

No. 23-2681

IN THE 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 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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INTEREST OF THE UNITED STATES

This case challenges an Arkansas statute that prohibits certain medical care for transgender minors. The United States has a strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender, and intersex. The President has issued an Executive Order that recognizes the right of all people to be “treated with respect and dignity” and receive equal treatment regardless of gender identity or sexual orientation. Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021). In addition, the Attorney General has authority to intervene to address sex-based denials of equal protection of the laws under the Fourteenth Amendment. *See* 42 U.S.C. 2000h-2.

The United States filed a statement of interest in the district court and an amicus brief in the previous appeal supporting plaintiffs’ equal-protection claim. The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE AND APPOSITE CASES

The United States addresses the following question:

Whether Arkansas Act 626, which bans certain kinds of medical care for transgender minors but not for other minors, violates the Equal Protection Clause as a classification based on sex and transgender status that is subject to and fails heightened scrutiny.

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

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

Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022)

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

STATEMENT OF THE CASE

A. Act 626

On April 6, 2021, the Arkansas legislature voted to override the Governor’s veto and enacted the Arkansas Save Adolescents from Experimentation (SAFE) Act, 2021 Ark. Acts 626 (Ark. Code Ann. §§ 20-9-1501 to 20-9-1504 (2023)) (Act 626). Act 626 prohibits a healthcare professional from providing “gender transition procedures to any individual under eighteen (18) years of age” or referring any such individual to another healthcare professional for the same. Ark. Code Ann. § 20-9-1502(a)-(b).

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).¹ The prohibited “[g]ender transition procedures” are any

¹ 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

“medical or surgical service,” including “physician’s services, inpatient and outpatient hospital services, or prescribed drugs related to gender transition,” if those services are sought 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.

Id. § 20-9-1501(6).

Act 626 exempts certain procedures from its definition of gender transition procedures. These exempted procedures include: (i) “[s]ervices to persons born with a medically verifiable disorder of sex development” (often called intersex conditions); (ii) services provided after a diagnosis of a disorder of sexual development “through genetic or biochemical testing”; (iii) treatment of any “infection, injury, disease, or disorder” caused by or exacerbated by “the performance of gender transition procedures”; or (iv) procedures undertaken to

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).

treat a “physical disorder, physical injury, or physical illness” that place 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).

A healthcare professional violating the Act is deemed to have engaged in “unprofessional conduct” and is “subject to discipline by the appropriate licensing entity or disciplinary review board.” Ark. Code Ann. § 20-9-1504(a). The Act also allows the Arkansas Attorney General and private parties to enforce its provisions. *Id.* § 20-9-1504(b) and (f)(1).

The law took effect on July 28, 2021, *see* Arkansas Att’y Gen., *Opinion No. 2021-029* (May 20, 2021), <https://perma.cc/2C3Q-ZJZZ>, although its enforcement by state officials was enjoined almost immediately.

B. Procedural History

Four transgender minors who either seek or currently receive medical treatments banned by Act 626, along with their parents and healthcare providers, sued Arkansas officials, seeking declaratory and injunctive relief. App.31-35,73/R.Doc. 1, at 4-8, 46.² Among other claims, the minor plaintiffs allege that

² “App. __/R.Doc. __” refers to the appendix, cross-referencing documents available on the district court docket. “Br. __” refers to defendants’ opening brief on appeal.

Act 626 violates their rights under the Equal Protection Clause. App.68-70/*Id.* at 41-43.

1. The Preliminary Injunction Proceedings

Plaintiffs moved for a preliminary injunction prohibiting enforcement of Act 626 during the litigation’s pendency. R.Doc. 11. The district court granted the preliminary injunction and denied the motion to dismiss. App.76/R.Doc.59; R.Doc.64.

Defendants appealed, and a unanimous panel of this Court affirmed. *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). The Court held that Act 626 discriminated based on sex because “procedures that are permitted for a minor of one sex are prohibited for a minor of another sex.” *Id.* at 669. It reasoned that “[b]ecause the minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law, Act 626 discriminates on the basis of sex.” *Ibid.* Though the Court declined to decide whether transgender persons constitute a quasi-suspect class, it found no clear error in the factual findings underlying the district court’s holding that they do. *Id.* at 670 n.4. The Court also ruled that Arkansas likely could not satisfy heightened scrutiny, finding substantial evidence in the record to support the district court’s conclusion that Act 626 “prohibits medical treatment that conforms with the recognized standard of care” for gender dysphoria and that this care is not experimental or unsafe. *Id.* at 670-

671. Accordingly, the Court concluded that plaintiffs had demonstrated a likelihood of success on the merits of their equal-protection claim. *Id.* at 671.

