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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES: **PAGE**

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

RULE:

MISCELLANEOUS:

MISCELLANEOUS (continued): **PAGE**

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INTEREST OF THE UNITED STATES

The United States has a strong interest in this case, which involves a challenge to an Arkansas statute that prohibits certain medical care for minors who are transgender. The United States is charged with protecting the civil rights of individuals seeking nondiscriminatory access to healthcare in a range of healthcare programs and activities under Section 1557 of the Affordable Care Act, 42 U.S.C. 18116. The Department of Justice, in particular, is further charged with the coordination and implementation of federal nondiscrimination laws that protect

individuals from discrimination on the basis of sex in a wide range of federally funded programs and activities, including the provision of healthcare. Exec. Order No. 12,250, § 1-201, 3 C.F.R. 298 (1980 Comp.). The United States also has a strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender, and intersex. The President issued an Executive Order that recognizes the right of all people to be "treated with respect and dignity" and receive "equal treatment" regardless of their gender identity or sexual orientation. Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE AND APPOSITE CASES

Whether the district court correctly ruled that, for purposes of obtaining a preliminary injunction, plaintiffs are likely to succeed on the merits of their claim that Arkansas Act 626 violates the Equal Protection Clause because it prohibits certain medical care for transgender minors alone.[1]

Bostock v. *Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020)

United States v. *Virginia*, 518 U.S. 515 (1996)

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985)

[1] The United States takes no position on any other issue presented in this case.

Grimm v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021)

STATEMENT OF THE CASE

1. Act 626

The Arkansas Legislature voted to override the Governor's veto and passed House Bill 1570, the Arkansas Save Adolescents from Experimentation (SAFE) Act, 2021 Ark. Acts 626 (Ark. Code Ann. §§ 20-9-1501 to 20-9-1504 (2021)) (Act 626). Act 626 prohibits healthcare professionals from providing "gender transition procedures to any individual under eighteen (18) years of age" or providing a referral for such procedures. Ark. Code Ann. § 20-9-1502(a) and (b). A healthcare professional violating the Act is deemed to have engaged in "unprofessional conduct" and is "subject to discipline" by the appropriate entity. Ark. Code Ann. § 20-9-1504(a). That healthcare professional may also be subject to an action for damages and injunctive relief for an "actual or threatened" violation of the Act. Ark. Code Ann. § 20-9-1504(b). The Arkansas Attorney General may bring an action to enforce compliance with the statute. Ark. Code Ann. § 20-9-1504(f)(1).

Act 626 defines "[g]ender transition" 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, and may involve social, legal, or physical changes." Ark. Code

Ann. § 20-9-1501(5).[2] The prohibited "[g]ender transition procedures" are any "medical or surgical service," including "physician's services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition," if that service seeks to:

> (i) Alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex; or
>
> (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or nongenital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.

Ark. Code Ann. § 20-9-1501(6)(A).

Act 626 exempts certain procedures from its definition of gender transition procedures, including: (i) "[s]ervices to persons born with a medically verifiable disorder of sex development"; (ii) services provided after a diagnosis of a disorder of sexual development "through genetic or biochemical testing"; (iii) treatment of any "injury, infection, disease, or disorder" caused by or exacerbated by "the

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[2] The Act defines "[b]iological sex" as the "biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective experience of gender." Ark. Code Ann. § 20-9-1501(1).

performance of gender transition procedures"; or (iv) procedures undertaken to treat a "physical disorder, physical injury, or physical illness" that places the individual in "imminent danger of death or impairment of major bodily function unless surgery is performed." Ark. Code Ann. §§ 20-9-1501(6)(B), 20-9-1502(c).[3]

The law took effect on July 28, 2021. See Ark. Att'y Gen., Opinion Letter No. 2021-029 (May 20, 2021), https://perma.cc/AQ8N-FANP.

2. Procedural History

Plaintiffs are four transgender minors living in Arkansas, their parents, and two healthcare providers. R.Doc. 1, at 4-8.[4] Each minor plaintiff is either currently receiving or imminently will receive medical care that would be prohibited by Act 626. R.Doc. 1, at 4-7.

Plaintiffs filed suit in the Eastern District of Arkansas against the Arkansas Attorney General and Arkansas State Medical Board members in their official

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[3] The term "disorder of sexual development" refers to people who are born intersex. See, *e.g.*, R.Doc. 60, at 56 (referring to "intersex children or children born with disorders of sexual development"). "Intersex" is an umbrella term for the many possible differences in sex traits or reproductive anatomy compared to the usual two ways that human bodies develop, including differences in genitalia, hormones, internal anatomy, brain anatomy, brain development, or chromosomes. Approximately 1.7% of people are born intersex. See Anne Fausto-Sterling, *The Five Sexes, Revisited*, The Sciences 19-20 (July-Aug. 2000), https://perma.cc/EA7R-KKRK.

