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CONSTITUTIONAL LAW—ARKANSAS'S UNCONSTITUTIONAL ATTACK ON TRANSGENDER CHILDREN AND THE RIGHTS OF THEIR PARENTS

I. INTRODUCTION

In being asked why the state of Arkansas would step in and override parents, physicians, psychiatrists, and endocrinologists who have developed guidelines for the protocols for treating gender dysphoria, Attorney General Leslie Rutledge replies that "for every single one of them, there is one that says we don't need to allow children to be able to take those medications."[1] In defending this false position, she claims to have heard testimony that "98% of the young people who have gender dysphoria" are able to "move past that" without the use of "medication."[2] Her interviewer, Jon Stewart, replies: "Wow, that's an incredibly made-up figure."[3] Being pressed further, Stewart asks her to cite her source.[4] To no avail, she claims she cannot think of the name "off the top of [her] head."[5]

Stewart sets up an analogy in an attempt to help Attorney General Rutledge understand the hypocrisy and political agenda-pushing beneath the Arkansas bill.[6] He sets up a scenario in which your child has pediatric cancer, and:

> The state comes in and tells you that 'they recommend chemotherapy, but we are not going to let you do that. We [the State] think you should get a different opinion, and here is the organization we think you should get the opinion from. They're not the mainstream, but they're an organization. That's who you have to be treated by.[7]

Rutledge quickly dismisses the analogy as being "not at all in line with" their discussion because parents with children who have pediatric cancer are facing "life or death," and she has friends who have lost children to pediatric cancer.[8] Stewart interrupts, "I've got some bad news for you: Parents with children who have gender dysphoria have lost children to suicide and

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1. The Problem with Jon Stewart, *Interview Excerpt with Arkansas Attorney General Leslie Rutledge*, YOUTUBE (Oct. 7, 2022), https://www.youtube.com/watch?v=NPmjNYt71fk.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. The Problem with Jon Stewart, *supra* note 1.
8. *Id.*

depression."[9] He continues, "I'm confused why you follow AMA[10] guidelines for all other health issues in Arkansas, but not for this."[11] Though she is unable or unwilling to answer the question directly, this discussion illuminates the very clear motivation behind Arkansas's ban on gender-affirming care for minors.[12] The motivation is not, as it is so claimed to be, the protection of Arkansan children.[13] The motivation is to disadvantage and attempt to erase a politically unpopular group.[14]

According to the American Psychiatric Association ("APA"), gender dysphoria "refers to psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity."[15] The *DSM-5-TR*[16] sets forth the standards for the diagnosis of gender dysphoria, elaborating on the more specific criteria for children.[17] It outlines the diagnosis criteria for gender dysphoria in children as an "incongruence between one's experienced/expressed gender and assigned gender for at least six months, as manifested by at least six" of further specified criteria.[18] Some of those other criteria include a strong insistence and/or desire to be another gender, or that one is the other gender, "a strong dislike of one's sexual anatomy," and "a strong desire for the physical sex characteristics that match one's experienced gender."[19] The World Professional Association for Transgender Health ("WPATH") developed the "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People ('Standards of Care')," which are recognized as the authoritative standards of care by the American Medical Association, the American Psychiatric Association, and the

9. *Id.*
10. American Medical Association ("AMA").
11. The Problem with Jon Stewart, *supra* note 1.
12. *Id.*
13. *See* Complaint at ¶ 140, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 4:21CV450-JM) [hereinafter Complaint].
14. *See id.* at ¶¶ 143, 147.
15. *What is Gender Dysphoria*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Jan. 07, 2024).
16. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR)*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm (last visited Jan. 07, 2024) ("*The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR)* features the most current text updates based on scientific literature with contributions from more than 200 subject matter experts. The revised version [clarifies] modifications to the criteria sets for more than 70 disorders . . . [and includes] Clinical Modification (ICD-10-CM) symptom codes for suicidal behavior and nonsuicidal self-injury, and updates to descriptive text for most disorders based on extensive review of the literature.").
17. *See id.*
18. *What is Gender Dysphoria*, *supra* note 15.
19. *Id.*