2. The Permanent Injunction Proceedings

After a bench trial, the district court ruled, as relevant here, that Act 626 violates the Equal Protection Clause. App.235-311/R.Doc. 283.

In support, the district court made detailed factual findings and conclusions of law. App.235-311/R.Doc. 283. First, it held that Act 626 discriminates based on sex because a “minor’s sex at birth determines whether the minor can receive certain types of medical care.” App.295/*id.* at 64 (citation omitted). The court held that the Act also discriminates based on transgender status by targeting care that only transgender persons would choose to undergo and that transgender persons constitute a quasi-suspect class. App.296/*id.* at 65. Therefore, the court applied heightened scrutiny. App.297-305/*id.* at 66-74.

The district court then held that Arkansas could not satisfy heightened scrutiny, rejecting the State’s contention that Act 626 serves Arkansas’s interests in protecting children from experimental medical treatment and safeguarding medical ethics. App.297-305/R.Doc. 283, at 66-74. First, the court found that the banned care “improves the health and well-being of many adolescents with gender dysphoria,” based on the clinical experience of testifying experts, clinical research,

and the testimony of parent plaintiffs. App.298-300/*id.* at 67-69; *see also* App.264-266,286/*id.* at 33-35, 55.

Next, the district court concluded that Arkansas failed to provide “sufficient evidence” that Act 626 “is justified by the risks of the treatment.” App.299-302/R.Doc. 283, at 68-71. It found the risks associated with gender-affirming care are generally not unique and that “in most cases,” doctors can sufficiently manage the impact of gender-affirming hormones on fertility through preservation options. App.266,270,301-302/*id.* at 35, 39, 70-71. The court likewise rejected defendants’ claims relating to “desistance” and “regret.” App.271-273,302-303/*id.* at 40-42, 71-72. It concluded that there is “broad consensus in the field that once adolescents reach the early stages of puberty and experience gender dysphoria, it is very unlikely they will subsequently identify as cisgender or desist.” App.302/*id.* at 71. Nor did the court find evidence to support defendants’ claim that doctors do not conduct proper evaluations or obtain sufficient informed consent before beginning the banned treatments. App.303-305/*id.* at 72-74.

Accordingly, the district court held that Act 626 violates the Equal Protection Clause. App.305/R.Doc. 283, at 74. The court permanently enjoined Arkansas officials from enforcing the statute and entered final judgment. App.310/*id.* at 79; App.312/R.Doc. 284. Arkansas appealed (App. 313-314/R.Doc. 287) and sought initial hearing en banc, which the Court granted.

SUMMARY OF ARGUMENT

This Court should affirm the district court's conclusion that Act 626 violates the Equal Protection Clause. Act 626's ban on the use of puberty blockers and hormone therapies for gender-affirming care is subject to, and cannot survive, intermediate scrutiny.

Act 626 warrants heightened scrutiny because it classifies based on sex and transgender status. First, the Act facially discriminates based on sex by using explicitly sex-based terminology to delineate which minors may or may not receive puberty blockers or hormones. Second, it discriminates based on sex by targeting transgender minors, which is a form of sex discrimination. Third, Act 626 discriminates based on sex because it punishes transgender minors for their gender nonconformity by prohibiting them from obtaining treatments that would change their appearance in a way that is not "typical for" or would be "different from" their sex assigned at birth. Finally, heightened scrutiny separately applies because transgender persons, who are targeted by Act 626, constitute at least a quasi-suspect class.

As the district court concluded after conducting a bench trial, Act 626 cannot survive heightened scrutiny. The court did not clearly err in finding that Act 626 prohibits medical care that improves the mental and physical health of transgender minors and thus is not substantially related to achieving Arkansas's asserted

interests in protecting children and safeguarding medical ethics. Indeed, puberty blockers and hormone therapy are widely recognized by the medical community as safe and effective care for treating gender dysphoria. Moreover, Act 626 is underinclusive because it expressly permits non-transgender minors to access the very same treatments that it denies to transgender minors. The Act is also overinclusive because it categorically bans necessary medical care to transgender minors when narrower regulation could address the State's asserted concerns.