[4] "R.Doc. ___" refers to documents filed in the district court. "Br. ___" refers to the Defendants-Appellants' opening brief.

capacities. R.Doc. 1, at 1, 7-8. Plaintiffs challenged Act 626 under 42 U.S.C. 1983, and, as relevant here, allege that the statute violates the Equal Protection Clause. R.Doc. 1, at 41-43. Plaintiffs sought a preliminary injunction to prohibit defendants from enforcing Act 626 during this litigation. R.Doc. 12. The United States filed a Statement of Interest (SOI) (R.Doc. 19) supporting that motion, addressing plaintiffs' likelihood of success on the merits of their equal protection claim.

After a hearing, the district court ruled from the bench, granting plaintiffs' motion for a preliminary injunction. R.Doc. 60. The court held that heightened scrutiny applied to plaintiffs' equal protection claim, but indicated that plaintiffs were likely to succeed under any standard of review. R.Doc. 60, at 63-64, 66. The court also concluded that the State's purported interest in protecting minors was not credible. R.Doc. 60, at 68.

The district court later issued a supplemental order providing additional justifications for its ruling. R.Doc. 64. The court clarified that heightened scrutiny applied to plaintiffs' equal protection claim because "Act 626 rests on sex-based classifications and because 'transgender people constitute at least a quasi-suspect class.'" R.Doc. 64, at 4 (citation omitted). The court found that the Act's reference to "gender transition" made clear that it targeted only transgender minors. R.Doc. 64, at 4.

The district court also ruled that Act 626 "is not substantially related to protecting children in Arkansas from experimental treatment or regulating the ethics of Arkansas doctors." R.Doc. 64, at 7. Instead, the court found that the State's "purported health concerns" regarding the risks of the prohibited medical procedures were "pretextual." R.Doc. 64, at 7. If those concerns had been "genuine," the court continued, "the State would prohibit these procedures for all patients under 18 regardless of gender identity." R.Doc. 64, at 7. The court determined that "[t]he State's goal in passing Act 626 was not to ban a treatment. It was to ban an outcome that the State deems undesirable"—minors failing to conform with stereotypes for their sex assigned at birth. R.Doc. 64, at 7.

The district court further reasoned that Act 626 was not substantially related to "regulating the ethics of Arkansas doctors," because "[g]ender-affirming treatment is supported by medical evidence." R.Doc. 64, at 7. Indeed, the court observed, "[e]very 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." R.Doc. 64, at 7-8. Yet "Act 626 prohibits most of these treatments" and "interfer[es] with the patient-physician relationship," thereby ensuring that "healthcare providers do not have the ability to abide by their ethical standards which may include medically necessary transition-related care" for transgender patients. R.Doc. 64, at 8.

Accordingly, the court concluded that plaintiffs were likely to succeed on the merits of their equal protection claim. R.Doc. 64, at 8.

The district court determined that plaintiffs would suffer irreparable harm if Act 626 were not enjoined. As the court found, the Act would "cause irreparable physical and psychological harms" to the minor plaintiffs by terminating their access to necessary medical treatment. R.Doc. 64, at 8-9. Among other harms, the minor plaintiffs would lose access to puberty blockers, causing them to undergo puberty and "live with physical characteristics that do not conform to their gender identity, putting them at high risk of gender dysphoria and lifelong physical and emotional pain." R.Doc. 64, at 8-9.[5] It found that the State's interest in enforcing Act 626 during the litigation "pales in comparison to the certain and severe harm faced by Plaintiffs." R.Doc. 64, at 9. Concluding that plaintiffs had demonstrated "that they are likely to prevail on the issue of Act's 626 unconstitutionality," the court issued a preliminary injunction. R.Doc. 64, at 9, 12. The injunction enjoins defendants "from enforcing any provision of [Act 626] during the pendency of the litigation." R.Doc. 64, at 13.

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[5] As recognized by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* 452-453 (5th ed. 2013), gender dysphoria is a medical condition defined by "a marked incongruence between one's experienced/expressed gender and assigned gender" that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."

Defendants filed a timely notice of appeal. R.Doc. 67.

SUMMARY OF ARGUMENT

The district court correctly ruled that plaintiffs were likely to succeed on the merits of their equal protection claim because Act 626 is subject to, and cannot survive, the requirements of intermediate scrutiny. Intermediate scrutiny applies because Act 626 discriminates on the basis of sex and on the basis of transgender status by banning certain medical care for transgender minors only. Defendants cannot show that Act 626 serves important governmental objectives and is substantially related to achieving those objectives. Rather, the two goals defendants claim for Act 626—protecting children and regulating the ethics of the medical profession—are not served by the Act. While these objectives are important, their invocation here is pretextual: the Act fails to regulate procedures based on their purported harms, defendants' assertion that medical evidence does not support the efficacy of gender-affirming care is factually inaccurate, and the legislative process was infected with bias against transgender persons.