American Psychological Association.[20] The United States government, in its regulatory guidance, has repeatedly recognized WPATH as a leader in setting the standards for transgender healthcare.[21] Treatment for gender dysphoria, recognized by these reputable organizations, includes social, legal, and medical affirmations.[22] Social affirmations include the adoption of different pronouns and names.[23] Legal affirmations include changing the name and gender markers on government identification.[24] Medical affirmations include "pubertal suppression for adolescents with gender dysphoria and gender-affirming hormones like estrogen and testosterone for older adolescents and adults."[25] The APA clarifies that "medical affirmation is not recommended for prepubertal children," and states that "psychological attempts to force a transgender person to be cisgender . . . are considered unethical and have been linked to adverse mental health outcomes."[26] Data indicates that "82% of transgender individuals have considered killing themselves and 40% have attempted suicide, with suicidality highest among transgender youth."[27] A 2021 peer-reviewed study found that gender-affirming hormone therapy is "significantly related to lower rates of depression and suicidality among transgender and nonbinary youth."[28]

This Note argues that Arkansas's Act 626[29] violates the Equal Protection Clause and the Due Process Clause of the United States Constitution and, upon inevitable appeal, the Eighth Circuit should affirm the decision of the District Court for the Eastern District of Arkansas.[30] If the Arkansas legislature wishes to protect children from permanent, life-altering procedures, then revised legislation that permits the use of non-permanent gender-affirming treatments, in alignment with the AMA, APA, and WPATH standards of care, while additionally not restricting the First Amendment rights of medical providers, would likely pass constitutional muster. The widely accepted standard

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20. *Resolution 122 (A-08): Removing Financial Barriers to Care for Transgender Patients*, p.10 AM. MED. ASS'N HOUSE OF DELEGATES, http://www.tgender.net/taw/ama_resolutions.pdf (last visited Jan. 07, 2024).

21. Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1170 (N.D. Cal. 2015); *see also* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 671 (8th Cir. 2022).

22. *What is Gender Dysphoria*, *supra* note 15.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Ashley Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. INTERPERSONAL VIOLENCE 2697, 2697 (2020).

28. 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, 643 (2022).

29. *See infra* notes 47–49.

30. *See infra* note 116.

of care is clear.[31] Yet Arkansas, and many other states, have attempted to inject themselves into the most private family and medical matters to counter-intuitively "protect" children. This Note, however, does not analyze the First Amendment claims made in *Brandt*, and focuses solely on the effects that Act 626 has on the Constitutional rights of parents and their transgender children.[32]

Section II of this Note will lay the foundation for the right of parents to make medical decisions for their children, by exploring bans on gender-affirming care in multiple states across the country. Additionally, Section II will highlight how courts in other states have handled nearly identical legislation, particularly focusing on the Sixth Circuit's analysis in *L.W. ex rel. Williams v. Skrmetti*.[33] Finally, Section II will outline the court's findings in *Brandt v. Rutledge*.[34]

Section III of this Note will address the strengths and weaknesses of both the *Brandt v. Rutledge* Plaintiffs' and Defendants' arguments and illuminate the logical fallacies interwoven throughout the argument against gender-affirming care for minors as presented by the defendants in *Brandt* and the Sixth Circuit in *Skrmetti*. Additionally, Section III will introduce a revised piece of legislation that would potentially pass constitutional muster, finding a middle ground where legitimate concerns of both parties may be alleviated.

II. BACKGROUND

A. Medical Decisions for Children as a Fundamental Right

It is well-established that so long as a parent adequately cares for his or her children, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decision concerning the rearing of that parent's children."[35] Societally, privacy and respect for parenting choices are often uncontested when the parenting goal aligns with the morals and values of politically popular groups. For example, allowing parents to indoctrinate children into religious groups is rarely met with animus.

This fundamental right for parenting choices expands into the medical context, in which parents are given the reins to make medical decisions for

31. *See supra* notes 16–28.

32. For further discussion of the First Amendment claims in this case, *see* Brandt v. Rutledge, 551 F. Supp. 3d 882, 893–94 (E.D. Ark. 2021).

33. L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408 (6th Cir. 2023).

34. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021).

35. Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

their children, except for cases in which "grievous harm" will result.[36] In other words, surgeries that are medically unnecessary and for the primary purpose of aesthetic or social conformity are "treated like parent decisions to attend church or select a school"[37] Similarly, societal norms, despite medical findings, sculpt how society decides what are appropriate parenting choices and what are not. As a general matter, parents are free to make medical decisions that he or she views as in the child's best interest, no matter the medical necessity of the treatment or alternative that is chosen.[38] Examples of controversial, yet accepted, medical decisions that parents have made for their children are the prescription of hormones for altering stature,[39] the westernizing of Asian eyes,[40] experimental growth stunting,[41] and even liposuction of a twelve-year old child.[42]

