidence, including three expert declarations and declarations from the Plaintiffs recounting the pain of gender dysphoria, how gender-affirming care provided relief to the Minor Plaintiffs, and the consequences of discontinuing the care. (*See* App. 91; R. Doc. 11-11, at 1; App. 109; R. Doc. 11-12, at 1; App. 911; R. Doc. 51-1, at 1; App. 52; R. Doc. 11-1, at 1; App. 56; R. Doc. 11-2, at 1; App. 61; R. Doc. 11-3, at 1; App. 64; R. Doc. 11-4, at 1; App. 68; R. Doc. 11-5, at 1; App. 70; R. Doc. 11-6, at 1; App. 75; R. Doc. 11-7, at 1; App. 79; R. Doc. 11-8, at 1; App. 83; R. Doc. 11-9, at 1; App. 87; R. Doc. 11-10, at 1.) Defendants provided evidence in response, including expert declarations from four witnesses. (App. 158; R. Doc. 45-1, at 1; App. 271; R. Doc. 45-2, at 1; App. 336; R. Doc. 45-3, at 1; App. 456; R. Doc. 45-4, at 1.) Defendants did not refute or respond to the testimony of the Minor and Parent Plaintiffs.

Defendants moved to dismiss the complaint alleging lack of standing and failure to state a claim. The court held a hearing on both motions. The court granted Plaintiffs' motion and denied Defendants' motion from the bench and subsequently issued a supplemental order explaining its ruling.

The court held that Plaintiffs were likely to succeed on the merits of their claims. Applying heightened scrutiny to Plaintiffs' equal protection claim, because the Ban classifies based on transgender status and sex, and transgender status constitutes at least a quasi-suspect class, the court held that the Ban is not substantially related to any

important governmental interest and could not even withstand rational basis review. (Add. 5, 8-9; R. Doc. 64, at 4, 7-8.) In reaching this conclusion, the court relied on the following findings of fact:

- "Gender-affirming treatment is supported by medical evidence that has been subject to rigorous study."
- "Every major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people."
- Absent an injunction, "healthcare providers [would] not have the ability to abide by their ethical standards which may include medically necessary transition-related care for improving the physical and mental health of their transgender patients."

(Add. 8-9; R. Doc. 64, at 7-8.)

The court also made findings that the Minor Plaintiffs would suffer physical and emotional harms if care were withheld and that the Ban would cause irreparable harm to the Parent and Doctor Plaintiffs. (Add. 9; R. Doc. 64, at 8.)

The court denied Defendants' motion to dismiss, explaining that "it is inherent in the Court's decision to grant the preliminary injunction that the Plaintiffs have stated claims for violations of their Equal Protection, Due Process, and First Amendment rights." (Add. 13; R. Doc. 64, at 12.)

Defendants appealed the grant of the preliminary injunction and seek to bring an interlocutory appeal of the court's denial of their motion to dismiss.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in preliminarily enjoining the Ban, because it correctly held that Plaintiffs were likely to succeed on the merits of each of their claims, they were likely to suffer irreparable harm if the law went into effect, and the balance of equities and public interest weighed in favor of an injunction.

The district court properly applied heightened scrutiny to Plaintiffs' equal protection claim, because the Ban's prohibition of "gender transition procedures" classifies based on sex and transgender status, which constitutes at least a quasi-suspect class. (Add. 2, 5; R. Doc. 64, at 1, 4.) The court held that the evidence showed that the law did not substantially further an important government interest in protecting children or regulating medical ethics, or even survive rational basis review.

The court also correctly concluded that the Ban interfered with the Parent Plaintiffs' fundamental right to seek medically appropriate care for their children protected by the Due Process Clause and that the law's prohibition on doctors making referrals to other health care providers for "gender transition procedures" intruded on Plaintiffs' free speech rights. (Add. 2, 11-12; R. Doc. 64, at 1, 10-11.)

The court's conclusions that the Ban "will cause irreparable physical and psychological harms to the [Minor] Plaintiffs by terminating their access to necessary medical treatment," as well as irreparable harm to their parents and doctors, were based

on well-supported findings of fact. The court did not abuse its discretion in concluding that the balance of equities favors the preliminary injunction.

ARGUMENT

I. Introduction.

This case is about whether a population of young people will continue to receive the medical care they need. Defendants ask this Court to issue a decision that would strip Dylan Brandt, Sabrina Jennen, Parker Saxton, and many other young people across Arkansas, of medical treatment that they, their parents, and their doctors have determined is medically necessary for them. This treatment is being provided in accordance with well-established medical protocols, and for many, like Dylan, Sabrina, and Parker, it has relieved their debilitating dysphoria and allowed them to become thriving teenagers. The ruling sought by Defendants would force doctors like Drs. Hutchison and Stambough to withdraw treatment from these and hundreds of other patients who they know, based on their professional experience, need this care. And it would force parents—if they have the resources to do so—to leave their homes and communities in Arkansas to ensure the health and safety of their children; those without the resources would have to watch their children needlessly suffer.

Nowhere in the extensive record below or before this Court do Defendants dispute that the Minor Plaintiffs have a medical need for this treatment. Defendants offer nothing to contradict or contest Plaintiffs' declarations describing the pain of gender dysphoria and the relief they experienced from gender-affirming care, and their

parents' fears for their children's health and safety should they have to return to the way things were before treatment.

Defendants' brief never acknowledges Dylan, Sabrina, Parker, or Brooke Dennis. But the outcome of this appeal will dramatically impact the course of their lives, as well as the lives of many other young people like them whose health and well-being require treatment that the State seeks to deny them.

II. Standard of Review.

When reviewing the grant of a preliminary injunction, this Court "review[s] the district court's material factual findings for clear error, its legal conclusions de novo, and the court's equitable judgment—the ultimate decision to grant the injunction—for an abuse of discretion." *Heartland Acad. Cmty. Church* v. *Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003) (citation omitted); *June Med. Servs. L. L. C.* v. *Russo*, 140 S. Ct. 2103, 2121 (2020) ("In applying [this] standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.") (internal quotation marks and citations omitted).