Accordingly, this Court should affirm the district court's ruling that plaintiffs are likely to succeed on the merits of their equal protection claim.

ARGUMENT

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM

A. Intermediate Scrutiny Applies To Plaintiffs' Equal Protection Claim

The district court was correct to apply intermediate scrutiny because Act 626 discriminates on the basis of sex and on the basis of transgender status in prohibiting transgender minors access to certain medical care. See R.Doc. 64, at 4.

1. Intermediate Scrutiny Applies Because Act 626 Discriminates On The Basis Of Sex

Act 626 discriminates on the basis of sex by prohibiting certain medical care for transgender minors based on the Act's definition of their "biological sex" and their nonconformity with sex stereotypes for their "biological sex."[6] Laws discriminating on the basis of sex are subject to "a heightened standard of review" under the Equal Protection Clause. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); see also *United States* v. *Virginia*, 518 U.S. 515, 555 (1996).

a. Act 626 expressly discriminates on the basis of sex. The law singles out minors for differential treatment based on their "[b]iological sex," which the law defines as certain physical characteristics "present at birth." Ark. Code Ann. § 20-9-1501(1). In particular, a healthcare professional cannot provide a minor with, or

[6] The United States does not concede the accuracy of the Act's definition, Ark. Code Ann. § 20-9-1501(1), which does not account for the full scientific understanding of sex. See SOI, R.Doc. 19, at 4 n.3.

refer a minor for, medical care that would either "[a]lter or remove physical or anatomical characteristics" that are "typical for the individual's *biological sex*" or "[i]nstill or create physiological or anatomical characteristics that resemble a sex different from the individual's *biological sex*." Ark. Code Ann. §§ 20-9-1501(6)(A)(i) and (ii) (emphasis added) (defining gender transition procedures), 20-9-1502(a) and (b) (banning such procedures). Only persons who are transgender would seek these "gender transition procedures," because only their gender identity differs from their "biological sex" (as defined by the Act). Therefore, these restrictions apply to transgender minors alone. Such discrimination against transgender minors is inherently based on sex because, as the Supreme Court recently recognized, "it is impossible to discriminate against a person for being * * * transgender without discriminating against that individual based on sex." *Bostock* v. *Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

Act 626 prohibits minors whose sex assigned at birth differs from their gender identity (*i.e.*, transgender minors) from receiving care that it permits for minors whose sex assigned at birth matches their gender identity (*i.e.*, cisgender minors). For example, the law prohibits a doctor from providing "puberty-blocking drugs" to a minor whose sex assigned at birth was *female* so that the minor can "liv[e]" as a boy, rather than develop the secondary sex characteristics of a girl. Ark. Code Ann. §§ 20-9-1501(5) and (6)(A)(ii), 20-9-1502(a) and (b).

But a minor whose sex assigned at birth was *male* can receive "puberty-blocking drugs" to treat precocious puberty so that the minor can "liv[e]" as a boy, rather than prematurely experiencing sexual development. See Ark. Code Ann. § 20-9-1502(a) and (b) (banning only gender transition procedures); see also *id.* § 20-9-1502(c) (permitting certain procedures if undertaken for medical reasons other than "gender transition"). That the Act's prohibitions depend on the minor's sex assigned at birth is quintessential sex discrimination. See *Bostock*, 140 S. Ct. at 1741 (explaining that sex discrimination occurs "if changing the employee's sex would have yielded a different choice by the employer" in the same scenario); *Flack* v. *Wisconsin Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wisc. 2018) (holding coverage denial for medically necessary care based on plaintiffs' sex assigned at birth was "straightforward case of sex discrimination").

Because Act 626 singles out transgender minors by using "biological sex" as a "ground for differential treatment," it triggers heightened scrutiny. *City of Cleburne*, 473 U.S. at 440. Other courts of appeals have applied heightened scrutiny in circumstances involving the restriction of access to school bathrooms based on a student's sex assigned at birth. Both the Fourth and Seventh Circuits have concluded that such policies are "inherently based upon a sex-classification" because they "cannot be stated without referencing sex." *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir.