A popular, mostly uncontested modern procedure that is left to the parents' judgment is male circumcision.[43] Newborn children are obviously unable to consent, so the decision is left to the parent to decide whether to circumcise the child. While circumcision is the standard in the United States, with an estimated 80.5% of American men being circumcised, it is generally rare in Europe, Latin America, and Asia.[44]

B. Ban on Gender-Affirming Care for Minors

Arkansas is far from the only state to introduce legislation to ban gender-affirming care for transgender minors.[45] Alabama, Arizona, Texas, Tennessee, Mississippi, Oklahoma, New Hampshire, Wisconsin, and Louisiana have all attempted to legislatively bar parents from seeking reputable treatment for their children.[46]

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36. Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955, 974 (2010).

37. *Id.* at 967 (citing Parham v. J.R., 442 U.S. 584, 603–04 (1979)).

38. *See id.*

39. *Id.* at 961–63.

40. *Id.* at 960–61.

41. *Id.* at 959 (citing DOROTHY KO, CINDERELLA'S SISTERS: A REVISIONIST HISTORY OF FOOTBINDING (2005); WANG PING, ACHING FOR BEAUTY: FOOTBINDING IN CHINA (2000)).

42. Ouellette, *supra* note 36, at 963–64.

43. Brian J. Morris et al., *Estimation of Country-Specific and Global Prevalence of Male Circumcision*, NAT'L LIBR. MED. (March 1, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4772313/.

44. *Circumcision by Country 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/circumcision-by-country (last visited Jan. 07, 2024).

45. Annette Choi and Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some With The Possibility of A Felony Charge*, CNN POLITICS (June 6, 2023 3:10 PM), https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html.

46. *Id.*

1. Brandt v. Rutledge

a. Preliminary Injunction

Arkansas's Act 626 prohibits a physician or other healthcare provider from providing or referring any individual under the age of eighteen for "gender transition procedures."[47] Under the Act, "gender transition procedures" include any means or surgical service, inpatient or outpatient hospital services, or prescribed drugs related to gender transitioning.[48] The Act also restricts medical providers' ability to refer patients when the provider himself or herself cannot provide such services.[49] Overriding Governor Asa Hutchinson's veto,[50] the Arkansas legislature passed the Act into law.[51]

The plaintiffs in *Brandt v. Rutledge* include medical providers, transgender minors, and the parents of Arkansan transgender minors who face incredible harm due to Act 626.[52] The plaintiffs filed suit claiming that the Act violates the Equal Protection Clause, Due Process Clause, and the First Amendment.[53] The plaintiffs initially sought a preliminary injunction to enjoin the defendants,[54] the Arkansas Attorney General, and her successors in office from enforcing the Act during the pendency of the litigation.[55] The defendants assert that Arkansas has a compelling government interest in protecting the health and safety of "vulnerable" children who are gender nonconforming or who experience "distress" at identifying with their biological sex.[56]

The *Brandt* court engaged in a preliminary constitutional analysis to assess the plaintiffs' success on the merits and to determine whether a preliminary injunction should be granted.

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47. Arkansas Save Adolescents from Experimentation (SAFE) Act, No. 626, sec. 3, 2021 Ark. Acts ___ (codified at ARK. CODE ANN. §§ 20-9-1501 to -1504).

48. *Id.*

49. *Id.*

50. Asa Hutchinson, *Why I Vetoed My Party's Bill Restricting Health Care for Transgender Youth*, WASH. POST (Apr. 8, 2021, 4:10 PM), https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78c1d8228819_story.html.

51. Brenda Lepenski, *ACLU Lays Out Plan to Fight for Transgender Youth in Arkansas Ahead of Two-week Trial*, KATV (Oct. 14, 2022, 5:12 PM), https://katv.com/news/local/aclu-lays-out-plan-to-fight-for-transgender-youth-in-arkansas-ahead-of-two-week-trial-american-civil-liberties-union-save-adolescents-experimentation-act-safe-asa-hutchinson-gender-affirming-medical-donnie-parker-saxton-attorney-general-leslie-rutledge.

52. Brandt v. Rutledge, 551 F. Supp. 3d 882, 888 (E.D. Ark. 2021).

53. Complaint, *supra* note 13.

54. *Id.*

55. *Brandt*, 551 F. Supp. 3d at 888.