III. All Plaintiffs Have Standing.

Defendants argue that some Plaintiffs lack standing to pursue some of their claims. This is incorrect, but in any event, it is not necessary for the Court to decide in this appeal, because there is no dispute that the Minor Plaintiffs have standing to bring their equal protection claim and, thus, seek a preliminary injunction. *See Heartland*

Acad. Cmty. Church, 335 F.3d at 689 ("it is not necessary for" the court to decide if certain plaintiffs have standing to bring certain claims when another plaintiff "has standing to bring its claim for a preliminary injunction").

A. Plaintiffs Have Standing to Challenge the Ban on "Gender Transition Procedures."

Defendants incorrectly argue that Plaintiffs lack standing to challenge what they refer to as the Ban's "prohibition of gender-reassignment surgery." (Defs. Br. at 24.) However, the Ban prohibits "gender transition procedures," which is defined to include surgery and other treatments Plaintiffs are receiving. ARK. CODE ANN. §§ 20-9-1502(a)-(b); (App. 54; R. Doc. 11-1, at 3; App. 62-63; R. Doc. 11-3, at 2-3; App. 76-77; R. Doc. 11-7, at 2-3). That Minor Plaintiffs are currently receiving care prohibited under this section is sufficient to establish standing to enjoin its enforcement. *See Webb ex rel. K.S.* v. *Smith*, 936 F.3d 808, 814 (8th Cir. 2019).

B. Plaintiffs Have Standing to Challenge the Private Right of Action.

Defendants incorrectly argue that the district court erred by enjoining them "from enforcing any provision of" the Ban (Add. 14; R. Doc. 64, at 13), because the law includes a private right of action. (Defs. Br. at 24.) But unlike the cases cited by Defendants, which involved laws enforced only through private rights of action, the Ban also has a government enforcement mechanism, and Plaintiffs, therefore, have standing to challenge the entire law. *Little Rock Family Planning Servs.* v. *Rutledge*,

397 F. Supp. 3d 1213, 1264 (E.D. Ark. 2019*), aff'd in part, dismissed in part on other grounds and remanded*, 984 F.3d 682 (8th Cir. 2021) (internal quotation marks and citation omitted) (rejecting the argument that the "plaintiffs lack standing to challenge the Acts' private rights of action . . . because each of the challenged Acts provide for criminal prosecution, civil penalties, and professional sanctions enforceable by the State").

C. The Doctor Plaintiffs Have Third-Party Standing.

The Doctor Plaintiffs have third-party standing to challenge the Ban. Courts "have generally permitted plaintiffs to assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *June Med. Servs. L. L. C.*, 140 S. Ct. at 2118-19 (2020) (quoting *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004) (emphasis in original)).

This Court has allowed medical practitioners to assert § 1983 claims on behalf of their patients to challenge restrictions on access to medical treatments, as has the Supreme Court. *See Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 293 F.3d 472, 478 (8th Cir. 2002); *see also Ayotte* v. *Planned Parenthood of N. New England,* 546 U.S. 320, 324-25 (2006); *Singleton* v. *Wulff*, 428 U.S. 106, 118 (1976). Defendants' assertion that doctors have a financial conflict of interest with their patients cannot be squared with this body of law.

Defendants argue that the Doctor Plaintiffs' patients do not face sufficient hindrance to pursue their own claims, because four patients are parties to this lawsuit. (Defs. Br. at 27.) However, some transgender individuals are unable to bring claims on their own behalf due to the sensitive and private nature of their healthcare and the legitimate fear of being targeted for discrimination should they bring suit. *See Grimm* v. *Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) ("[T]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity") (internal quotations and citations omitted); *Singleton*, 428 U.S. at 117 (third-party standing appropriate for doctors because patients "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit.").[13]

IV. The District Court Correctly Held That the Ban Likely Violates the Equal Protection Clause.

Plaintiffs are likely to succeed on their claim that the Ban violates the Equal Protection Clause. The Ban classifies based on both transgender status and sex and, therefore, triggers heightened equal protection scrutiny. As the district court held, Defendants cannot carry their heavy burden of showing that the law's prohibition on treatment related to "gender transition" substantially serves any important

[13] Defendants do not contest that the practitioners have first-party standing to challenge this law on equal protection grounds. (Defs. Br. at 28.)

governmental interest. (Add. 8-9; R. Doc. 64, at 7-8.) Given that Defendants' alleged concerns about the prohibited care apply to many other forms of treatment that are not prohibited, the law's relationship to Defendants' asserted interests is "so attenuated as to render the distinction arbitrary or irrational" and, therefore, unconstitutional under any level of scrutiny. *City of Cleburne, Tx.* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985).

A. The Ban Classifies Based on Transgender Status and Sex.

The Ban, on its face, differentiates based on a person's transgender status and sex. The text, purpose, and effect of the law is to bar treatment used for "gender transition," defined as "the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex." ARK. CODE ANN. § 20-9-1501(5).

1. The Ban Classifies Based on Transgender Status.

The Ban facially discriminates based on transgender status by prohibiting care related to "gender transition." ARK. CODE ANN. § 20-9-1502. A transgender person is someone with a gender identity that does not align with their sex assigned at birth. (App. 94; R. Doc. 11-11, at 4.) Only transgender people undergo "gender transition," (App. 96; R. Doc. 11-11, at 6), and the Ban singularly and explicitly prohibits any medical care prescribed to minors for this purpose. ARK. CODE ANN. § 20-9-1502.

Thus, by definition, the Ban uniquely prohibits care tied to the status of being transgender, creating a facial transgender status classification. *Cf. Lawrence* v. *Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("sodomy statute is directed toward homosexuals as a class," because "the conduct targeted by this law is conduct that is closely correlated with being homosexual").