2017); see also *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021).

b. Act 626 also facially discriminates based on transgender minors' nonconformity with sex stereotypes for their sex assigned at birth. As the Eleventh Circuit explained, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (2011); see also *Bostock*, 140 S. Ct. at 1741 (finding sex discrimination where an employer "penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth"). As a result, when the failure to conform to sex stereotypes serves as the basis for differential treatment, the Eleventh Circuit and other courts have found that heightened scrutiny applies. *Glenn*, 663 F.3d at 1320; see also *Grimm*, 972 F.3d at 608-609; *Whitaker*, 858 F.3d at 1051.

Act 626's prohibition on "gender transition procedures" turns on whether the medical care sought would "[a]lter or remove physical or anatomical characteristics or features" that are "typical" for the individual's "biological sex," or would "[i]nstill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Ark. Code Ann. §§ 20-9-1501(6)(A)(i) and (ii), 20-9-1502(a) and (b). The statute's use of the word "typical" confirms its reliance on sex stereotypes. If the medical care sought

reinforces these stereotypes, then Act 626 does not interfere, such as when a cisgender minor whose sex assigned at birth is female has a voluntary breast augmentation procedure for cosmetic purposes. Such care would not qualify as a prohibited "gender transition procedure" under the Act because it adheres to the stereotypes associated with this minor's sex assigned at birth. Ark. Code Ann. § 20-9-1501(5) and (6). However, Act 626 would prohibit the same procedure for a transgender minor whose sex assigned at birth was male—even when recommended as medically appropriate—simply because the procedure would produce certain "characteristics" not stereotypically associated with males.

Act 626's reliance on sex stereotypes based on a minor's sex assigned at birth is also evident in the statute's carve-out for intersex minors. See Ark. Code Ann. §§ 20-9-1501(6)(B)(ii), 20-9-1502(c)(1) and (2). The Act permits intersex minors to obtain the identical treatments it forbids for transgender minors, presumably because those procedures are intended to align the intersex minors' physical appearance with stereotypical assumptions for their sex assigned at birth.

2. Intermediate Scrutiny Also Applies Because Act 626 Classifies On The Basis Of Transgender Status

The district court had a second basis for holding that intermediate scrutiny applies: Act 626 discriminates against transgender persons, whom the court found to be "at least a quasi-suspect class." R.Doc. 64, at 4 (quoting *Grimm*, 972 F.3d at 607).

a. Transgender Persons Constitute A Quasi-Suspect Class

The Supreme Court has analyzed four factors to determine whether a group constitutes a "suspect" or "quasi-suspect" class, such that classifications targeting the group warrant heightened scrutiny: (1) whether the class historically has been subjected to discrimination, see *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); (2) whether the class has a defining characteristic that "frequently bears no relation to [the] ability to perform or contribute to society," *City of Cleburne*, 473 U.S. at 440-441 (citation omitted); (3) whether the class has "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and (4) whether the class lacks political power, see *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987). As the Fourth Circuit and numerous district courts have concluded, these factors demonstrate that "transgender people constitute at least a quasi-suspect class." *Grimm*, 972 F.3d at 610 (so holding, and collecting cases reaching that conclusion); see also, *e.g.*, *Karnoski* v. *Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (holding that intermediate scrutiny applied to a policy barring transgender persons from serving in the military).[7]

[7] The Tenth Circuit in *Brown* v. *Zavaras*, 63 F.3d 967, 971 (1995), held that a transgender plaintiff "[was] not a member of a protected class." However, that decision "reluctantly followed a since-overruled Ninth Circuit opinion." *Grimm*, 972 F.3d at 611.

First, "[t]here 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). For example, the 2015 U.S. Transgender Survey (USTS Report), which represents "the largest nationwide study of transgender discrimination," *Grimm*, 972 F.3d at 597, found that 33% of respondents who had seen a healthcare provider in the previous year reported at least one negative experience because of their real or perceived gender identity, USTS Report at 96. The report also found that 77% of respondents who had a job the previous year "hid their gender identity at work, quit their job, or took other actions to avoid discrimination." *Id.* at 154.[8]

Second, the characteristic that defines the transgender community—having a gender identity that differs from one's sex assigned at birth—bears no relation to transgender persons' ability to contribute to society. In *Grimm*, the Fourth Circuit specifically found that "[b]eing transgender bears no such relation," pointing out that "[s]eventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" 972 F.3d at 612

[8] The USTS report is available here: Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the2015 U.S. Transgender Survey* (Dec. 2016), https://perma.cc/FC9M- 4QZJ.

(citation omitted).

Third, there is no reasonable dispute that transgender persons share "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). Transgender persons "'consistently, persistently, and insistently' express a gender" that differs from their sex assigned at birth. *Grimm*, 972 F.3d at 594 (citation omitted). This "is not a choice," but rather, "is as natural and immutable as being cisgender." *Id.* at 612-613.