56. *Id.* at 887–88.

i. Equal Protection

As to the plaintiffs' Equal Protection Claim, the harms that the plaintiffs faced outweighed the State's interest in enforcing the Act throughout the pendency of the litigation. The plaintiffs alleged that Act 626 categorically bans potentially life-saving treatment to transgender minors given in accordance with widely accepted medical protocols for treating gender dysphoria.[57] Further, the plaintiffs claimed that the State's assertion that gender-affirming care causes "irreversible and dangerous consequences" is undermined by the fact that "the same medical treatments banned for transgender adolescents for specifically 'gender transition' by Act 626 are permitted for non-transgender adolescents for any other purpose, including bringing non-transgender minors' bodies into alignment with their gender."[58] The defendants claimed that Act 626 is substantially related to the State's important governmental objectives of protecting children from "experimental treatment and regulating the ethics of the medical profession," and that there is a "lack of credible scientific evidence that gender-transition procedures improve children's health" and the consequences of allowing these procedures to be performed are too great.[59]

ii. Due Process

When evaluating the Due Process claim, the court in *Brandt* referred back to the precedent set in *Troxel* as to a parent's fundamental right to seek and make judgments as to the medical care of their children.[60] The court reasoned that so long as a parent adequately cares for his or her child, there will normally not be a reason for the State to "inject itself" into the private family realm to question that parent's ability to make decisions that are in the best interest of the child.[61] Thus, the plaintiffs were likely to succeed on the merits of this claim.

After evaluating each claim, the court found that the plaintiffs would suffer irreparable harm if the defendants were not enjoined from enforcing Act 626 during the pendency of the litigation.[62] Therefore, a preliminary injunction was granted on August 2, 2021, to enjoin the defendants from banning gender-affirming treatments during the pendency of the litigation.[63]

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57. *Id.* at 890.
58. *Id.* at 891.
59. *Id.* at 889.
60. *Id.* at 892.
61. *Brandt*, 551 F. Supp. 3d at 892–93 (quoting Troxel v. Granville, 530 U.S. 57, 68–69 (2000)).
62. *Id.* at 894.
63. *Id.*

An appeal to the Eighth Circuit regarding the preliminary injunction followed and it was subsequently affirmed on August 25, 2022.[64] In reviewing the district court's findings for abuse of discretion, the court did not determine that the district court's findings were "clearly erroneous."[65] In holding that the lower court did not err, the preliminary injunction was affirmed.[66] A trial on the merits of the constitutional questions began on October 17, 2022.[67] A petition for both a rehearing en banc and panel rehearing on the preliminary injunction was denied on November 16, 2022.[68]

b. Permanent Injunction

On June 20, 2023, Judge James M. Moody held that Act 626 was violative of the Equal Protection and Due Process Clauses of the U.S. Constitution, as well as the First Amendment, and that a permanent injunction was warranted.[69] The district court held an eight-day bench trial in which it heard testimony from witnesses and received exhibits from both parties.[70]

i. Equal Protection

At the conclusion of the trial, Judge Moody found that the evidence at trial supported the conclusion that Act 626 discriminates on the basis of sex because a minor's sex at birt h determines whether the minor can receive certain types of medical care under the law."[71] This is because Act 626 would permit a minor assigned male to receive hormones or surgical procedures for the purpose of aligning himself with his biological sex.[72] The same goes for minors assigned female at birth—she would not be barred from receiving estrogen or surgical procedures to "enhance her appearance so long as the enhancements align with her biological sex."[73] Therefore, the distinguishing factor between who may receives these treatments and who may not all comes

64. Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 667 (8th Cir. 2022).
65. *Id.* at 671.
66. *Id.* at 672.
67. Brenda Lepenski, *ACLU Lays Out Plan to Fight for Transgender Youth in Arkansas Ahead of Two-week Trial*, *KATV* (Oct. 14, 2022, 5:12 PM), https://katv.com/news/local/aclu-lays-out-plan-to-fight-for-transgender-youth-in-arkansas-ahead-of-two-week-trial-american-civil-liberties-union-save-adolescents-experimentation-act-safe-asa-hutchinson-gender-affirming-medical-donnie-parker-saxton-attorney-general-leslie-rutledge.
68. Brandt *ex rel.* Brandt v. Rutledge, No. 21-2875, 2022 WL 16957734 (8th Cir. Nov. 16, 2022).
69. Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727 at *35 (E.D. Ark. June 20, 2023).
70. *Id.* at *2.
71. *Id.* at *31 (citing Brandt ex rel. Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022)).
72. *Id.* at *31.
73. *Brandt*, 2023 WL 4073727 at *31.