The law likewise creates a transgender status classification by permitting medical treatments for non-transgender people while explicitly prohibiting the same treatments for transgender people. Under the Ban, a non-transgender adolescent is able to receive pubertal suppression, estrogen, testosterone suppression, testosterone, or chest surgery—including for purposes of affirming their gender identity—while a transgender adolescent cannot. (*See, e.g.*, App. 103; R. Doc. 11-11, at 13) (describing the use of testosterone suppression to address cisgender girls' symptoms of polycystic ovarian syndrome such as excess facial hair; and chest surgery to remove breast tissue from cisgender boys).

Though Arkansas claims it is the conduct of undergoing transition that is being targeted, not the status of being transgender, the Supreme Court has "declined to distinguish between status and conduct" in analogous contexts. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L.* v. *Martinez*, 561 U.S. 661, 689 (2010) (rejecting the idea that discrimination based on same-sex intimacy was not discrimination based on sexual orientation).

2. The Ban Classifies Based on Sex.

The Ban also discriminates based on sex in at least three ways.

First, discrimination against someone because they are transgender is a form of sex discrimination. As the Supreme Court recognized, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock* v. *Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020). While *Bostock* addressed Title VII of the Civil Rights Act, nothing about this aspect of Court's reasoning is limited to the statutory context.

Second, whether care is prohibited turns explicitly on a person's sex assigned at birth – referred to in the law as "biological sex." ARK. CODE ANN. § 20-9-1501(1). A person assigned male at birth can receive certain treatments, *e.g.*, testosterone, (*see* App. 103; R. Doc. 11-11, at 13; App. 125-26; R. Doc. 11-12, at 17-18), but a person assigned female at birth cannot, because that is "gender transition." The law's prohibition "cannot be stated without referencing sex," and "[o]n that ground alone, heightened scrutiny should apply." *Grimm*, 972 F.3d at 608 (internal citation omitted). *See also Bostock*, 140 S. Ct. at 1741-42 (Where the state "intentionally penalizes a person identified as male at birth for . . . actions that it tolerates in [someone] identified as female at birth . . . sex plays an unmistakable and impermissible role").

Third, the law prohibits care solely based on whether it comports with stereotypes about sex. Procedures are prohibited when they "alter features" the State

considers "typical" of a person's assigned sex at birth or when they "create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." ARK. CODE ANN. § 20-9-1501(4, 6). This is a "form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics." *Boyden* v. *Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018). It is undeniable that the Ban discriminates based on one's non-conformity with stereotypes related to sex, because the law allows the same treatments for individuals with intersex conditions (referred to in the Ban as disorders of sexual development), including surgery on intersex infants to bring their bodies into alignment with what is deemed typical of their assigned sex. *See* ARK. CODE ANN. § 20-9-1502(B)(1).

The fact that one sex is not categorically treated worse than another (Defs. Br. at 38) does not change the fact that the law discriminates based on sex for purposes of equal protection. "[T]he Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring); *see also Waters* v. *Ricketts*, 48 F. Supp. 3d 1271, 1282 (D. Neb.) ("The 'equal application' of [bans on same-sex marriage] to men and women as a class does not remove them from intermediate scrutiny"), *aff'd*, 798 F.3d 682 (8th Cir. 2015); *cf. Loving* v. *Virginia*, 388 U.S. 1, 8 (1967) (rejecting "the notion that the mere 'equal application' of a statute

containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discriminations").

3. Defendants Fail to Refute That the Ban Classifies Based on Transgender Status and Sex.

Defendants are wrong in claiming that the Ban classifies based on medical procedures rather than transgender status or sex. Their argument that the banned treatments are different procedures when provided to cisgender adolescents because the impact of the treatment is different confuses the asserted *justification* for the law with the classification. (*See* Defs. Br. at 31-32.) The only way to determine whether a treatment is banned under the law is to identify the patient's sex assigned at birth and whether the treatment is used for "gender transition." *See* ARK. CODE ANN. § 20-9-1502.[14] As such, it classifies based on transgender status and sex, not medical procedure.

[14] Unlike the limited insurance exclusion at issue in *Hennessy-Waller* v. *Snyder*, 529 F. Supp. 3d 1031, 1034 (D. Ariz. 2021), *appeal filed sub nom*. *D.H.* v. *Snyder*, No. 21-15668 (9th Cir. docketed Apr. 19, 2021), cited by Defendants, (Defs. Br. at 41), the Ban categorically prohibits *any* medical treatment related to gender transition for minors, not just a single procedure. The district court in *Hennessy-Waller* concluded that the prohibition was not sex discrimination, because the exclusion could have been based on a permissible basis related uniquely to the procedure. *Hennessy-Waller*, 529 F. Supp. 3d at 1045. The situation here is vastly different, where no medical treatment related to "gender transition" for minors is permitted.

Defendants further argue the Ban does not classify based on transgender status or sex, because the law bans "only the hormonal procedures that present particular risks, most notably, infertility." (Defs. Br. at 32.) But the law does not create a classification based on risk of infertility. The prohibition encompasses any "gender transition procedure" regardless of the impact on fertility and does not cover any other procedure that impacts fertility. *See* ARK. CODE ANN. § 20-9-1502. Indeed, some surgical interventions performed on infants with intersex conditions are sterilizing but are explicitly allowed by the Ban. (App. 104; R. Doc. 11-11, at 14; App. 127; R. Doc. 11-12, at 19.)

Defendants also claim that, because the prohibition is limited to minors, the law creates only an age classification. (Defs. Br. at 29-30.) But a law "need not injure *all* members of a protected class for it to constitute sex discrimination." *Boyden*, 341 F. Supp. 3d at 996 (emphasis in original); *see also Craig* v. *Boren*, 429 U.S. 190, 210 (1976) (recognizing as a sex classification a law permitting the purchase and sale of alcohol to young women beginning at 18 and to young men beginning at 20).

