No. 23-2681

United States Court of Appeals for the Eighth Circuit

DYLAN BRANDT, ET AL.,
Plaintiffs-Appellees,

v.

TIM GRIFFIN, ET AL.,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Eastern District of Arkansas, Central Division
(No. 4:21-CV-00450-JM) (The Hon. James S. Moody)

BRIEF OF STATE OF CALIFORNIA AND 19 OTHER STATES AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTERESTS OF AMICI CURIAE

Amici Curiae States of California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Pennsylvania, Washington, Vermont, and the District of Columbia strongly support transgender people's right to live with dignity, be free from discrimination, and have equal access to healthcare.[1] Discrimination and exclusion on the basis of transgender status cause direct economic, physical, and emotional harms to transgender people, including an increased risk of depression, anxiety, substance abuse, and suicide. To prevent these injuries, many amici States have adopted laws and policies to combat discrimination against transgender people who seek gender-affirming medical care. These laws and policies adhere to medically accepted standards of care and avoid interfering with the doctor-patient relationship. Such state laws and policies result in better health outcomes for our transgender teenagers, safeguard their physical,

[1] Amici States submit this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a) and Eighth Circuit Rule of Practice 29(a) in support of Plaintiffs-Appellees and affirmance of the grant of a permanent injunction.

emotional, and financial well-being, protect their autonomy, and preserve the integrity and ethics of the medical profession.

Amici States also share a strong interest in the proper application of the Equal Protection Clause to protect transgender individuals throughout our nation from unconstitutional discrimination. Arkansas' complete ban on gender-affirming care for minors violates equal protection. The challenged law, Arkansas Act 626, treats cisgender minors differently from transgender minors, allowing cisgender minors to access certain medications and procedures while banning transgender minors from accessing the same. The ban thus singles out transgender minors for discriminatory treatment *because of* their gender nonconformity. As this Court previously concluded, such treatment is discrimination on the basis of sex. The lower court correctly reviewed the ban under heightened scrutiny, and after extensive findings of fact, permanently enjoined Act 626. Transgender minors deserve, and are guaranteed, the equal protection of the law, as are all other persons under the Constitution. This Court should affirm.

ARGUMENT

I. RESTRICTING ACCESS TO GENDER-AFFIRMING MEDICAL CARE SIGNIFICANTLY HARMS TRANSGENDER MINORS

Denying medically necessary care to transgender teenagers harms their physical, emotional, and psychological health.[2] Many transgender teenagers suffer from gender dysphoria, the often debilitating distress and anxiety that can result from incongruence between a person's gender identity and sex at birth.[3] If unaddressed or untreated, gender dysphoria can affect quality of life and trigger decreased social functioning.[4] The

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[2] Arkansas' ban not only harms its own residents, but also threatens amici States' residents who travel to Arkansas for school, vacation, and work. Arkansas' law, for example, could compel transgender teenagers who receive gender-affirming healthcare in amici States to discontinue their prescribed medications while in Arkansas. Those traveling to Arkansas, even on a temporary basis, may lack access to gender-affirming medical care if they are hospitalized for an injury or need to refill a prescription. And amici States' residents working, visiting, and studying in Arkansas, like college students and tourists, could be forced to forgo necessary medical care to avoid the ban's effects.

[3] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2022); *see also* American Psychiatric Association, *What is Gender Dysphoria?* (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[4] *See* Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15(9) Quality of Life Research 1447 (2006), https://www.ncbi.nlm.nih.gov/pubmed/16758113 (observing that

symptoms of gender dysphoria, and the compounding effects of societal discrimination, can also be fatal. One study in 2014 found that suicide attempts are nine times more common among transgender people than in the overall U.S. population (41% versus 4.6%).[5] The risks are especially high among transgender minors.[6] One study found that 56% of transgender minors reported a previous suicide attempt and 86% reported suicidal thoughts.[7]

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transgender men who received transition-related care reported having a higher health-related quality of life than those who had not).

[5] Ann P. Haas et al., Am. Found. for Suicide Prevention & The Williams Inst., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, at 2 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-GNC-Suicide-Attempts-Jan-2014.pdf.

[6] *See, e.g.*, Ali Zaker-Shahrak et al., Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (2012), https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf ("A recent systematic review of largely American samples gives a suicide attempt rate of approximately one in every three individuals with higher rates found among adolescents and young adults.").