ARGUMENT

Act 626 violates the Equal Protection Clause.

As a panel of this Court recognized was likely at the preliminary injunction stage, Act 626 violates the Equal Protection Clause because it classifies based on sex and transgender status and thus triggers heightened scrutiny, which the Act cannot survive. *See Brandt v. Rutledge*, 47 F.4th 661, 669-671 (8th Cir. 2022). The en banc Court should reaffirm, at the permanent injunction stage, the panel's sound legal analysis.³

³ The Sixth and Eleventh Circuits recently held, at the preliminary injunction stage, that rational-basis review applied to similar gender-affirming care bans, which those bans likely survived. *See Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1227-1231 (11th Cir. 2023), *pet. for reh'g en banc pending*, No. 22-11707; *L.W. v. Skrmetti*, 83 F.4th 460, 486-489 (6th Cir. 2023) *pets. for cert. pending*, Nos. 23-466, 23-477, 23-492. For the reasons set forth below, these decisions are unpersuasive, and this Court should decline to follow them.

A. Act 626 warrants heightened scrutiny.

The district court correctly held that Act 626 triggers heightened scrutiny as a classification based on sex and transgender status. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (*VMI*) (holding sex-based classifications subject to heightened scrutiny). The Act classifies based on sex for three reasons: (1) it regulates certain medical procedures in expressly sex-based terms; (2) it discriminates based on sex by targeting transgender minors for differential treatment; and (3) it punishes transgender minors for their gender nonconformity. Act 626 also separately warrants heightened scrutiny because it discriminates against transgender persons, who constitute at least a quasi-suspect class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (explaining quasi-suspect classifications are subject to heightened review).

1. Act 626 facially discriminates based on sex.

As the district court held, Act 626 facially discriminates based on sex because, as confirmed by the evidence at trial, “a minor’s sex at birth determines whether the minor can receive certain types of medical care under the law.” App.295/R.Doc. 283, at 64 (citing *Brandt*, 47 F.4th at 669). The Act prohibits a healthcare professional from providing a minor with, or referring 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) (emphases added) (defining such procedures), 20-9-1502(a) and (b) (banning such procedures).

Under this definition, “[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.” App.296/R.Doc. 283, at 65 (quoting *Brandt*, 47 F.4th at 670). For example, Act 626 does not prohibit an adolescent assigned male at birth from “receiving testosterone or surgical procedures such as subcutaneous mastectomy, voice surgery, liposuction, lipofilling, pectoral implants, or various aesthetic procedures for the purpose of aligning himself with his biological sex.” App.295/R.Doc. 283, at 64 (internal quotation marks omitted). But Act 626 prohibits the same medication and procedures for an adolescent assigned female at birth.⁴

To explain what Act 626 prohibits, the Arkansas legislature could not “writ[e] out instructions” identifying the banned medical procedures “without using the words, man, woman, or sex (or some synonym).” *Bostock v. Clayton*

⁴ Though Act 626’s ban on gender-affirming surgery is relevant to whether the statute discriminates based on sex, the United States takes no position in this brief on whether this ban violates the Equal Protection Clause. This brief focuses only on the prohibition of puberty blockers and hormone therapies.

Cnty., 140 S. Ct. 1731, 1746 (2020). Thus, because the Act’s prohibition “cannot be stated without referencing sex,” it is “inherently based upon a sex-classification.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *accord A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), *pet. for cert. pending*, No. 23-392; *Brandt*, 47 F.4th at 669-670; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

2. Act 626 discriminates based on sex by targeting transgender minors.

a. Heightened scrutiny also applies because Act 626 discriminates based on transgender status, which the Supreme Court has recognized as a form of sex discrimination. The Court has concluded that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741. This conclusion is straightforward—when a law “penalizes a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth,” the person’s “sex plays an unmistakable” role. *Id.* at 1741-1742.