B. Classifications Based on Sex and Transgender Status Independently Trigger Heightened Equal Protection Scrutiny.

The district court correctly held that the Ban must be tested under heightened scrutiny, because it discriminates on the basis of both sex, which under long-standing precedent is subject to heightened scrutiny, and transgender status, which meets all the indicia of a suspect or quasi-suspect class. (Add. 5; R. Doc. 64, at 4.)

First, the Ban must be tested under heightened scrutiny, because it discriminates on the basis of sex. "[A]ll gender-based classifications today warrant heightened scrutiny." *United States* v. *Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted). There is no exception for sex discrimination based on physiological or biological characteristics. *See Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 70, 73 (2001) (applying heightened scrutiny to different standard of establishing citizenship through fathers and mothers, which was based on biological differences related to procreation).

Second, this Court should follow the Fourth and Ninth Circuits and hold that government discrimination based on transgender status separately triggers heightened scrutiny.[15] *Grimm*, 972 F.3d at 611-13; *Karnoski* v. *Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019). Transgender people satisfy all the indicia of a suspect class: (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they may be defined as a discrete group by obvious, immutable, or distinguishing characteristics; and

---

[15] The fact that this Court declined to find that sexual orientation is a suspect classification in *Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), is not relevant to the question of whether transgender status meets the test for heightened scrutiny. Many courts have held that transgender status classifications trigger heightened scrutiny, even in circuits that have held that sexual orientation does not. *See, e.g., Evancho* v. *Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist.* v. *U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 872-73 (S.D. Ohio 2016); *M.A.B.* v. *Bd. of Educ. Of Talbot Cty.*, 286 F. Supp. 3d 704, 718-19 (D. Md. 2018).

(4) they are a minority group lacking political power. *See, e.g.*, *Windsor* v. *United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744, 770 (2013).

History of discrimination. "There is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611 (citation omitted). As the Fourth Circuit detailed in *Grimm*, there is extensive data documenting the staggering discrimination that transgender people face in all aspects of life. *Grimm*, 972 F.3d at 611-12. This pattern of discrimination is long-standing, including through formal governmental action. Expression of a person's transgender identity was criminalized for much of the nineteenth and twentieth centuries through cross-dressing laws. *See* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality,* 34 Seattle U. L. Rev. 133, 152-53, 171 (2010). More recently, Congress explicitly excluded transgender people from protection under four civil rights statutes over the past thirty years. *See* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 556 (2016).[16]

---

[16] Defendants complain of a lack of record evidence demonstrating that transgender people have been subjected to a history of purposeful discrimination. (Defs. Br. at 34.) But when courts decide the legal question of what level of equal protection scrutiny applies to a classification, they are not confined to record evidence presented by the parties. *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (referencing diverse sources including history books and law review

Defining characteristic. Transgender people have a defining characteristic that "bears no relation to ability to perform or contribute to society." *See Cleburne*, 473 U.S. at 441. Defendants claim that because transgender people have different experiences, they do not share a "distinguishing characteristic," (Defs. Br. at 34-35); but this critique would be true for every suspect class. The relevant question is not whether every person in the class is the same but rather whether they share a characteristic that "tend[s] to be irrelevant to any proper legislative goal." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982). Transgender people share the defining characteristic of having "a gender identity that differs from the[ir] sex designated at birth." (App. 94; R. Doc. 11-11, at 4.) And "[s]eventeen of our foremost medical, mental health, and public health organizations agree that being transgender implies no impairment on judgment, stability, reliability, or general social or vocational capabilities." *Grimm*, 972 F.3d at 612 (internal quotation marks omitted).

Obvious, immutable, or distinguishing characteristics. There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. For example, heightened scrutiny applies to classifications based on alienage and "illegitimacy" even though both classifications are subject to change. *Windsor*,

---

articles in its analysis supporting its conclusion that classifications based on sex are inherently suspect); *see also Grimm*, 972 F.3d at 611-12 (referencing congressional records and law review articles).

699 F.3d at 183 n.4; *see Nyquist* v. *Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting argument that alienage did not deserve strict scrutiny, because it was mutable). "Rather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should be required* to change because it is central to a person's identity." *Wolf* v. *Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis.) (emphasis in original), *aff'd sub nom; Baskin* v. *Bogan*, 766 F.3d 648 (7th Cir. 2014); *see also Latta* v. *Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014). "A transgender person's awareness of themselves as male or female is no less foundational to their essential personhood and sense of self than it is for those [who are not transgender]." *Grimm*, 972 F.3d at 624 (Wynn, J., concurring).

Defendants' arguments about the mutability of transgender status not only apply the wrong standard but also distort the record.[17] "A person's gender identity . . . is not subject to voluntary control, [and] cannot be voluntarily changed." (App. 94; R. Doc. 11-11, at 4.)

Political powerlessness. The final factor concerns whether the class of persons is "in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. As this legislative session in Arkansas

---

[17] Defendants misrepresent the positions of WPATH and other professional associations, falsely claiming that they agree transgender status is not immutable. (Defs. Br. at 35-37); (*see* App. 789; R. Doc. 45-21, at 6.)

alone demonstrates, transgender people are not. The fact that some groups have opposed this particular law does not change the staggering legislative landscape of 2021, where lawmakers across the country introduced over 100 bills restricting rights for transgender people, of which at least 13 became law.[18]

C. Defendants Failed to Carry Their Burden Under Heightened Scrutiny.

Defendants wrongly assume that the Ban enjoys a presumption of constitutionality. (Defs. Br. at 28.) Heightened scrutiny imposes a burden "rest[ing] entirely on the State" to demonstrate an "exceedingly persuasive" justification for the government's differential treatment. *Virginia*, 518 U.S. at 533. The government "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. (internal quotation marks and citations omitted). Defendants have not met their burden.