[7] Ashley Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. of Interpersonal Violence 2696 (2020), https://journals.sagepub.com/doi/10.1177/0886260520915554.

Access to gender-affirming healthcare and other medical interventions that improve mental health are thus especially important to transgender teenagers. A 2021 analysis found that, for teenagers under the age of eighteen, use of gender-affirming hormone therapy was associated with lower odds of recent depression and lower odds of attempting suicide compared to adolescents who wanted, but did not receive, such therapy.[8] Another study concluded that, for teenagers and young adults ages thirteen to twenty, receiving gender-affirming care, including puberty blockers and gender-affirming hormones, was associated with 60% lower odds of moderate or severe depression and 73% lower odds of having suicidal thoughts over a twelve-month follow-up.[9] A longitudinal study that followed transgender adolescents from their intake at a gender clinic into young adulthood reported that gender-affirming treatment resulted in significant improvement in global

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[8] Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. Adolescent Health 643, 647–48 (2022), https://doi.org/10.1016/j.jadohealth.2021.10.036.

[9] Diana M. Tordoff, et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 J. Am. Med. Ass'n Network Open 1, 6 (2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423.

functioning and psychological well-being and the participants' life satisfaction, quality of life, and subjective happiness were comparable to their cisgender peers.[10] Another study found significant improvement in teenagers' sense of self-worth after starting hormone therapy.[11] In short, removing discriminatory barriers to healthcare likely improves health outcomes for our transgender residents, especially teenagers.

By contrast, adolescents who begin gender-affirming treatment at later stages of puberty may have more acute symptoms than those who do so sooner. A 2020 study showed that adolescents who begin gender-affirming treatment at later stages of puberty are five times more likely to be diagnosed with depression and four times more likely to have anxiety disorders than adolescents who seek treatment in early puberty; the authors concluded that "[gender incongruent] youth who present to [gender-affirming medical care] later in life are a particularly high-risk

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[10] Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 Pediatrics no. 4 at 696, 702 (2014), https://doi.org/10.1542/peds.2013-2958.

[11] Marijn Arnoldussen et al., *Self-Perception of Transgender Adolescents After Gender-Affirming Treatment: A Follow-Up Study Into Young Adulthood*, 9 LGBT Health no. 4 at 238, 242-244 (2022), https://www.liebertpub.com/doi/epdf/10.1089/lgbt.2020.0494.

subset of a vulnerable population."[12]

II. AMICI STATES' LAWS AND POLICIES PROMOTE ACCESS TO GENDER-AFFIRMING MEDICAL CARE BASED ON ESTABLISHED MEDICAL STANDARDS

In light of the adverse consequences that arise when transgender individuals are deprived of access to medically necessary healthcare, many amici States have enacted laws and regulations to ensure that their residents, including transgender teenagers, have access to gender-affirming healthcare.[13] These laws promote sound medical practices and increase equity in healthcare. Beyond these general protections, some amici States have issued explicit guidance prohibiting insurers from denying minors treatment for gender dysphoria solely based on age, in recognition of the importance of gender-affirming interventions for this vulnerable population. For instance, Oregon has codified its prohibition on insurance plans denying benefits on the basis of gender identity and,

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[12] *See* Julia C. Sorbara et al., *Mental Health and Timing of Gender-Affirming Care*, 146 Pediatrics no. 4 at 1, 5-6 (2020), https://publications.aap.org/pediatrics/article/146/4/e20193600/79683/Mental-Health-and-Timing-of-Gender-Affirming-Care (reporting odds ratios).

[13] *See generally Equality Maps: Healthcare Laws and Policies*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Dec. 12, 2023).

in 2015, Oregon approved puberty suppression coverage under its Medicaid program for beneficiaries who are 15 or older.[14] Washington's Medicaid program explicitly covers puberty suppression therapy and hormone therapy for those under age twenty. WASH. ADMIN. CODE §§ 182-531-1675(b)(i)–(ii), (f). Similarly, New York's Medicaid regulations require coverage for medically necessary puberty suppression for patients who meet eligibility criteria and medically necessary hormone therapy for individuals who are sixteen years of age and older. N.Y. COMP. CODES R. & REGS. tit. 18 § 505.2(*l*)(2)(i).