Act 626 discriminates based on transgender status by expressly prohibiting “gender transition procedures,” which the district court found to be a type of “medical care that only transgender people choose to undergo.” App.296/R.Doc. 283, at 65 & n.12; *see* Ark. Code Ann. § 20-9-1502(a) and (b). Indeed, the Act

underscores the unmistakable role sex plays in discrimination based on transgender status by explicitly defining “gender 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*.” Ark. Code Ann. § 20-9-1501(5) (emphases added); *see also id.* § 20-9-1501(6)(A) (defining “gender transition procedures”). As these definitions make clear, by targeting transgender minors, Act 626 “unavoidably discriminates against persons with one sex identified at birth” but who identify with a different sex “today.” *Bostock*, 140 S. Ct. at 1746.

b. The Sixth and Eleventh Circuits have incorrectly held that *Bostock*’s reasoning does not apply to the Equal Protection Clause. *See L.W. v. Skrmetti*, 83 F.4th 460, 484-485 (6th Cir. 2023), *pets. for cert. pending*, Nos. 23-466, 23-477, 23-492; *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228-1229 (11th Cir. 2023), *pet. for reh’g en banc pending*, No. 22-11707. Both courts assert that differences between the language of Title VII and the Equal Protection Clause justify limiting *Bostock*’s reasoning, but neither court explains how any textual difference would render a classification sex-based under the former but sex-neutral under the latter. *See Skrmetti*, 83 F.4th at 484; *Eknes-Tucker*, 80 F.4th at 1229. *Bostock*’s core insight—that “it is impossible to discriminate against a person for

being . . . transgender without discriminating against that individual based on sex,” rings just as true in the equal-protection context. 140 S. Ct. at 1741.

3. Act 626 discriminates based on sex because it targets transgender minors for their gender nonconformity.

a. The Supreme Court has recognized differential treatment based on gender nonconformity as a form of sex classification subject to heightened scrutiny. *E.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 137-138 (1994). Multiple courts have held that laws discriminating based on transgender status also trigger heightened scrutiny because they punish transgender persons for “fail[ing] to conform to the sex-based stereotypes associated with their assigned sex at birth.” *Whitaker*, 858 F.3d at 1051; *see also Grimm*, 972 F.3d at 608-609 (collecting cases).

As discussed above, discrimination based on gender nonconformity appears in Act 626’s plain text. The Act prohibits the covered medical care if it changes a minor’s appearance from that “*typical* for the individual’s biological sex” or in a way that is “*different* from the individual’s biological sex,” including procedures that “promote the development of *feminizing or masculinizing features* in the *opposite biological sex*.” Ark. Code Ann § 20-9-1501(6)(A)(i) and (ii) (emphases added). In other words, the Act’s very purpose is to deny medical treatments to transgender minors when such medical treatments would cause their bodies to deviate from their birth-assigned sex. By contrast, the law does not deny these same treatments to minors when used to *conform* their bodies to their birth-

assigned sex. Thus, for example, an adolescent assigned male at birth can receive testosterone to treat delayed puberty because testosterone would conform his physical appearance with his sex assigned at birth. *See* App.269,295/R.Doc. 283, at 38, 64.

b. The Sixth and Eleventh Circuits disagree that laws like Act 626 penalize gender nonconformity. *See Skrmetti*, 83 F.4th at 485; *Eknes-Tucker*, 80 F.4th at 1229. The Sixth Circuit stated that “[a] concern about potentially irreversible medical procedures for a child is not a form of [sex] stereotyp[e],” 83 F.4th at 485, while the Eleventh Circuit opined that “biological differences” are not sex stereotypes, 80 F.4th at 1229. But both courts relied on the purported *justifications* for laws like Act 626—which is relevant at the second step of the analysis—without recognizing that the challenged statutes treat transgender minors differently because of their gender nonconformity. *Cf. Skrmetti*, 83 F.4th at 499 (White J., dissenting) (“The statutes . . . condition the availability of procedures on a minor’s conformity with societal expectations associated with the minor’s assigned sex.”). As explained above, forcing minors to conform to their sex assigned at birth lies at the heart of the Act’s prohibitions.

4. Act 626 triggers heightened scrutiny because transgender persons constitute at least a quasi-suspect class.

Heightened scrutiny applies to Act 626 on the separate basis that transgender persons constitute at least a quasi-suspect class. *See* App.296/R.Doc. 283, at 65.

The Supreme Court has analyzed four factors to determine whether a group constitutes a “suspect” or “quasi-suspect” class: (1) whether the class historically has faced 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 members of the class have “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). If these factors are satisfied, then discrimination against the class warrants heightened scrutiny.

This test sets a high bar to ensure that a class truly requires “extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Two circuits already have found that transgender persons are the rare group that meets this high bar. *See Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023), *pet. for reh’g en banc pending*, No. 20-35813 (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019)); *Grimm*, 972 F.3d at 610 (collecting district court cases).