1. The Ban Is Not Substantially Related to Protecting Youth from Ineffective Treatment.

Defendants attempt to justify the Ban by claiming that the prohibited treatments offer "no discernible mental-health benefits." (Defs. Br. at 44.) Despite overwhelming

---

[18] Sam Levin, "In an extraordinary attack on trans rights, conservative state lawmakers proposed more than 110 anti-trans bills this year," *Guardian* (June 14, 2021), https://www.theguardian.com/society/2021/jun/14/anti-trans-laws-us-map.

evidence presented below that the banned care substantially improves mental health outcomes, Defendants baselessly assert that there is "no evidence that gender-transition procedures relieve any of those symptoms" (Defs. Br. at 57), and ask this court to set aside the district court's well-supported findings. (*See* Add. 8; R. Doc. 64, at 7.)

There is nothing in the record below to contradict the district court's finding that terminating care for the individual Minor Plaintiffs will "cause irreparable physical and psychological harms" (Add. 9; R. Doc. 64, at 8), let alone evidence that would warrant a determination that the finding was clearly erroneous. And nowhere in their brief do Defendants mention the testimony of three of the Minor Plaintiffs and their parents documenting the substantial benefits that have come from their treatment. (App. 54-55; R. Doc. 11-1, at 3-4; App. 58-59; R. Doc. 11-2, at 3-4; App. 62-63; R. Doc. 11-3, at 2-3; App. 65; R. Doc. 11-4, at 2; App. 76-77; R. Doc. 11-7, at 2-3; App. 81; R. Doc. 11-8, at 3.)

In addition to the unrebutted evidence presented about the Minor Plaintiffs, Defendants ignore Plaintiffs' expert declarations providing testimony that the banned treatments are effective, including testimony of:

- A pediatric endocrinologist with experience providing gender-affirming care to hundreds of transgender minors discussing the substantial benefits of the care to her patients (*see* App. 91, R. Doc. 11-11);
- A psychiatrist who conducts scientific research on the well-being of transgender minors identifying multiple studies demonstrating the efficacy of the banned treatments (*see* App. 911; R. Doc. 51-1);

- A medical ethicist and pediatrician explaining that the level of evidence supporting the banned treatment is comparable to or greater than the level of evidence supporting other widely accepted pediatric medical treatments (*see* App. 123, 127; R. Doc. 11-12, at 15, 19); and
- Multiple doctors explaining that the treatments Arkansas seeks to ban are supported and recommended by every major medical association in the United States (*see* App. 96; R. Doc. 11-11, at 6; App. 914-15; R. Doc. 51-1, at 4-5.)

This extensive record supports the district court's finding that "[g]ender-affirming treatment is supported by medical evidence that has been subject to rigorous study." (Add. 8; R. Doc. 64, at 7.) The court's well-supported findings do not leave a "definite and firm conviction that a mistake has been committed," as is required to overturn factual findings on appeal. *Lawn Managers, Inc.* v. *Progressive Lawn Managers, Inc.*, 959 F.3d 903, 913 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 819 (2020).[19]

Even if the Court were to review the record evidence de novo, Defendants' experts fail to support their claim that gender-affirming care is ineffective. They quarrel with the quality of the evidence that has found this care to be effective, specifically suggesting that only randomized clinical trials would suffice. (Defs. Br. at 14.) But undisputed expert testimony showed that the quality of evidence supporting

[19] Defendants complain that the district court "did not acknowledge—let alone consider—Defendants' evidence." (Defs. Br. at 20.) But there is no basis for the claim that the court did not consider their evidence. The fact that the court did not find it persuasive does not mean it did not consider it. Additionally, the court was informed that two of Defendants' proffered experts have been found not credible by other federal courts. (Reply Brief at 21-23.)

the banned treatment is comparable to or greater than the quality of evidence supporting other widely-accepted pediatric medical treatments, which rarely are supported by randomized clinical trials. (*See* App. 122-23, 127; R. Doc. 11-12, at 14-15, 19). Defendants failed to offer any argument why gender-affirming treatment should be singled out for a uniquely high evidentiary standard of efficacy.

Defendants assert that there is an "international controversy" about gender-affirming medical care for adolescents. But the evidence below makes clear that none of the countries mentioned by Defendants have banned care. (*See* App. 951-955; R. Doc. 51-1, at 41-45.) And none of the government reports cited by Defendants or their experts supports a ban on treatment. (*See id*.) Defendants rely heavily on the conclusions of a UK court's decision in *Tavistock* to support their claims about "inefficacy," but that opinion has since been overturned. (Defs. Br. at 45-46.) In overturning the lower court opinion, the Court of Appeal held that the lower court should not have made "controversial factual findings" and specifically rejected the idea that "the prescription of puberty blockers was in a special category of medical intervention" requiring a divergence from typical consent practices. *Bell* v. *Tavistock & Portman NHS Found. Trust*, [2021] EWCA (Civ) 1363, at ¶¶ 48, 62-64.

2. The Ban Is Not Substantially Related to Protecting Youth From Infertility and Other Alleged Harms.

Defendants further attempt to defend the law by asserting that the banned healthcare can result in infertility and poses risks of other harms. (Defs. Br. at 45.) But

the Ban is not substantially related to the government's interest in protecting against these harms.

The law does not ban treatments based on risk of infertility and is grossly under- and over-inclusive with regard to this purported interest. Neither puberty blockers nor chest surgery have any impact on fertility but are banned under the law. (App. 104; R. Doc. 11-11, at 14.) At the same time, the Ban explicitly permits genital surgeries on intersex minors despite the fact that they can be irreversibly sterilizing. *Id*.