Finally, transgender persons are a minority that lacks political power. Transgender people comprise a minuscule percentage of the United States population, estimated at 0.6% of adults. *Grimm*, 972 F.3d at 613. But even taking this low percentage into account, transgender persons still are "underrepresented in every branch of government" and "constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process." *Ibid.* (citing data).

These factors confirm that transgender persons are a quasi-suspect class. Consequently, classifications based on transgender status are subject to intermediate scrutiny. See *Grimm*, 972 F.3d at 613.

b. Act 626 Bans Certain Medical Care Based On Whether The Minor Receiving That Care Is Transgender

Act 626 expressly discriminates on the basis of transgender status. First, as explained above, the Act's restrictions on certain types of medical care apply only to minors who are transgender. The prohibited "[g]ender transition procedures" refer to medical procedures that support a "[g]ender transition," which the Act defines 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) and (6)(A). This definition makes clear that the prohibited procedures are ones sought only by minors who are transgender, who by definition, have a gender identity that is "different" from their sex assigned at birth. Cisgender individuals simply do not seek "gender transition procedures." In addition, the Act's legislative findings demonstrate that Act 626 targets transgender minors—and only transgender minors—by specifically addressing "children who are gender nonconforming" and who "experience distress at identifying with their biological sex." Act 626, § 2(3); see also *id.* § 2(4), (6)(A), (7), and (14).

3. The State's Arguments To The Contrary Are Not Persuasive

The State maintains that Act 626 does not discriminate on the basis of sex or transgender status but rather on the basis of medical procedure. Br. 22, 29-32.[9] In particular, the State argues that the procedures prohibited for transgender minors are not the same procedures that Act 626 allows for cisgender minors because the prohibited procedures are "experimental," not FDA-approved, or may cause infertility or other irreversible effects for transgender minors but not for cisgender minors. Br. 29-33. For this reason, the State claims that the law does not distinguish between transgender and cisgender minors on the basis of their transgender status but differentiates among procedures alone. *Ibid.*

This argument has no merit. First, Arkansas conflates its purported justification for the law with whether the law itself classifies on the bases of sex or transgender status. As explained above, the law expressly classifies on the basis of sex and transgender status through its use of the terms "biological sex," "gender transition," and "gender transition procedures" in delineating its prohibitions on medical care. Nowhere does the law define its prohibition in terms of whether a

[9] The State also argues that Act 626 discriminates based on age rather than sex or transgender status. Br. 22, 29-30. To be sure, Act 626 applies only to medical care provided to minors. But that Act 626 discriminates on the basis of age does not preclude finding that it also discriminates on the basis of sex and on the basis of transgender status.

particular procedure is "FDA-approved," "experimental," or has the potential to cause infertility or other irreversible effects. See Section B.1., *infra*.

Second, the banned procedures for minors—expressly denominated gender transition procedures—are, by definition, sought by persons who are transgender. As the Supreme Court has recognized, when a government targets an activity that it would seem irrational to disfavor, and that activity "also happen[s] to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Thus, for example, a "tax on wearing yarmulkes is a tax on Jews." *Ibid.* Following similar logic, in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), the Supreme Court suggested that laws criminalizing "deviate sexual intercourse" operated to target gay people. As the majority noted, because the criminalized conduct was typically associated with gay people, "that declaration in and of itself is an invitation to subject [gay] persons to discrimination." *Id.* at 575. Justice O'Connor went further, concluding that though the law ostensibly targeted conduct alone, because that conduct "is closely correlated with being" gay, the law "is instead directed toward gay persons as a class." *Id.* at 583 (O'Connor, J., concurring). Thus, by prohibiting medical procedures only when they qualify as gender transition procedures, Act 626 targets persons who are transgender.

B. Applying Intermediate Scrutiny, The District Court Correctly Found That Plaintiffs Were Likely To Succeed On Their Equal Protection Claim

To survive intermediate scrutiny, "[t]he State 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.'" *Virginia*, 518 U.S. at 533 (internal quotation marks omitted; second alteration in original) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Any justification must be "exceedingly persuasive" and "genuine"—it must not be "hypothesized" or "rely on overbroad generalizations." *Ibid.* Importantly, a classification does not withstand heightened scrutiny when the "alleged objective" differs from its "actual purpose." *Hogan*, 458 U.S. at 730.

Arkansas asserts two interests in support of Act 626: (1) protecting children from harm, and (2) regulating the medical profession to prevent healthcare providers from inflicting harm. Br. 43-44. Both of these purported interests rest on the State's assertions that the medical care prohibited by the Act is experimental and causes long-term, irreversible harms and that no scientifically valid evidence exists that these procedures benefit recipients. Br. 44-48; see also Act 626, § 2(15) ("The risks of gender transition procedures far outweigh any benefit at this stage of clinical study on these procedures."). As the district court correctly ruled at this preliminary stage, neither of these interests survives intermediate scrutiny because "Act 626 is not substantially related to protecting children in Arkansas from

experimental treatment or regulating the ethics of Arkansas doctors," and indeed, the State's "purported health concerns" regarding gender transition procedures are "pretextual." R.Doc. 64, at 7.