In contrast to Arkansas' categorical ban on gender-affirming care for minors, many amici States' policies also recognize that best medical practices require an *individualized* assessment to determine whether—and to what extent—gender-affirming care is medically necessary for an individual patient. For example, the District of Columbia has instructed that determinations of "medical necessity" for insurance coverage purposes "must also be guided by providers in communication with

[14] *See* OR. REV. STAT. § 746.021; *see also* Or. Health Auth., *Prioritized List: Guideline for Gender Dysphoria*, at 1 (last updated Mar. 2019), https://www.oregon.gov/oha/HPA/DSI-HERC/FactSheets/Gender-dysphoria.pdf.

individual patients."[15] Washington forbids insurers from "deny[ing] or limit[ing] coverage for gender affirming treatment" when it is "medically necessary" and "prescribed in accordance with accepted standards of care."[16] Washington also requires "a health care provider with experience prescribing or delivering gender-affirming treatment" to "review[] and confirm[] the appropriateness of" an insurer's decision to deny or limit coverage.[17] And California encourages health insurance companies to evaluate coverage criteria for gender-affirming care in order "to avoid needlessly delaying and interfering with medical care recommended by a patient's doctor."[18]

Taken together, these laws and policies reflect amici States' core

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[15] Chester A. McPherson, D.C. Dep't of Ins., Bulletin 13-IB-01-30/15, *Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression* 1, 4 (2014), https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityor-Expression v022714.pdf.

[16] WASH. REV. CODE § 48.43.0128(3)(a) (2019).

[17] WASH. REV. CODE § 48.43.0128(3)(c) (2019).

[18] Cal. Dep't of Ins., *Commissioner Lara Takes Proactive Step to Ensure Transgender Youth Have Access to Gender-Affirming Medical Care for Gender Dysphoria* (Dec. 30, 2020), https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release140-2020.cfm.

commitment to preserving the integrity of the medical profession, protecting the equality of all people, regardless of their gender identity, and ensuring that people with gender dysphoria are not denied medically necessary healthcare.

III. THE BAN VIOLATES THE EQUAL PROTECTION CLAUSE

Act 626 prohibits "gender transition procedures," which it defines as "any medical or surgical service . . . related to gender transition that seeks to . . . [a]lter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex." H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021). The law prohibits these medical interventions only when used to assist with gender transition, and does not ban these procedures when used for other purposes; in other words, it expressly classifies on the basis of sex and transgender status (which is a form of sex-based discrimination). Thus, to survive, Act 626 must withstand heightened scrutiny.

But it cannot. The State's ban on certain procedures for transgender youth while permitting them for cisgender youth violates equal protection.

A. Heightened Scrutiny Applies

This Court previously held that the Act "discriminates on the basis of sex" and subjected the Act to heightened scrutiny. *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669-70 (8th Cir. 2022) (citing *Heckler v. Mathews*, 465 U.S. 728, 744 (1984)). Following this precedent, the district court correctly examined the law under heightened scrutiny, concluding that Act 626 "discriminates against transgender people," which is a "gender-based classification." Order Granting Perm. Inj. ("Perm. Inj. Order") at 65, *Brandt v. Rutledge*, No. 4:21-cv-00450-JM (E.D. Ark. June 20, 2023), ECF No. 283 (quoting *United States v. Virginia*, 518 U.S. 515, 555 (1996)).

On appeal of the permanent injunction, Arkansas again argues that the Act does not discriminate on the basis of sex because it bans gender transition procedures for all youth, equally, regardless of sex. Appellants' Opening Brief ("AOB") at 22-25. As this Court previously held, Arkansas is incorrect. Recognizing that "[t]he biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not," this Court correctly applied heightened scrutiny to the Act. *Brandt*, 47 F.4th at 670. Indeed,

the ban treats cisgender and transgender youth differently by permitting certain procedures for the former while categorically denying the same procedures for the latter. It is beyond dispute that one group—and only one group—pursues the "gender transition procedures" that Arkansas has banned: transgender people. Under the Act, "[a] minor born as a male may be prescribed testosterone or have breast tissue surgically removed . . . but a minor born as a female is not permitted to seek the same medical treatment." *Id.* at 669. Act 626's classifications thus target transgender people on the basis of their sex, even if the ban does not expressly use the word "transgender." *See, e.g.*, *Doe v. Ladapo*, No. 4:23-cv-114-RH-MAF, 2023 WL 3833848, at *9 (N.D. Fla. June 6, 2023) (explaining that to know whether prescribing puberty blockers is legal or illegal, "one must know whether the child is cisgender or transgender. The treatment is legal if the child is cisgender but illegal if the child is transgender because the statute prohibits [puberty blockers] only for transgender children, not for anyone else.")