As for other potential harms cited by Defendants, such as risk of high blood pressure and cardiovascular disease, these outcomes are rare when treatment is provided under a clinician's supervision. (App. 104-105; R. Doc. 11-11, at 14-15.) In any event, potential risks of puberty blockers or hormone therapy exist whether they are provided for gender transition or for other purposes that are not banned. *Id.*

Defendants also attempt to justify the Ban by asserting that the prohibited treatments are irreversible. (Defs. Br. at 44.) Not all of the banned treatments are irreversible. (*See* App. 97-98; R. Doc. 11-11, at 7-8) (puberty blockers are fully reversible). In any event, this is not a sound basis to single out gender-affirming care for prohibition, because most surgeries and many other forms of medical treatment are also irreversible. The State has not drawn a line at irreversible treatments but, rather, at prohibited "gender transition procedures," regardless of their reversibility.

Defendants' focus on irreversibility appears to be tied to their claim that regret among those who have undergone gender transition is common, despite evidence showing that it is rare. (*See* App. 927-31; R. Doc. 51-1, at 17-21.) They cite only anecdotes to claim that the provision of gender-affirming care "on demand" without proper evaluation leads to frequent regret. (Defs. Br. at 6, 9-10.) As discussed above, the rushed provision of care without evaluation would be inconsistent with prevailing protocols. (*See* App. 938-40; R. Doc. 51-1, at 28-30.) If individual doctors are deviating from the protocols and providing inappropriate care, that does not explain a ban on care for those who have been properly assessed to need it. There are mechanisms available to state medical boards to regulate the conduct of individual doctors without taking away care from those who need it. (App. 1001; R. Doc. 51-3, at 10.) The Ban's wholesale prohibition of care is not substantially related to this asserted concern.

Finally, most medical care comes with potential risks, some of which can be very serious. (App. 125-26; R. Doc. 11-12, at 17-18.) Patients, parents, and doctors weigh those risks and decide if they are outweighed by the benefits of the care. (App. 126-27; R. Doc. 11-12, at 18-19.) The evidence presented below, including the uncontested evidence about the Minor Plaintiffs, showed that for many minors suffering from gender dysphoria, the benefits of treatment far outweigh the risks. (*See*, *e.g.*, App. 124-25; R. Doc. 11-12, at 16-17.) Nothing about gender-affirming care warrants treating it

differently than all other medical care and denying patients, parents, and doctors the ability to weigh the benefits and risks and access treatments they deem to be beneficial. (App. 123; R. Doc. 11-12, at 15.)

D. The Ban Fails Any Level of Scrutiny.

Though the Ban is properly subject to heightened scrutiny, it fails any level of scrutiny. The stated justifications for banning gender-affirming care for minors "ma[k]e no sense in light of how" Arkansas treats medical care provided for purposes other than "gender transition." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 366 n.4 (2001) (citation omitted). What the law does is "so far removed from [the asserted] justifications that . . . it [is] impossible to credit them." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996).

The Ban is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. If the object of the law, as Defendants suggest, is to ban care that can cause infertility, or that has potential risks, or that is not supported by particular standards of evidence, or that is "irreversible," then the law is entirely too narrow, covering only a tiny subset of care that falls into those categories and specifically authorizing irreversible surgical treatments that can cause infertility and that are not supported by evidence when provided to infants with intersex conditions. (*See* Defs. Br. at 44-45; *see also* App. 127; R. Doc. 11-12, at 19.) The law is likewise too broad for all of the State's alleged concerns. If the State were seeking to prevent treatment that can cause infertility, it

would not prohibit gender-affirming chest surgeries or puberty blockers. (App. 104; R. Doc. 11-11, at 14.) If the State were seeking to prevent treatment that is irreversible, it would not prohibit puberty blockers. (App. 97-98; R. Doc. 11-11, at 7-8.)

There is no rational basis to conclude that allowing gender dysphoric adolescents to receive gender-affirming care that they, their parents, and their doctors agree is medically necessary "would threaten legitimate interests of [Arkansas] in a way that" allowing other types of care "would not." *Cleburne*, 473 U.S. at 448; *see also* *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (health risks of birth control pills not a rational basis for banning access for unmarried people while allowing for married people, where risk is the same).

The purpose of the Ban is not to protect minors by limiting care that may cause particular harms, but rather to limit care that affirms their gender identity when it differs from their sex assigned at birth. Indeed, this is spelled out in the text of the law itself. Under any level of scrutiny, laws with the "peculiar property of imposing a broad and undifferentiated disability on a single named group" are "invalid." *Romer*, 517 U.S. at 632. That is precisely what Arkansas's Ban does to transgender minors, and it is therefore unconstitutional under any level of scrutiny.

V. The District Court Correctly Held That the Ban Likely Violates Parents' Fundamental Rights.

Defendants ignore the parental autonomy claims that Plaintiffs have brought and instead incorrectly claim that the district court created a new substantive due process

right "to subject a child to experimental medical procedures." (Defs. Br. at 48-49.) The Ban infringes on parents' well-established fundamental right to make decisions regarding the "care, custody, and control" of their children, which includes the right for parents to "seek and follow medical advice" for their children. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). Defendants try to narrow the right at stake but fail to address the legal principles established in these cases. (Defs. Br. at 49-50); *see Parham*, 442 U.S. at 602 (fundamental right "includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice"); *Troxel*, 530 U.S. at 65-66 ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Kanuszewski* v. *Mich. Dep't of Health and Human Servs.*, 927 F.3d 396, 419 (6th Cir. 2019) ("[P]arents' substantive due process right 'to make decisions concerning the care, custody, and control' of their children includes the right to direct their children's medical care." (citation omitted)).

Contrary to Defendants' claim (Defs. Br. at 50), this fundamental right of parents does not derive from their children's rights. *See, e.g.*, *Michael H.* v. *Gerald D.*, 491 U.S. 110, 130 (1989) (analyzing parents' fundamental liberty interest in maintaining a filial relationship with their child while noting that "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent"); *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-

35 (1925) (a ban on private schools violated the "liberty of parents and guardians to direct the upbringing and education of [their] children," without recognizing a correlative right of the child).