1. Act 626 Is Not Related To The State's Purported Objectives Because It Does Not Regulate Procedures Based On The Health Risks Identified By The State

Act 626 does not regulate procedures based on the health risks that the State claims drive the Act. Instead, the law bans reversible procedures and procedures that have no impact on fertility when those procedures provide gender-affirming care to a transgender minor. For example, the law prohibits transgender minors from receiving liposuction, lipofilling, breast augmentation, pectoral implants, hair reconstruction, gluteal augmentation, and "various aesthetic procedures" as gender-affirming care but permits exactly the same procedures for cisgender minors. See Ark. Code Ann. § 20-9-1501(6)(A) and (9) (describing banned procedures if made for the purpose of gender transition).

If the State's health concerns were "genuine," then "the State would prohibit these procedures for all patients * * * regardless of gender identity." R.Doc. 64, at 7. For example, the law permits minors who are intersex to undergo the same procedures banned for transgender minors, regardless of whether those procedures carry risks of being irreversible or affecting the minor's fertility, which are two of the State's purported health concerns. Br. 30-33, 44-45. See Ark. Code Ann.

§§ 20-9-1501(6)(B)(ii), 20-9-1502(c)(1) and (2) (specifically exempting care for intersex minors from the Act's prohibitions); see also R.Doc. 11-11, at 13-14. Similarly, the law also permits a doctor to prescribe testosterone for a cisgender boy with male hypogonadism, where the body produces insufficient testosterone, see Ark. Code Ann. §§ 20-9-1501(5) and (6)(B)(ii), 20-9-1502(a)-(b) and (c)(2); Br. 8, 31-32, even though studies indicate that such treatment could also have a negative effect on fertility, see SOI, R.Doc. 19, at 10-11, 19; see also Jordan Cohen et al., *Low Testosterone in Adolescents and Young Adults*, 10 Frontiers in Endocrinology (Jan. 10, 2020), https://perma.cc/N9CH-4HSZ.

If the law's purpose truly concerned the health risks of these procedures, then they would be banned for all minors regardless of their transgender status or sex assigned at birth. As the district court put it, "Defendants' rationale that [Act 626] protects children from experimental treatment and the long-term, irreversible effects of the treatment, is counterintuitive to the fact that it allows the same treatment for cisgender minors as long as the desired results conform with the stereotypes of their biological sex." R.Doc. 64, at 7.[10]

[10] To the extent that the State relies on the risks associated with genital surgery, this rationale is particularly disingenuous, as it is a solution in search of a problem. See Act 626, § 2(9)-(14); see also Br. 9. Doctors rarely recommend genital surgeries for transgender minors with gender dysphoria, and such surgeries are *not* performed on minors in Arkansas. See R.Doc. 11-11, at 11. Representative Robin Lundstrum, the Act's lead sponsor, also admitted that she

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2. The Inaccuracy Of The State's Claim About The Efficacy Of Gender-Affirming Care Also Demonstrates That Its Stated Objectives Are Pretextual

The inaccuracy of the State's claim that there is limited evidence supporting the "efficacy" of gender-affirming care (see Br. 45-48 (citation omitted); see also Br. 11-18) also demonstrates that the State's purported objectives for Act 626 are pretextual. As the district court found, "[g]ender-affirming treatment is supported by medical evidence that has been subject to rigorous study." R.Doc. 64, at 7.

The district court found that "[e]very major expert medical association recognizes that gender-affirming care for transgender minors," including forms of care prohibited by Act 626, "may be medically appropriate and necessary to improve the physical and mental health of transgender people." R.Doc. 64, at 7-8; see also R.Doc. 11-11, at 6-16; R.Doc. 11-12, at 11-15; SOI, R.Doc. 19, at 22; see also R.Doc. 30, at 8-15 (Amicus Br. of American Academy of Pediatrics *et al.* In Support of Pls. Mot. for a Prelim. Inj.) (AAP Amicus Br.). This finding reflects the evidence cited by plaintiffs and their amici below demonstrating that gender-