Transgender persons “satisfy all indicia of a suspect class.” App.296/R.Doc. 283, at 65. First, “[t]here is no doubt” that transgender persons, as a class, “historically have been subjected to discrimination [based on] their gender identity,

including high rates of violence and discrimination in education, employment, housing, and healthcare access.” *Grimm*, 972 F.3d at 612 (citation omitted); *see also Whitaker*, 858 F.3d at 1051 (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”).⁵

Second, whether a person is transgender plainly bears no relation to their ability to contribute to society. As the Fourth Circuit observed, “[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 abilities.’” *Grimm*, 972 F.3d at 612 (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 (citation omitted). Specifically, their gender identities do not align with their respective sexes assigned at birth. Courts also have recognized that “being transgender is not a choice” but rather is as “immutable as being cisgender.” *Grimm*, 972 F.3d at 612-613. Here, the district court similarly found

⁵ Arkansas claims that transgender persons have not experienced “wrongly enshrined purposeful” discrimination like other suspect classes because, as purportedly recognized in *Bostock*, Title VII has protected them “for nearly a half-century.” Br. 29. That reading of *Bostock* is remarkable. As *Bostock* acknowledged, it was likely that no one in 1964 expected Title VII to protect transgender persons. 140 S. Ct. at 1737. And for decades before *Bostock*, courts routinely held that Title VII did not extend such protection. *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-1087 (7th Cir. 1984).

that “[g]ender identity is not something that an individual can control or voluntarily change,” although “a person’s *understanding* of their gender identity can change over time.” App.236-237/R.Doc. 283, at 5-6 (emphasis added).

Finally, transgender persons have not “yet been able to meaningfully vindicate their rights through the political process” in much of the nation. *Grimm*, 972 F.3d at 613. They are “underrepresented in every branch of government.” *Ibid.* (citing data). Furthermore, the proliferation of laws and policies, like Act 626, targeting transgender persons for discrimination is more evidence that transgender people lack the power necessary to protect themselves in the political process. Arkansas’s remarkable assertion that transgender persons “enjoy broad institutional support from all levels of American society” (Br. 30) is squarely contradicted by the fact that in 2023 alone, States enacted 85 laws that curtail or prohibit a transgender person’s access to public life, including access to health care, educational opportunities, restrooms and other public facilities, and accurate government identification. *See 2023 Anti-Trans Bills Tracker*, Trans Legislation Tracker, <https://perma.cc/9LML-EN9Y> (last visited Dec. 12, 2023). This is *more than three times* the number of such laws enacted in 2022, suggesting that anti-transgender political mobilization is *growing* rather than decreasing. *See 2022 Anti-Trans Legislation*, Trans Legislation Tracker, <https://perma.cc/FY9G-SPV2> (last visited Dec. 12, 2023) (26 anti-transgender laws enacted in 2022).

That the position of some transgender persons in our country may have “improved markedly in recent decades,” *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973), does not undermine a finding that transgender persons, as a group, lack political power. *See* Br. 30. The same was true about women when the Supreme Court began treating sex as a quasi-suspect classification. *See Frontiero*, 411 U.S. at 658-686. Nor does the United States’ participation as amicus suggest that transgender persons possess political power. *See* Br. 30. The recent wave of legislation targeting transgender individuals decisively refutes any suggestion that they have no need of the courts’ protection.

5. Defendants’ arguments against the application of heightened scrutiny lack merit.

a. That Act 626’s prohibitions apply to all minors does not foreclose heightened scrutiny.

Despite the Act using expressly sex-based terms to delineate the prohibited “gender-transition procedures,” Arkansas argues that Act 626 is “sex-neutral” because it “treats males and females equally.” Br. 21-22. “Neither may access gender-transition procedures until they reach adulthood.” Br. 21. As an initial matter, this framing zooms out to a level of abstraction intended to obscure the sex discrimination on the statute’s face. Act 626 cannot identify the banned “gender-transition procedures” without relying on sex assigned at birth. *See* Ark. Code Ann. § 20-9-1501(6)(A). Doctors can prescribe puberty blockers, estrogen, and

testosterone to any minor. But under Act 626, whether those prescriptions are lawful depends solely on the minor's birth-assigned sex.