Several other courts have reached similar conclusions.[19] "Without sex-based classifications, it would be impossible for [the statute] to define whether a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted)." *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023), at *8; *see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny because "the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate"), *abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020); *accord A.C. v. Metro. Sch.*

[19] *See, e.g.*, *M.C. ex rel. A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020); *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023); *Ladapo*, 2023 WL 3833848 at *8. Some courts, however, have recently taken a different approach. *See Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1227 (11th Cir. 2023) (applying rational basis review and vacating preliminary injunction); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 486, 491 (6th Cir. 2023) (applying rational basis review and reversing preliminary injunction).

Dist. of Martinsville, 75 F.4th at 772 (applying *Whitaker* in an equal protection case involving discrimination against transgender students). Here, as in *K.C.*, *Whitaker*, and *A.C.*, Act 626 discriminates on the basis of sex.

Such "discrimination on the basis of transgender status is a form of sex-based discrimination" for purposes of an equal-protection claim. *Hecox*, 79 F.4th at 1026. Indeed, only transgender people seek gender-affirming care, and banning certain medical care because transgender people seek it is discriminatory. *See Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding that discrimination against transgender people on the basis of gender stereotypes "is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause"); *Whitaker*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny where a school district "treats transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently").

The Supreme Court also recognized that discrimination against transgender people is necessarily a form of sex-based discrimination in *Bostock v. Clayton County*. In that case, the Court explained that, in the

context of a Title VII claim, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020). In other words, "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." *Id.* This Court, too, has recognized that the Supreme Court "interpreted Title VII's prohibition on 'sex discrimination' to include gender identity and sexual orientation." *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 594 (8th Cir. 2022). Here, a similar analysis reveals that Act 626 imposes differential treatment on the basis of sex: changing the minor's sex at birth yields a different result, *e.g.*, a cisgender young man can receive testosterone to initiate male puberty but a transgender young man cannot. Such discriminatory treatment of transgender minors warrants heightened scrutiny under the Equal Protection Clause. *See Hecox*, 79 F.4th at 1022–26.

This Court should reaffirm the reasoning of the prior panel and join the Fourth, Seventh, and Ninth Circuits, which "have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because

such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Hecox*, 79 F.4th at 1026 (internal citations omitted); *see also Grimm*, 972 F.3d at 608 (Plaintiff "was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy"); *Whitaker*, 858 F.3d at 1051.

For all of these reasons, by its express terms, Act 626 facially discriminates against transgender persons on the basis of sex and gender nonconformity. But if this Court is inclined to reconsider its prior holding and conclude that Arkansas' law is facially neutral, the Court should still hold that Arkansas has engaged in discrimination against transgender people because the Act's use of seemingly facially neutral criteria discriminates by proxy. "In a case of proxy discrimination the defendant discriminates against individuals on the basis of criteria that are almost exclusively indicators of membership in the disfavored group." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). Courts have found that laws and policies with "seemingly neutral criteria that are so closely associated with [a] disfavored group," *id.*, discriminate by proxy on the basis of religion, race,

sex, disability, and age. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Davis v. Guam*, 932 F.3d 822, 839 (9th Cir. 2019) (statute limiting voting to "Native Inhabitants of Guam" served as a proxy for race); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (excluding service dogs or wheelchairs is a proxy for disability).