down to biological sex.[74] Therefore, the Act discriminates on the basis of sex. Additionally, Judge Moody found that the Act discriminates against transgender people, as it prohibits medical care "that only transgender people choose to undergo."[75] He continued by stating:

> Transgender people satisfy all indicia of a suspect class: (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they may be defined as a discrete group by obvious, immutable, or distinguishing characteristics; and (4) they are a minority group lacking political power.[76]

Since the Act was found to discriminate on the basis of sex, the State had the burden of showing that the Act is substantially related to an important governmental interest.[77] Judge Moody found that the State did not meet this burden. The State claimed that it did meet this burden because "the Act advances the State's important governmental interest of protecting children from experimental medical treatment and safeguarding medical ethics."[78] The State offered five assertions to support its position: (1) "that there is a lack of evidence of efficacy of the banned care;" (2) " that the banned treatment has risks and side effects;" (3) "that many patients will desist in their gender incongruence;" (4) "that some patients will later come to regret having received irreversible treatments;" and (5) "that treatment is being provided without appropriate evaluation and informed consent."[79] However, according to Judge Moody, the evidence presented at trial did not support these assertions.[80]

As for the efficacy argument, the evidence showed that "the prohibited medical care improves the health and well-being of many adolescents with gender dysphoria."[81] This was proven by testimony of the minor plaintiffs and multiple expert witness doctors that attested to the treatments' success.[82] The State did not put forth evidence contesting the "extensive clinical experience of Plaintiffs' witnesses."[83] The State's only expert witness to have treated gender dysphoria before testified that "he felt a decision about whether an adolescent should pursue hormone therapy should be made by a 'team of well-informed doctor[s], scientifically well-informed, parents that have a respect

74. *Id.* (quoting Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022)).
75. *Id.*
76. *Id.*
77. *Id.* at *32 (quoting Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 670 (8th Cir. 2022)).
78. *Id.*
79. *Brandt*, 2023 WL 4073727 at *32.
80. *Id.* at *37
81. *Id.* at *32.
82. *Id.*
83. *Id.*

for the doctor and have met with the doctor numerous times, and the doctor who has a relationship with the patient.'"[84] In fact, the State's expert testified that "if that team of doctors, patient, and parent want to do [hormone therapy] that's what doctors do. We do that for cancer as well, you know."[85] On the contrary, the plaintiffs' experts testified to the extensive body of research demonstrating that the medical procedures that Act 626 intends to ban improves patient health.[86] The State's expert offered "no evidence-based treatment alternatives" to gender-affirming care.[87] According to the district court, the evidence showed that there are decades worth of clinical experience and scientific research in both the medical and mental health fields that gender-affirming care can significantly relieve the distress associated with gender dysphoria in adolescents, the State failed to "provide sufficient evidence that the banned treatments are ineffective or experimental."[88]

As for the risks and side effects argument, Judge Moody found that the risks associated with hormone therapy and puberty blockers are equally risky for both cisgender[89] and transgender adolescents.[90] It is undisputed that hormone therapy can affect both sex's fertility in the future. However, as for immediate adverse health effects, the plaintiffs' expert Dr. Deanna Adkins testified that "when a doctor monitors treatment to ensure appropriate therapeutic levels, adverse health effects are rare."[91] The State failed in providing evidence sufficient to prove that the risks outweighed the benefits.[92] All of the foregoing evidence led the court to find that the risk associated with gender-affirming care were no riskier than any other medical treatments not prohibited by the Act."[93]

As for the desistance and regret argument, the court found the State's expert witness's testimony "to be inconsistent and unreliable in this area."[94] On the contrary, the evidence illustrated a consensus among medical professionals that once gender dysphoria begins in adolescents, those adolescents are unlikely to subsequently identify as cisgender.[95]

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84. *Id.*
85. *Brandt*, 2023 WL 4073727 at *32.
86. *Id.* at *33.
87. *Id.*
88. *Id.*
89. Cisgender is defined as "being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." *Cisgender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cisgender?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Jan. 07, 2024).
90. *Brandt*, 2023 WL 4073727, at *34.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Brandt*, 2023 WL 4073727 at *34.