That the Arkansas ban applies to transgender males *and* females does not inoculate it from heightened scrutiny. As the Supreme Court repeatedly has held, laws that restrict conduct based on a protected characteristic (*e.g.*, race or sex) are not insulated from heightened review simply because they apply to members of *all* races or sexes. *See, e.g., J.E.B.*, 511 U.S. at 140-142; *Loving v. Virginia*, 388 U.S. 1, 8 (1967). Because access to a particular medical treatment depends on an adolescent's sex assigned at birth, Act 626 by definition includes a sex classification subject to heightened review. *See Bostock*, 140 S. Ct. at 1742-1743 (A law that discriminates against both transgender males and transgender females “doubles rather than eliminates” liability for sex discrimination.).

b. *Dobbs* is inapposite.

Nonetheless, relying on *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), Arkansas insists that Act 626 does not discriminate based on sex or transgender status. Br. 21, 24, 31. In *Dobbs*, the Supreme Court described abortion as a “medical procedure that only one sex can undergo,” a fact that was insufficient to “trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of

one sex or the other.” 597 U.S. at 236 (alteration in original) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

Dobbs is not instructive here. First, unlike the regulation in *Dobbs* or the law excluding certain pregnancy-related disabilities in *Geduldig*, Act 626 contains an *express* sex-based classification, as explained above.

Second, neither *Dobbs* nor *Geduldig* involved a law that, like Act 626, generally allows certain medical procedures but bans them *only* for a discrete class of people—a class *defined* by sex assigned at birth. *See* Ark. Code. Ann. § 20-9-1501(6)(A)(ii) (defining prohibited “gender transition procedures” in terms of whether they promote characteristics of the “*opposite biological sex*” (emphasis added)). The law at issue in *Dobbs* banned abortion for everyone. In contrast, Act 626 regulates medical procedures that *all* individuals can undergo but bans them only when sought to treat gender dysphoria, the purpose for which transgender adolescents need them.

Finally, Arkansas’s underlying premise in invoking *Dobbs*—that prescribing puberty blockers and hormones for gender dysphoria is not the same medical procedure as prescribing them for any other condition—is deeply flawed. Br. 22-24. As the State puts it, “only females can use testosterone as a *transition* treatment,” and “only males can use estrogen as a *transition* treatment.” Br. 23

(emphases added) (quoting *Skrmetti*, 83 F.4th at 481). But that argument simply bakes into the equal-protection analysis the very classification being scrutinized.

Doubling down, Arkansas claims that the very same prescriptions become “experimental” rather than “recognized, established medical procedures” when used to treat gender dysphoria because, unlike “traditional” sex-hormone treatments, the banned treatments “disrup[t] normal, healthy bodily function.” Br. 24. Yet that argument “conflates the classifications drawn by the law with the [S]tate’s justification for it,” as this Court previously explained. *Brandt*, 47 F.4th at 670; *see also, e.g., Nguyen v. INS*, 533 U.S. 53, 56, 64 (2001) (discussing whether men and women were similarly situated with “regard to the proof of biological parenthood” to determine whether the law *survived* heightened scrutiny). Of course, the State’s justifications for treating the same medical procedure differently depending on the “underlying condition” or its “overarching goals” are important to the equal-protection analysis. *Skrmetti*, 84 F.4th at 481. But they provide no basis for refusing to find a sex-based classification in the first instance.

c. Heightened scrutiny is consistent with the proper role of courts applying the Equal Protection Clause.

Arkansas asserts that applying heightened scrutiny here “exempts gender-transition procedures” from the general rule that States “have plenary power to regulate the practice of medicine” and therefore substitutes a court’s judgment for

that of its legislature. Br. 39, 40-44. But of course, the Equal Protection Clause is a *limit* on state power. In most contexts, the Constitution presumes “that even improvident decisions will eventually be rectified by the democratic process[.]” *Cleburne*, 473 U.S. at 440. But the Equal Protection Clause’s premise is that courts must approach lines drawn based on race, sex, and other suspect classifications differently. As our Nation’s history makes all too clear, such distinctions are both pernicious and “unlikely to be soon rectified by legislative means.” *Ibid.* Accordingly, when as here, States differentiate based on suspect classifications, the Constitution gives courts both the power and the duty to carefully scrutinize their proffered justifications.