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does not know of a single genital reassignment surgery performed on a minor in Arkansas. *Hearing on H.B. 1570 Before H. Pub. Health, Welfare, & Lab. Comm.*, 2021 Leg., 93d Sess. (Mar. 9, 2021), at 4:51:22-4:51:44, https://perma.cc/9MMK-B8QQ (Mar. 9 Hearing); see also Asa Hutchinson, Governor, State of Arkansas, Press Conf. Vetoing House Bill 1570 (Apr. 5, 2021), at 10:20 ("In Arkansas, gender reassignment surgery is not performed on anyone under 18."), https://perma.cc/ HA6D-G27U. To view full videos here and at p. 29, *infra*, select "view the live page" option.

affirming care, including puberty suppression and hormone therapies with estrogen or testosterone, can reduce gender dysphoria and improve other markers of well-being for transgender people, including quality of life, interpersonal and psychological functioning, and self-esteem. See R.Doc. 51, at 5-10, 44-45; R.Doc. 11-11, at 11-16; R.Doc. 11-12, at 15-16; see also SOI, R.Doc. 19, at 21-22; AAP Amicus Br., R.Doc. 30, at 8-9, 14 & n.54 (highlighting studies regarding positive outcomes for transgender minors who have undergone puberty suppression).[11]

As the district court recognized, "[t]he consensus recommendation of medical organizations is that the only effective treatment for individuals at risk of or suffering from gender dysphoria is to provide gender-affirming care." R.Doc. 64, at 6. In the face of this consensus, Act 626 would "interfer[e] with the patient-physician relationship" and would "subject[] physicians who deliver safe" and "medically necessary care to civil liability and [the] loss of licensing." R.Doc. 64, at 8. Thus, the court reasoned, if Act 626 "is not enjoined, healthcare providers in

[11] By contrast, transgender minors who do not receive gender-affirming care face increased rates of victimization, suicide, substance abuse, and other potentially risky behavior. See, *e.g.*, R.Doc. 11-11, at 16-18; U.S. Dep't Health & Human Servs. Weekly Morbidity and Mortality Rep. Vol. 68, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017* 67-71 (Jan. 25, 2019), https://perma.cc/N7TR-X6Q9; see also AAP Amicus Br., R.Doc. 30, at 7-8 (noting "evidence shows that [the] emotional and psychiatric challenges" faced by transgender youth "can be reduced to baseline levels" when they receive "support in their identities").

[the] State will not be able to consider the recognized standard of care for adolescent gender dysphoria." R.Doc. 64, at 8. Rather than ensuring that healthcare providers in Arkansas "abide by ethical standards, the State has ensured that its healthcare providers do 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." R.Doc. 64, at 8. As a result, the court correctly found that the Act is not "substantially related to the regulation of the ethics of the medical profession in Arkansas." R.Doc. 64, at 7.

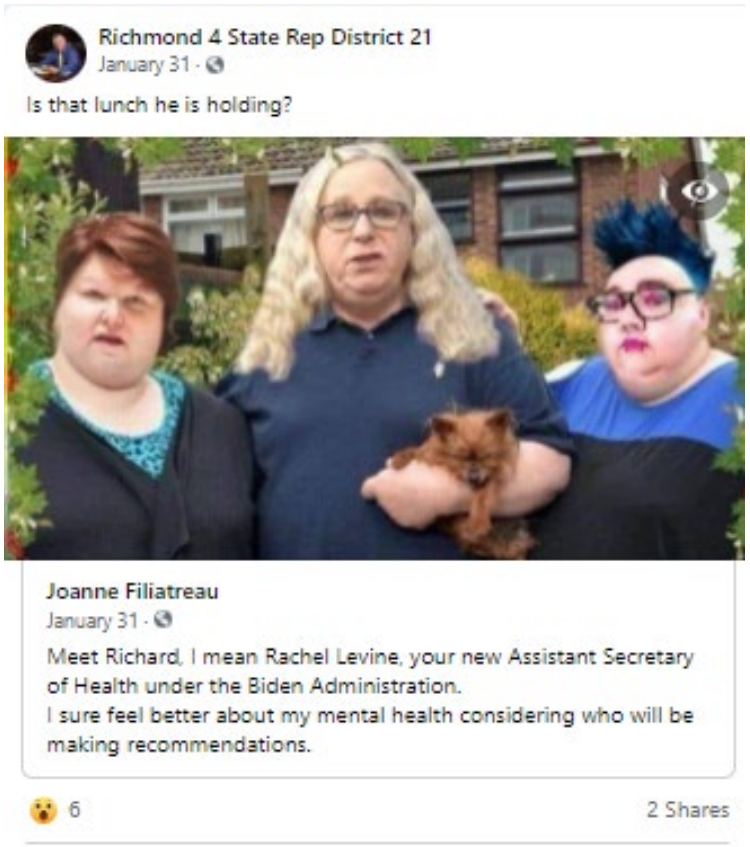
3. Bias Against The Transgender Community Infected The Legislative Process, Reinforcing The Conclusion That The State's Purported Objectives Are Pretextual

Although the district court did not rely on the ample evidence of legislators' bias against the transgender community, statements by legislators and the legislative record demonstrate that such bias infected the legislative process. Bias against a politically unpopular group cannot serve as a legitimate state interest, even under rational basis review. See *Cleburne*, 473 U.S. at 446-448 (noting a "bare . . . desire to harm a politically unpopular group" is not a legitimate legislative motive and that the law cannot give effect to "[p]rivate bias"); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) (noting a "purpose to

discriminate" in and of itself "cannot constitute a legitimate governmental interest") (citation omitted).