For the proper evaluation and informed consent argument, the State spent a large amount of time at trial arguing that there is evidence of a large increase in the number of children identifying as transgender which is attributable to reasons other than gender dysphoria, and by affirmatively treating gender dysphoria with medical interventions, doctors are "throw[ing] caution out the window."[96] Despite this argument, there is no evidence that doctors in Arkansas negligently prescribe puberty blockers or hormones to minors.[97] The State argued that a lot of doctors have no mental health evaluation requirement and allow children to receive hormones and permanent body-altering surgeries upon simple request.[98]

In contrast with the State's position, no doctor in Arkansas has ever performed gender transition surgery on any person under the age of 18, much less are they doing so "on demand."[99] The plaintiffs' experts testified to the multitude of evaluative requirements that a child and their parents must go through prior to receiving gender-affirming care.[100] In addition, parental consent is required prior to approval of any gender-affirming care.[101]

Adopting the plaintiffs' position and scientific facts, Judge Moody accurately observed that the evidence illustrated that the State's interests in children's well-being were undermined by the Act.[102] Thus, the court found that Act 626 prohibits medical care "on the basis of sex and the State failed to meet its demanding burden of proving the Act advances its articulated interests," thus violating the plaintiffs' rights to equal protection.[103]

ii. Due Process

Judge Moody found that Act 626 also failed under a due process analysis.[104] He found that since parents have a fundamental right "to make decisions concerning the care, custody, and control of their children," and that right "includes the right to direct their children's medical care," strict scrutiny is to be applied.[105] Although the State does have "a compelling interest in 'safeguarding the physical and psychological well-being of a minor,'" the court found that the State's evidence did not prove that the procedures banned by the Act would put children's physical and psychological well-being in

96. *Id.*
97. *Id.* at *35.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Brandt*, 2023 WL 4073727 at *35.
102. *Id.*
103. *Id.*
104. *Id.* at *36.
105. *Id.*

jeopardy.[106] The court found that the evidence showed that the Arkansas Medical Board is the best option for regulating both medical ethics and duties of physicians in the treatment of gender dysphoria.[107] The plaintiff-Parents' testimony at trial further solidified this point that parents "are acting in the best interest of children."[108] Additionally, the court found that the Act's ban was not narrowly tailored to achieve its articulated interest.[109] Because of this, the Act violated the Parent-Plaintiffs' rights to substantive due process.[110]

For those reasons, the court granted a permanent injunction due to the substantial evidence that demonstrated how Act 626 violated the plaintiffs' constitutional rights.[111]

2. L.W. ex rel. Williams v. Skrmetti

As the Eighth Circuit will be tasked with reviewing the Brandt case upon appeal, the Sixth Circuit has already reviewed an appeal of a very similar case. In *L.W. ex rel. Williams v. Skrmetti*, the Sixth Circuit reversed a Tennessee district court's decision to issue a preliminary injunction against a similar gender-affirming care ban.[112] Similar to the *Brandt* case, *Skrmetti* began with the State of Tennessee attempting to interject itself into the personal healthcare decisions of transgender minors, their parents, and their healthcare providers through the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity Act.[113] The Act was scheduled to go into effect on July 1, 2023.[114] The Act was intended to prohibit healthcare providers from performing gender-affirming surgeries and administering hormones or puberty blockers to transgender minors.[115]

The legislature, in attempting to "protect minors from physical and emotional harm," identified several concerns about treatments that are offered by medical providers to children with gender dysphoria.[116] It cited concerns such as gender-affirming care leading to sterilization, other medical risks associated with the treatments, the experimental nature of the treatments, the lack of support from long-term medical studies, and that there are other "helpful, less risky, and non-irreversible treatments" which remain available.[117]

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106. *Id.*
107. *Brandt*, 2023 WL 4073727 at *36.
108. *Id.*
109. *Id.*
110. *Id.* at *36.
111. *Id.* at *38.
112. L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 413 (6th Cir. 2023).
113. *See* TENN. CODE ANN. § 68-33-101 (2023).
114. *Skrmetti*, 73 F.4th at 413.
115. TENN. CODE ANN. § 68-33-103 (2023).
116. *Skrmetti*, 73 F.4th at 413.
117. *Id.*

Due to these findings, the legislature was convinced that it should take steps to ban certain medical treatments for minors with gender dysphoria.[118] The Act states:

> a healthcare provider may not "administer or offer to administer" "a medical procedure" to a minor "for the purpose of" either "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[119]

Such prohibited medical procedures include surgical intervention, puberty blockers, and hormone therapy.[120] The Act contains two exceptions: "[i]t permits the use of these procedures to treat congenital defects, precocious puberty, disease, or physical injury;" and it has a "continuing care" exception until March 31, 2024, which would permit healthcare providers to "continue administering a long-term treatment . . . that began before the Act's effective date."[121] Not only does the Act permit the state regulatory authorities to impose "professional discipline" on a healthcare provider who violates the Act, it also creates a private right of action for an "injured" minor or nonconsenting parent to sue a healthcare provider for violating the Act.[122]