B. Act 626 does not survive heightened scrutiny.

As the district court correctly held, Act 626 fails to satisfy heightened scrutiny. App.297-305/R.Doc. 283, at 66-74. To survive heightened scrutiny, defendants bear the “demanding” burden of showing that the challenged “classification serves important governmental objectives” and that it is “substantially related to the achievement of those objectives.” *VMI*, 518 U.S. at 524 (citation omitted). This justification must be “exceedingly persuasive.” *Id.* at 531 (citation omitted). As such, it “must be genuine, not hypothesized or invented *post hoc* in response to litigation” and “must not rely on overbroad generalizations.” *Id.* at 533.

Act 626 cannot satisfy heightened scrutiny because the evidence at trial established that the law does not serve Arkansas's articulated interests in protecting children and regulating medical ethics. App.297-298,305/R.Doc. 283, at 66-67, 74.

1. The district court did not clearly err in finding that the State had not proven its justifications for Act 626.

The district court correctly concluded that Arkansas did not prove its claim that Act 626 protects children and safeguards medical ethics. App.297-305/R.Doc. 283, at 66-74. In particular, the court did not clearly err in finding that the State failed to prove its assertions supporting these interests:

- (i) that there is a lack of evidence of efficacy of the banned care;
- (ii) that the banned treatment has unique risks and side effects;
- (iii) that many patients will desist in their gender incongruence;
- (iv) that some patients will later come to regret having received irreversible treatments; and (v) that treatment is being provided without appropriate evaluation and informed consent.

App.297-298/*Id.* at 66-67. To the contrary, “[r]ather than protecting children or safeguarding medical ethics,” Act 626 prohibits “medical care [that] improves the mental health and well-being of patients.” App.305/*Id.* at 74. As the court found, “the testimony of well-credentialed experts, doctors who provide gender-affirming medical care in Arkansas, and families that rely on that care directly refutes any claim by the State that the Act advances an interest in protecting children.” *Ibid.*

a. As the district court found, with respect to the efficacy of gender-affirming care, the trial “evidence showed that based on the decades of clinical experience and scientific research,” the “medical and mental health fields—including . . . major medical and mental health professional associations”—widely recognize that gender-affirming care “can relieve the clinically significant distress associated with gender dysphoria” in transgender adolescents. App.300/R.Doc. 283, at 69; *see also* App.238-241,264-266,297-300/*id.* at 7-10, 33-35, 66-69. Thus, the court did not clearly err in finding that Arkansas failed to prove that “the banned treatments are ineffective or experimental.” App.300/*Id.* at 69.

b. Next, the district court properly concluded that Arkansas failed “to show that the risks of gender-affirming care banned by Act 626 substantially outweigh the benefits.” App.302/R.Doc. 283, at 71; *see also* App.266-271/*id.* at 35-40. In particular, the court found that “adverse health effects are rare” when “a doctor monitors treatment” (App.301/*id.* at 70; *see also* App.270-271/*id.* at 39-40) and that “the risks of gender-affirming medical care are not categorically different than the types of risks” posed by “other types of pediatric healthcare” (App.266/*id.* at 35).

The latter is true, in part, because “except for the potential risk to fertility, the risks associated with puberty blockers, testosterone, estrogen[,] and anti-androgens are the same regardless of . . . whether they are used to treat birth-

assigned males or birth-assigned females.” App.267-268/R.Doc. 283, at 36-37.

But even as to the risk of impaired fertility, the district court found the existence of treatments for “certain rheumatologic conditions, kidney diseases, and cancers” that can also “impair a minor’s fertility.” App.267/*Id.* at 36. Regardless, the court found that the risk of impaired fertility does not outweigh the benefits of gender-affirming care because patients, their parents, and medical providers have options for managing this risk. App.270-271,301/*Id.* at 39-40, 70.

c. The district court also did not clearly err in finding no “significant risk of harm to a minor” based on the occurrence of “desistance” or “regret.”

App.302/R.Doc. 283, at 71; *see also* App.271-273/*id.* at 40-42. Instead, the evidence demonstrated “broad consensus in the field that once adolescents reach the early stages of puberty and experience gender dysphoria, it is very unlikely they will subsequently identify as cisgender or desist.” App.302/*Id.* at 71. While the court credited the testimony of defendants’ witnesses Billy Burleigh and Laura Smalls, who testified about their experience as “detransitioners,” the court did not consider their testimony relevant given that they did not receive gender-affirming care as a minor, neither was treated in Arkansas, both “detransitioned” as a result of a religious experience, and both “continued to struggle with living consistently with their birth-assigned sex after deciding to detransition.” App.273/*Id.* at 42.

d. Finally, the district court did not clearly err in finding that, contrary to the State's assertion, gender-affirming care in Arkansas is being provided with proper evaluation and consent. App.249-253,303-305/R.Doc. 283, at 18-22, 72-74. Indeed, the State's experts admitted they "had no contact with any Arkansas doctors or information about how doctors in Arkansas treat minors with gender dysphoria." App.303/*Id.* at 72. Moreover, there was no evidence "that doctors in Arkansas negligently prescribe" puberty blockers or hormone therapy to minors. *Ibid.*; *see also* App.278/*id.* at 47.