Arkansas' law discriminates by proxy against transgender individuals because—in the words of the district court—it "prohibits medical care that only transgender people choose to undergo, *i.e.*, medical or surgical procedures related to gender transition." Perm. Inj. Order at 65. *Hecox* is instructive. There, the Ninth Circuit analyzed a law banning the participation of transgender women and girls in women's student athletics. *Hecox*, 79 F.4th at 1015. The Court explained how the law's "specific classification of 'biological sex'" was "carefully drawn to target transgender women and girls, even if it does not use the word 'transgender' in the definition." *Id.* at 1025; *see also id.* at 1043 (Christen, J, concurring in part and dissenting in part) (concluding that the law "can only be understood as a transgender-based classification" because it "uses a technically neutral classification—biological sex—as a proxy to evade

the prohibition of intentional discrimination") (citing *McWright*, 982 F.2d at 228).

So too here. Act 626's classifications concern "gender transition procedures," which by definition target transgender—and only transgender—people. Arkansas thus cannot credibly assert that its law does not facially discriminate on the basis of transgender status. Such a claim is belied by the complete overlap between the banned procedures (gender transition) and the targeted group (transgender individuals). By definition, cisgender individuals do not seek to transition their gender, and therefore no cisgender person will be subject to the ban, even though they may receive the same medical treatment that is banned for their transgender peers.[20] By banning certain treatments for a medical

[20] Although Arkansas' law targets only transgender minors, it does not affect all transgender minors. Not all transgender minors suffer from gender dysphoria, and not all individuals suffering from gender dysphoria seek to medically transition. But the fact that Act 626 does not discriminate against all transgender minors is no defense. "[A] law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others." *Hecox*, 79 F.4th at 1025 (internal citations omitted); *see also Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (invalidating New York law which barred some, but not all, immigrants from accessing state financial assistance for higher education).

purpose that only transgender people pursue, Arkansas facially (and by proxy) discriminates against transgender individuals on the basis of sex and gender nonconformity. *See Hecox*, 79 F.4th at 1025.

B. The Ban Does Not Satisfy Heightened Scrutiny

The district court below and the prior panel opinion both correctly concluded that Act 626 fails heightened scrutiny. Perm. Inj. Order at 66-74; *Brandt*, 47 F.4th at 670-71.[21]

"Statutes that discriminate based on sex must be supported by an 'exceedingly persuasive justification.'" *Id.* at 670 (quoting *Virginia*, 518 U.S. at 531). For a gender-based classification to withstand heightened scrutiny, it must "serve[] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the

[21] Although heightened scrutiny applies, at least one court has concluded on a similar record that a blanket ban of all gender-affirming treatments for all transgender minors—regardless of their individual circumstances and in conflict with well-established medical standards—is not even rationally related to a legitimate government interest. *See Ladapo*, 2023 WL 3833848, at *10 ("The State of Florida's decision to ban the treatment is not rationally related to a legitimate state interest."); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (applying rational basis review and concluding that City's proffered justification for disparate treatment of class violated Equal Protection Clause because it "rest[ed] on an irrational prejudice").

achievement of those objectives." *Virginia*, 518 U.S. at 533 (internal citations omitted). In other words, a "close means-end fit [is] required to survive heightened scrutiny." *Sessions v. Morales-Santana*, 582 U.S. 47, 68 (2017).

Arkansas' ban is not even plausibly—let alone substantially—related to the purported goal of protecting children from ineffective or harmful medical treatment, because those very same treatments are permitted for cisgender youth. *Compare* ARK. CODE ANN. § 20-9-1502(a) (2021) (banning "gender transition procedures") *with id.* § 20-9-1502(c)(1) (permitting treatment for "persons born with a medically verifiable disorder of sex development.")

Additionally, Arkansas' specific "means"—a categorical ban of gender-affirming medical care for minors—do not fit its proffered "end" of protecting minors and regulating the medical profession. Plaintiffs have presented evidence of risks to minors' health and well-being from denying gender-affirming care, including prolonging their gender dysphoria and causing additional distress and health risks, such as

depression, posttraumatic stress disorder, and suicidality.[22] Under a close means-end analysis, Arkansas' potential interest in *some* regulation of gender transition procedures for minors is not adequate to justify Act 626's wholesale prohibition of *all* gender transition procedures for minors. *See Morales-Santana*, 582 U.S. at 68 (a "close means-end fit [is] required to survive heightened scrutiny.").