Three transgender minors, their parents, and one doctor initiated a lawsuit, claiming that this Act violated the United States Constitution's Due Process and Equal Protection clauses.[123] The plaintiffs moved for a preliminary injunction to prevent the Act from going into effect on July 1, 2023.[124] On June 28, the district court concluded that the Act violates the Equal Protection and Due Process Clauses of the U.S. Constitution.[125]

On appeal, however, the Sixth Circuit stated that the plaintiffs were unlikely to succeed on the merits of neither their Due Process nor their Equal Protection claims.[126] The appellate court stated that while the plaintiffs do "invoke constitutional precedents of the Supreme Court and Sixth Circuit," none of its precedents would resolve this claim.[127] The Sixth Circuit further stated that the plaintiffs sought to "extend the constitutional guarantees to new territory."[128] Though the court was sure to state that there is "nothing wrong with that," it claimed that this suggests that "the key premise of a preliminary

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 413.
122. *Skrmetti*, 73 F.4th at 413.
123. *Id.*
124. *Id.*
125. *Id.* at 413–14.
126. *Id.* at 415.
127. *Id.*
128. *Skrmetti*, 73 F.4th at 415.

injunction—likelihood of success on the merits—is missing."[129] It continued that "constitutionalizing new areas of American life is not—and should not be" taken lightly, particularly when "the States are currently engaged in serious, thoughtful" debates about the issue.[130] Additionally, the court stated that having many members of the medical community support the plaintiffs' contentions is "surely relevant," but is not dispositive "for the same reason we would not defer to a consensus among economists about the proper incentives for interpreting the impairment-of-contracts or takings clauses of the U.S. Constitution."[131] Finally, the court went on to state that the fact that the FDA has not approved hormone therapy drugs for these purposes is evidence that there is no consensus among the medical community.[132]

a. Due Process

When assessing the merits of Due Process, the Sixth Circuit gave significant weight to the idea that federal courts have become ever more "reluctant to expand the concept of substantive due process" to new areas.[133] The court stated that the Supreme Court retains the right to confine a parent's fundamental right to make decisions concerning the care, custody, and control of their children to narrower fields, such as education and visitation rights.[134] In giving particular credence to the fact that courts attempting to identify due process rights look to "norms that are 'fundamental'" or "'deeply rooted in this Nation's history and tradition," the court emphasized that there has not been a single Supreme Court case that recognizes the right to "receive new medical or experimental drug treatments."[135] The court stated that the plaintiffs did not show that "a right to new medical treatments is 'deeply rooted in our history and traditions' and thus beyond the democratic process to regulate."[136]

The Sixth Circuit seemed to place significant emphasis on the fact that it cannot constitutionalize new parental rights in the context of "new" medical treatments, and that states are given the power to "limit parental freedom."[137] The court went on to say that "[j]udicial deference is especially appropriate where 'medical and scientific uncertainty' exists."[138] The court asserted that

129. *Id.*
130. *Id.* at 416.
131. *Id.*
132. *Id.*
133. *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).
134. *Skrmetti*, 73 F.4th at 415 (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)).
135. *Id.*
136. *Id.* at 417 (quoting Washington v. Glucksberg, 521 U.S. 720, 727 (1997)).
137. *Id.* (quoting Prince v. Massachusetts, 231 U.S. 158, 167 (1944)).
138. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

"[g]ender-affirming procedures often employ FDA-approved drugs for non-approved, 'off label' uses" and it is within the state's police powers to ban off label use of drugs.[139] It then relied on *Glucksberg* to make the point that the "State could prohibit individuals from receiving care they wanted and their physicians wished to provide, all despite the 'personal and profound' liberty interests at stake."[140] Accordingly, the court held that the plaintiffs were unlikely to succeed on the merits of their due process claim.[141]

b. Equal Protection

Regarding the plaintiffs' Equal Protection claim, the court stated that it is highly unlikely that the plaintiffs can logically refute that the State lacked a rational basis in enacting the Act due to the debate on the topic in both the medical and political spheres, as the state of Tennessee would be wise to "take the side of caution" before permitting "irreversible medical treatments to its children."[142] However, the plaintiffs based their equal protection claim on a heightened level of scrutiny, which the court dismantled.[143] First, the court stated that it was skeptical of the argument that the Tennessee Act discriminates on the basis of sex and requires the State to satisfy intermediate scrutiny.[144] The court stated that since the Act bans gender-affirming care for minors of both sexes, and it does not ban the administration of naturally occurring hormones, it does not discriminate on the basis of sex.[145] Quoting *Dobbs*,[146] the court asserted that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"[147] The court stated that no such pretext can be shown in this case, continuing that "[i]f a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny, as in *Dobbs*, a law equally applicable to all minors, no matter their sex at birth, does not require such scrutiny either."[148] The court also posited that *Bostock v. Clayton County*[149] does not change the analysis because the case itself and subsequent cases have made "clear" that the