Because the Ban infringes parents' fundamental right to seek medical care for their children, it must be tested under strict scrutiny. *See Washington* v. *Glucksburg*, 521 U.S. 702, 719-21 (1997) (infringement of a fundamental liberty interest, such as "direct[ing] the . . . upbringing of one's children" must be "narrowly tailored to serve a compelling state interest." (citation omitted)). As discussed above, the Ban fails heightened scrutiny and rational basis review and, therefore, fails the more stringent strict scrutiny that must be satisfied to justify governmental intrusion into the Parent Plaintiffs' fundamental rights.[20]

VI. The District Court Correctly Held That the Ban's Referral Prohibition Likely Violates the First Amendment.

The district court correctly held that the Ban's prohibition against referrals for the banned care is a "presumptively unconstitutional" content-based and viewpoint discriminatory regulation. (Add. 12; R. Doc. 64, at 11 (citing *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)).)

---

[20] Additionally, the district court correctly held that the Ban is not narrowly tailored to serve Defendants' asserted interests, since the Ban prohibits gender-affirming care without regard to individual patients' needs. (Add. 11; R. Doc. 64, at 10.)

A. The Referral Prohibition Restricts Speech, Not Conduct.

Without citing authority, Defendants claim the Referral Prohibition "prohibits only conduct—not speech." (Defs. Br. at 52.) But a referral is the act of providing information to assist a patient in seeing another health care provider and is, therefore, speech. *See Bartnicki* v. *Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the act[] of 'disclosing' . . . information do[es] not constitute speech, it is hard to imagine what does fall within that category.") (citations omitted); *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see Valley Fam. Plan.* v. *State of N.D.*, 489 F. Supp. 238, 242 (D.N.D. 1980) ("The referral of persons to a physician who performs abortions is a form of speech protected by the First Amendment.").

Defendants point to the WPATH SOC advising that a referral "should provide documentation—in the chart and/or referral letter—of the patient's personal and treatment history, progress, and eligibility [for treatment]." (App. 687; R. Doc. 45-19, at 32.) But providing this documentation falls within the First Amendment's protections. *See Bartnicki*, 532 U.S. at 527 ("[T]he delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is . . . 'speech'. . . ."); *Sorrell*, 564 U.S. at 570 (finding the "sales, transfer, and use of prescriber-identifying information" to be speech). In any event, the following sentence of the WPATH SOC notes that referrals

involve "recommend[ing]" treatments, so reliance on the WPATH SOC does not support Defendants' position that a referral is just a ministerial transfer of documents.

B. No First Amendment Exception Is Applicable.

Defendants argue that the Referral Prohibition falls within Arkansas's right to "regulate professional conduct, even though that conduct incidentally involves speech." (Defs. Br. 53 (citing *Nat'l Inst. of Fam. & Life Advocs. ("NIFLA")* v. *Becerra*, 138 S. Ct. 2361, 2372, (2018)).) But *NIFLA* makes clear that "'professional speech' [is not] a separate category of speech." 138 S. Ct. at 2371. Instead, speech is only afforded less protection when (1) laws "require professionals to disclose factual, noncontroversial information in their 'commercial speech[,]'" which is not the case here; and (2) the state regulates "conduct that incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372.

Defendants' cited cases do not support the restriction here. *Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), concerned an informed consent requirement, which as later explained in *NIFLA*, is "'firmly entrenched in American tort law.'" 138 S. Ct. at 2373 (citations omitted). As other circuits have recognized, *Casey* "'did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review.'" *Wollschlaeger* v. *Governor, Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (*quoting Stuart* v. *Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014). *Ohralik* v. *Ohio State Bar Association*'s holding was "narrow and depended

upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." *Edenfield* v. *Fane*, 507 U.S. 761, 774 (1993) (discussing *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)). And *Rust* v. *Sullivan* concerned whether the State could fund only certain speech, not whether it could prohibit speech. 500 U.S. 173 (1991).

The Referral Prohibition is not a regulation of conduct to which speech is incidental, because it targets referrals directly, not simply conduct of which referrals are a part. *See Sorrell*, 564 U.S. at 567 (law "impose[d] more than an incidental burden on protected expression," because "[b]oth on its face and in its practical operation, [it] impose[d] a burden based on the content of speech and the identity of the speaker"). And, even if it was, it would still require justification that Defendants cannot meet. *See Cap. Associated Indus., Inc.* v. *Stein*, 922 F.3d 198, 209 (4th Cir. 2019) ("[I]intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech").

C. The Referral Prohibition Cannot Withstand Any Level of Review.

The Ban fails both heightened scrutiny and rational basis review, as discussed above, and, therefore, necessarily fails strict scrutiny. The Referral Prohibition also fails for two additional reasons. *First*, the State lacks a compelling or even legitimate interest in prohibiting referrals. Contrary to Defendants' arguments, courts have long held that states cannot infringe the First Amendment simply by invoking its "interest

in the regulation of professional conduct." *Reed*, 576 U.S. at 167 (citations omitted). And, courts have rejected the notion that States have an interest in protecting against "fear that people [will] make bad decisions if given truthful information." *See Thompson* v. *W. States Med. Ctr*., 535 U.S. 357, 374 (2002); *see also Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 794 (2011).

Second, the Referral Prohibition is not narrowly tailored. Defendants have offered nothing to meet their burden that "forbidding [the speech is] a necessary as opposed to merely convenient means of achieving its interests." *Thompson*, 535 U.S. at 373; *see also 281 Care Comm.* v. *Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) (law not narrowly tailored where government did not "dispel the generally accepted proposition that counterspeech may be a logical solution to the interest advanced in this case.").

VII. The District Court Correctly Held That the Other Preliminary Injunction Factors Weighed in Favor of the Injunction.

The district court held, based on the evidence, that without an injunction Plaintiffs would suffer irreparable harm, and the balance of equities weighed in favor of an injunction (Add. 10, 11; R. Doc. 64, at 9, 10). The factual findings underlying this holding were not clearly erroneous, and the court's equitable judgment to grant the injunction was not an abuse of discretion.

A. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

After being presented with extensive evidence, the district court properly held that if the Ban were to take effect, Plaintiffs would suffer serious and irreparable harm for which there is no adequate remedy at law. (Add. 10, 11; R. Doc. 64, at 9, 10.) The court made factual findings that the law "will cause irreparable physical and psychological harms to the [Minor] Plaintiffs by terminating their access to necessary medical treatment," including forcing them to undergo endogenous puberty, "putting them at high risk of gender dysphoria and lifelong physical and emotional pain." *(Id*. at 8-9.) The court further found, based on the record evidence, that the Parent and Doctor Plaintiffs would face irreparable harms, including, for the Parents, watching their children experience severe pain or uprooting their families, and for the Doctors, choosing between breaking the law and providing appropriate and needed care to their patients. (*Id*. at 9.) These findings were supported by expert testimony and uncontested Plaintiff declarations. (*See supra* at 14-19.) Defendants offer no basis to disturb these findings.

B. The Balance of Equities Favors Plaintiffs, and an Injunction Serves the Public Interest.

The threat of harm to Plaintiffs far outweighs Defendants' interest in immediately enforcing the Ban. As described above, the harm to Plaintiffs from allowing the Ban to go into effect would be tangible, immediate, and irreparable. As the district court noted, whatever interest the State may have in enforcing the Ban

during the pendency of this case "pales in comparison to the certain and severe harm faced by Plaintiffs." (Add. 10; R. Doc. 64, at 9.) Because the balance of equities decidedly favors Plaintiffs, it was not an abuse of discretion for the court to preserve the status quo until the case can be decided on the merits. *Dataphase Sys., Inc.* v. *C L Sys., Inc*., 640 F.2d 109, 113 (8th Cir. 1981).

Defendants attempt to recast the preliminary injunction as upsetting the status quo, claiming that it "opens the door" to gender-affirming care. (*See* Defs. Br. at 56-57.) But the Minor Plaintiffs (and numerous other Arkansans) have been receiving gender-affirming care for months or longer, and the district court correctly held that it would upset this status quo if the Ban were to take effect. (Add. 11; R. Doc. 64, at 10.)

Because Plaintiffs are likely to prevail on their constitutional claims, the preliminary injunction best serves the public interest. *D.M. ex rel. Bao Xiong* v. *Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019).

VIII. The District Court Did Not Abuse Its Discretion in Issuing a Facial Injunction.

The scope of the injunction was not an abuse of the district court's discretion. Despite stating the correct standard to justify a facial injunction—that "no set of circumstances exists under which the Act would be valid," Defendants ask the Court to misapply that standard, suggesting that, because not every adolescent with gender dysphoria has a medical need for gender-affirming care, the Ban could be validly applied to those who do not need it. But the "proper focus of the constitutional inquiry

is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles, Cal.* v. *Patel*, 576 U.S. 409, 418 (2015).[21]

CONCLUSION

For the reasons stated above, the Court should affirm the district court's order.

Dated: January 12, 2022

Respectfully submitted,

/s/ *Leslie Cooper*
Leslie Cooper
Chase Strangio*
James Esseks
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
Telephone: (917) 345-1742
lcooper@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
Attorneys for the Plaintiffs

Beth Echols, Ark. Bar No. 2002203
Christopher Travis, Ark. Bar No. 97093
Drake Mann, Ark. Bar No. 87108
Gill Ragon Owen, P.A.
425 W. Capitol Avenue, Suite 3800
Little Rock, AR 72201
Telephone: (501) 376-3800
echols@gill-law.com
travis@gill-law.com
mann@gill-law.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.
Attorneys for the Plaintiffs

[21] Defendants' reliance on *Brakebill* v. *Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) is misplaced, because that case involved a law that was found to be constitutional as applied to the "vast majority of residents." Here, any application of the Ban would be unconstitutional.

Breean Walas, Ark. Bar No. 2006077
Walas Law Firm, PLLC
P.O. Box 4591
Bozeman, MT 59772
Telephone: (501) 246-1067
breean@walaslawfirm.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.
Attorneys for the Plaintiffs

Gary L. Sullivan, Ark. Bar No. 92051
Sarah Everett, Ark. Bar No. 2017249
Arkansas Civil Liberties Union Foundation, Inc.
904 W. 2nd Street Little Rock, AR 72201
Telephone: (501) 374-2842
Gary@acluarkansas.org
sarah@acluarkansas.org
Attorneys for the Plaintiffs

Garrard R. Beeney*
Jonathan J. Ossip*
Brandyn J. Rodgerson*
Alexander S. Holland*
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Telephone: (212) 558-4000
beeneyg@sullcrom.com
ossipj@sullcrom.com
rodgersonb@sullcrom.com
hollanda@sullcrom.com
Attorneys for the Plaintiffs

Laura Kabler Oswell*
Duncan C. Simpson LaGoy*
Sullivan & Cromwell LLP
1870 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 461-5600
oswell@sullcrom.com
simpsond@sullcrom.com
Attorneys for the Plaintiffs

*Admitted pro hac vice

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of FED. R. APP. P. 27(d)(2)(A), because it contains 12,663 words, excluding the parts exempted by FED. R. APP. P. 32(f).

Pursuant to FED. R. APP. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of FED. R. APP. P. 32(a)(5)-(6), because it has been prepared in proportionally spaced typeface with 14-point Times New Roman and uses the word-processing system Microsoft Word.

Additionally, pursuant to Eighth Circuit Local Rule 28A(h)(2), the undersigned counsel certifies that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ *Breean Walas*
Breean Walas

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system. I further certify that upon approval by the Clerk, I will serve paper copies of the foregoing document to Defendants-Appellants by mailing a true and correct copy thereof to their attorneys of record at the address on file with the Clerk.

/s/ *Breean Walas*
Breean Walas