At least three of the Act's co-sponsors made statements demonstrating such bias. For example, after the House approved the bill, Representative Jim Wooten responded to the concerns of transgender people: "What if your child comes to you and says I want to be a cow?" Andrew DeMilo, *Arkansas Law Makers OK Transgender Sports, Treatment Limits*, Associated Press (Mar. 10, 2021), https://perma.cc/5CD8-MTWV. Similarly, Representative Alan Clark, one of the Act's primary sponsors, and Representative Marcus Richmond, another co-sponsor, shared the same social media post, a cartoon mocking a request for medical care for transgender minors by comparing it to a minor's request to drink beer or smoke cigarettes. See Richmond 4 State Rep. Dist. 21, *Facebook* (Mar. 2, 2021), https://www.facebook.com/Richmond4StateRep (pictured below, left). Representative Richmond showed further anti-transgender bias by reposting a picture and comment mocking Assistant Secretary of Health and Human Services Admiral Rachel Levine, M.D., a transgender woman. Richmond 4 State Rep. District 21, *Is that lunch he is holding?*, Facebook (Jan. 31, 2021), https://www.facebook.com/Richmond4StateRep (pictured below, right). The original poster purposefully misidentified Dr. Levine by using her former name, and Representative Richmond shared that post with his own comment, using a

male pronoun—"Is that lunch *he* is holding?"—suggesting that the dog Dr. Levine is holding is her lunch. *Ibid.* (emphasis added). These two posts are reprinted here:



Bias against the transgender community permeated the legislative hearings on Act 626. The committees considering the bill limited the testimony of opponents of the bill to two minutes per witness but did not impose a similar limitation on the testimony of proponents. *Hearing on H.B. 1570 Before H. Pub.*

Health, Welfare, & Lab. Comm., 2021 Leg., 93d Sess. (Mar. 9, 2021), at 4:52:10-4:55:45, https://perma.cc/9MMK-B8QQ (Mar. 9 Hearing) (voting to limit testimony of bill opponents after no time limit placed on previously testifying proponents of the bill); *Hearing on H.B. 1570 Before the S. Pub. Health, Welfare, & Lab. Comm.*, 2021 Leg., 93d Sess. (Mar. 22, 2021), at 4:15:03-4:15:18, https://perma.cc/84UQ-MV5N (Mar. 22 Hearing) (committee chair informing witnesses speaking in favor of the bill that two-minute restriction does not apply to them). The opponents of the bill included medical professionals and transgender persons who sought to explain the detailed treatment protocols in place to ensure the safety of transgender minors, as well as how banning gender-affirming care would threaten the lives and well-being of people who are transgender. See Mar. 9 Hearing, at 4:54:55-5:37:48; Mar. 22 Hearing, at 4:20:51-5:07:35. The time restriction on their testimony resulted in multiple witnesses with first-hand experience on the topic being cut-off mid-testimony. See *ibid.* By contrast, Senator Cecile Bledsoe, who chaired the Senate committee hearing, told a proponent of the bill that she would "love" for him "to go on" after he appeared to finish his testimony. Mar. 22 Hearing, at 4:15:03-4:15:18.[12]

[12] Representative Robin Lundstrom, the lead sponsor, also compared certain gender-affirming care for transgender people to "genital mutilation." Mar. 9 Hearing, at 4:14:49-4:15:07.

* * *

Accordingly, as the district court correctly ruled, based on the record at this time, Act 626 "cannot withstand heightened scrutiny" and "would not even withstand rational basis scrutiny." R.Doc. 64, at 8. For all of these reasons, the district court correctly determined that plaintiffs are likely to succeed on the merits of their claim that Act 626 violates their right to equal protection of the laws.

CONCLUSION

The United States respectfully urges this Court to affirm the district court's determination that plaintiffs-appellees are likely to succeed on the merits of their claim that Act 626 violates the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,498 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word 2019 in a proportionally spaced typeface (Times New Roman) in 14-point font.

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Barbara Schwabauer
BARBARA SCHWABAUER
Attorney

Date: January 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2022, I filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES 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.

s/ Barbara Schwabauer
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