As amici States' experience demonstrates, Act 626 fails to satisfy this close means-end fit because there are many ways to effectively regulate—rather than outright ban—gender transition procedures for minors. Our preexisting state-level safeguards have proven adequate and effective in guarding against improper medical practices. And as Plaintiffs-Appellees have repeatedly pointed out, "the rushed provision of care without evaluation would be inconsistent with prevailing protocols." Appellees' Answering Br. at 44, *Brandt v. Rutledge*, No. 21-2875, 2022 WL 174971, at *44 (8th Cir. Jan. 13, 2022) (citations omitted).

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[22] Plaintiffs-Appellees Br. at 6-15, *Brandt v. Griffin*, No. 23-2681 (8th Cir. Dec. 6, 2023). The district court credited this evidence, finding that "[g]ender dysphoria is a serious condition that, if left untreated, can result in other psychological conditions including depression, anxiety, self-harm, suicidality, and impairment in functioning." Perm. Inj. Order at 7.

Like Arkansas, amici States regulate medical practice through laws and regulations that prohibit abusive, unethical, or medically improper conduct. *See, e.g.*, ARK. CODE ANN. §§ 17-95-201 (2020) *et seq.* (establishing the Arkansas State Medical Board, granting it power to regulate the practice of medicine, and establishing licensing and punishment authority).[23] Violation of the code of conduct set forth in a medical practice act can result in a State's medical board suspending or revoking a provider's medical license; the same is true in Arkansas. ARK. CODE ANN. 17-95-409 (providing for the revocation, suspension, and denial of medical licenses).[24] Given the regulatory and supervisory authority that Arkansas' medical board already possesses, a categorical ban on well-established medical treatment is not substantially related to Arkansas' purported goal of regulating the medical profession.

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[23] *See also, e.g.*, CAL. BUS. & PROF. CODE § 2000 *et seq.*; D.C. CODE § 3–1205.14; 225 IL. COMP. STAT. 60/22(A); MASS. GEN. LAWS ch. 112, § 5; MD. CODE ANN., HEALTH OCC. § 14-101 *et seq.*; NEV. REV. STAT. §§ 630.301, 630.306, 630.230; N.Y. EDUC. LAW § 6530; 63 PA. CONS. STAT. § 422.1 *et seq.*; WASH. REV. CODE § 18.71.002 *et seq.*

[24] *See also, e.g.*, CAL. BUS. & PROF. CODE § 2220 *et seq.*; D.C. CODE § 3–1205.14; 225 IL. COMP. STAT. 60/22(A); MASS. GEN. LAWS ch. 112, § 5; MD. CODE ANN., HEALTH OCC. § 14-404; NEV. REV. STAT. § 630.352(4); N.Y. PUB. HEALTH LAW § 230-a; 63 PA. CONS. STAT. § 422.41; WASH. REV. CODE § 18.130.050 *et seq.*

The legitimate concerns about the risks that gender-affirming care may present can be addressed through ordinary regulatory methods—as recent history shows. States did not react to the devastating, nationwide opioid crisis by completely banning the use of opioids and depriving all patients of medications to manage their pain. Instead, States adopted legislation or regulations to limit the amounts of opioids that physicians could prescribe and disciplined providers who engaged in improper prescribing practices.[25]

Amici States' experiences also confirm that a categorical ban on gender-affirming care is not substantially related to a concern about the medical risks of receiving such care because, when performed in accordance with careful protocols, gender-affirming care is scientifically recognized as appropriate medical treatment. Our laws and guidance

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[25] Nat'l Conf. of State Legislatures, *Prescribing Policies: States Confront Opioid Overdose Epidemic* (June 30, 2019), https://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx [https://web.archive.org/web/20220426122124/www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx] (archived Apr. 26, 2022) ("State lawmakers are crafting innovative policies . . . to address this public health crisis while also ensuring appropriate access to pain management.").

reflect this.[26] For example, New York, Oregon, and Rhode Island's insurance guidelines cover gender-affirming care, explicitly identifying the importance of adhering to scientific evidence and prevailing professional standards.[27] The World Professional Association for

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[26] Many States have relied on prevailing professional standards of care set forth by nationally recognized medical experts in crafting laws and guidance on coverage of gender-affirming medical care to treat gender dysphoria. *See, e.g.*, Mass. Comm'r of Ins., Bulletin 2021-11, *Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services* at 2 (2021), https://www.mass.gov/doc/bulletin-2021-11-prohibited-discrimination-on-the-basis-of-gender-identity-or-gender-dysphoria-including-medically-necessary-gender-affirming-care-and-related-services-issued-september-9-2021/download (recommending insurance carriers "consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender health field, including but not limited to those issued by the [WPATH]"); WASH. REV. CODE § 48.43.0128(3)(a) (forbidding insurers from "deny[ing] or limit[ing] coverage for gender-affirming treatment" when it is medically necessary and "prescribed in accordance with accepted standards of care").

