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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-2875

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

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

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 heal

Ann. § 20-9-1501(5).[2]

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

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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

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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).

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

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);

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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

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 nd (tha)8.3 (om)21.3 (int2h2.2u( )Ta the)3.6 ( )8.6 70d.38"Asdynsr, o aFv002 Tf-0.004 Tw 0.

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

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.

2.

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.

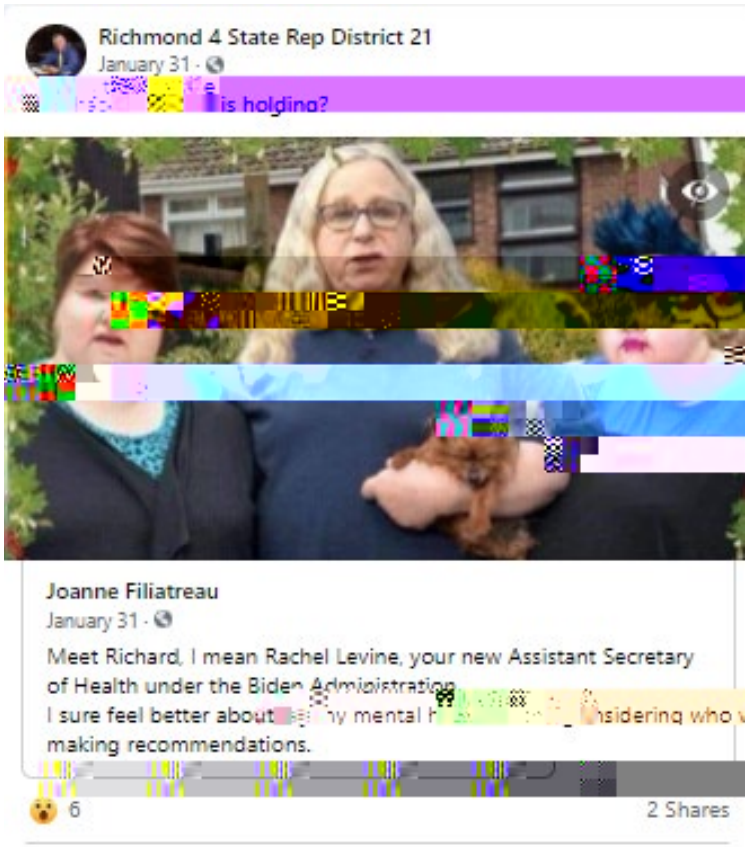
3. Bias Against The Transgender Community Infected The Legislative Process, Reinforcing The Conclusion That The State's Purported Objectives Are Pretextual

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 legitim]TJ0.004 Tc -0/5 (r)12. (le)3.5 (g)

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

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.2 (E.20n(op)8.2c)3.6 ot].

* * *

Accordingly, as the district court correctly ruled, based on the record at this time, Act 626 "cannot withstand heightened scrutiny" and "would not even

CERTIFICATE OF COMPLIANCE

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

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
BARBARA SCHWABAUER
Attorney