2. Act 626 is not substantially related to achieving Arkansas's asserted interests.

Even if Arkansas had substantiated its asserted concerns for protecting children and safeguarding medical ethics, Act 626 is not "substantially related," *VMI*, 518 U.S. at 533 (citation omitted), to addressing those concerns because it is both underinclusive and overinclusive.

a. Act 626 is underinclusive.

Act 626 is underinclusive in addressing Arkansas's concerns about the use of puberty blockers and hormone therapies for gender-affirming care because, as the district court emphasized, only gender-affirming care "is singled out for prohibition." App.305/R.Doc. 283, at 74. The Act expressly permits the same medical treatments to treat a range of conditions other than gender dysphoria, including, for example, precocious or delayed puberty, hypogonadism, ovarian

failure, Turner Syndrome, polycystic ovarian syndrome, and any disorders of sexual development (intersex conditions). App.268-270/*Id.* at 37-39; *see* Ark. Code. Ann. §§ 20-9-1501(6)(B), 20-9-1502(c). Yet, as the court found, “the risks of gender-affirming medical care are not categorically different than the types of risks that other types of pediatric healthcare pose.” App.266/R.Doc. 283, at 35; *see also* App.266-271/*id.* at 35-40. Nor does Act 626 ban treatments for other conditions that carry a similar risk of impaired fertility (App.267/*id.* at 36), treatments that lack randomized controlled clinical trials supporting their use (App.277/*id.* at 46), or other treatments for minors on the rationale that minors cannot provide informed assent (App.277-278/*id.* at 46-47).

Arkansas argues that one basis for treating gender dysphoria differently than other conditions is because “it’s the only psychological—rather than physiological—condition” these medications “are used to treat.” Br. 24. Regardless of whether this line is as distinct as the State suggests, it is unclear why this distinction should matter. As the Supreme Court has recognized, “[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). And regardless, the evidence at trial demonstrated that there are serious, physical consequences of gender dysphoria, including increased risks of self-harm and suicidality. App.238,253,264,280-281,283/R.Doc. 283, at 7, 22, 33, 49-50, 52.

b. Act 626 is overinclusive.

Act 626 is overinclusive because it is “not narrowly tailored to achieve the State’s articulated interests” but bans “all gender-affirming care.”

App.305,307/R.Doc. 283, at 74, 76. The Act “classif[ies] unnecessarily and overbroadly” because it categorically bans the provision of puberty blockers and hormone therapies to treat gender dysphoria for all transgender minors under all circumstances. *Sessions v. Morales-Santana*, 582 U.S 47, 63 n.13 (2017).

As the district court observed, “[t]hough the State applauds the efforts of European countries to restrict gender-affirming care for minors with gender dysphoria, the State’s expert agreed that no other country in the world has taken Arkansas’s broad stance.” App.305/R.Doc. 283, at 76. Indeed, none of the countries Arkansas identified at trial—Sweden, Finland, and the United Kingdom—have imposed an outright ban on all gender-affirming care for transgender minors. App.293/*Id.* at 62. Instead, gender-affirming care is still provided, subject to country-specific guidelines. For example, in Finland, hormone therapy is available on a “case-by-case” basis “if it can be ascertained that the adolescent’s identity as the other sex is of a permanent nature and causes severe [gender] dysphoria.” *Ibid.*

* * *

In sum, if Act 626's objective is to curb the risks associated with puberty blockers and hormone therapies, its categorical ban on those medications when used to treat gender dysphoria is a severely underinclusive and overinclusive response. The Act does not survive heightened scrutiny.

CONCLUSION

This Court should affirm the district court's conclusion that Act 626 violates the Equal Protection Clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS
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(1) complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) (for amicus briefs) because it contains 6494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

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s/ Barbara Schwabauer
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Date: December 14, 2023

CERTIFICATE OF SERVICE

On December 14, 2023, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system. I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (30 copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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