[27] N.Y. Dep't of Fin. Servs., *Ins. Circular Letter No. 7* (Dec. 11, 2014), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2014_07 (citing the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders' recognition of gender dysphoria); Or. Health Auth., *Prioritized List: Guideline for Gender Dysphoria*, *supra* note 14 (approving youth puberty suppression coverage based on extensive testimony "from experts at various public meetings," "reviewing relevant evidence and literature," and citing WPATH standards); R.I. Off. of the Health Ins. Comm'r, Health Ins. Bulletin 2015-3, *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression*

Transgender Health (WPATH), the Endocrine Society, and other recognized and reputable professional associations endorse evidence-based standards of care for transgender people.[28] And while gender-affirming medical care, like all medical treatments, can carry both risks and benefits, those concerns are appropriately addressed on a case-by-case basis through consultation among treating providers, patients, and their families. A flat ban on gender-affirming care for teenagers—even in cases when doctors deem such care to be medically necessary—is inconsistent with those well-established medical standards and practices.[29]

(Nov. 23, 2015), https://ohic.ri.gov/sites/g/files/xkgbur736/files/bulletins/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf ("[A] growing body of scientific and clinical evidence regarding the potential harm to consumers arising from the denial or exclusion of services on the basis of gender identity" prompted reexamination of exclusions.).

[28] *See* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1 (2022), https://doi.org/10.1080/26895269.2022.2100644; *see also* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender Incongruent-Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869 (2017), https://doi.org/10.1210/jc.2017-01658.

[29] *See id.*

Arkansas' ban also oversteps by unnecessarily interfering with the doctor-patient relationship. According to the American Medical Association's Code of Medical Ethics, the relationship between a patient and a physician is based on trust, "which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare."[30] Courts have recognized the significance of this relationship.[31] And amici States' policies explicitly avoid interfering with the doctor-patient relationship

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[30] American Medical Association, *Patient-Physician Relationships*, AMA Code of Medical Ethics, https://code-medical-ethics.ama-assn.org/ethics-opinions/patient-physician-relationships (last visited Dec. 13, 2023).

[31] *See, e.g.*, *Ladapo*, 2023 WL 3833848, at *13 ("Ordinarily it is the patient, in consultation with the doctor, who weighs the risks and benefits and chooses a course of treatment. What is remarkable about the challenged statute and rules is not that they address medical treatments with both risks and benefits but that they arrogate to the state the right to make the decision."); *Brandt v. Rutledge*, 551 F.Supp.3d 882, 891 (E.D. Ark. 2021) ("[T]he State's goal of ensuring the ethics of Arkansas healthcare providers is not attained by interfering with the patient-physician relationship, unnecessarily regulating the evidence-based practice of medicine and subjecting physicians who deliver safe, legal, and medically necessary care to civil liability and loss of licensing.").

and disrupting decisions rooted in well-accepted medical standards.[32] In short, Arkansas' ban undermines the practice of medicine, the doctor-patient relationship, and the integrity of the medical profession.

For the above reasons, Act 626 does not withstand heightened scrutiny.

CONCLUSION

The permanent injunction of Act 626 should be affirmed.

[32] *See, e.g.*, McPherson, *supra* note 15, at 3–4 (determinations of "medical necessity" for insurance coverage purposes "must also be guided by providers in communication with individual patients."); Cal. Dep't of Ins., *supra* note 18 (the State encourages health insurance companies to evaluate coverage criteria for gender-affirming care in order "to avoid needlessly delaying and interfering with medical care recommended by a patient's doctor.").

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CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,205 words.

2. I certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font. Fed. R. App. P. 32(g)(1).

3. In accordance with 8th Cir. R. 28A(h)(2), I certify that this brief has been scanned for viruses and that the brief is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 13, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to any CM/ECF participants.

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