139. *Id.* at 417–18.
140. *Skrmetti*, 73 F.4th at 416. (quoting Washington v. Glucksberg, 521 U.S. 702, 725 (1997)).
141. *Id.* at 418.
142. *Id.* at 419.
143. *Id.*
144. *Id.*
145. *Id.*
146. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
147. *Skrmetti*, 73 F.4th at 419 (quoting *Dobbs*, 142 S. Ct. at 2245–46).
148. *Id.*
149. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

reasoning that Title VII's prohibition on employment discrimination "because of sex" encompasses discrimination against persons who are gay or transgender only applies to Title VII.[150] While recognizing that different judges and other courts take different approaches, this court held that one's transgender identity only triggers a rational basis test, not an intermediate scrutiny test.[151] Even though the Sixth Circuit had held in *Smith v. City of Salem*[152] that a transgender employee being fired for dressing as a woman established a cognizable equal protection claim, it did not require heightened scrutiny for transgender persons because it did not involve medical intervention, among other facts.[153] For those reasons, the court held that the plaintiffs lacked a clear showing that they would succeed on the merits of their Equal Protection claim.[154]

In citing additional factors that weighed against granting the preliminary injunction, the court found the March 31, 2023, continuing care exception to be enough to avoid irreparable harm to those minors already receiving treatment, yet still recognized that this does not alleviate concerns of those minors, their parents, and their doctors about what happens after that date has passed.[155] The Sixth Circuit relieved itself of any moral duty to answer to this concern by throwing its hands up and saying "[w]hat makes it bearable to choose between the two sides is the realization that not every choice is for judges to make."[156] Commendably, the court made a note in which it stated that its initial views "may be wrong" and that the "one week [it had] to resolve this motion does not suffice to see [its] own mistakes" and chose to "expedite the appeal of the preliminary injunction."[157]

Circuit Judge Helene N. White dissented in part, stating that the majority was incorrect in holding that Tennessee's law likely did not discriminate against the Plaintiffs on the basis of sex in violation of the Equal Protection Clause, triggering intermediate scrutiny.[158] Judge White paid particular attention to how the court in *Brandt* assessed the requisite scrutiny level appropriate in situations such as these.[159] She asserted that although the State argued that the Act "'applies equally to males and females,' the law discriminates based on sex because 'medical procedures that are permitted for a minor of

150. *Skrmetti*, 73 F.4th at 420 (citing Bostock, 140 S. Ct. at 1743).
151. *Id.* at 421 (distinguishing Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661, 670 (8th Cir. 2022)).
152. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
153. *Skrmetti*, 73 F.4th at 420–21.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 422.
158. *Id.* (White, J., dissenting).
159. *Skrmetti*, 73 F.4th at 422 (White, J., dissenting).

one sex are prohibited for a minor of another sex.'"[160] She continued that, until this holding, "every federal court addressing similar laws reached the same conclusion as *Brandt*."[161] Judge White asserted that the principle announced by the Supreme Court in *Bostock* is "directly on point . . . and highly persuasive" in regard to this case.[162] She did not understand how the State could justifiably deny some children hormone therapy and not others, especially given other courts' extensive factual findings that illustrate the beneficial effects of gender-affirming care.[163] The Sixth Circuit was the first federal court to allow a ban on gender-affirming care to take affect after other courts in Arkansas, Alabama, Florida, Indiana, and Kentucky have unanimously blocked such bans.[164]

III. ARGUMENT

As an appeal has been filed to the Eighth Circuit by the State of Arkansas in the *Brandt* case regarding the permanent injunction, the appellate court will likely look to other courts in order to assess the plaintiffs' constitutional claims. This Section argues that upon appeal, the Eighth Circuit should not look to the Sixth Circuit's reasoning in *Skrmetti* in making its decision. Rather, the Eighth Circuit should look to the reasoning presented in the Arkansas district court's reasoning in *Brandt* and the Alabama district court's reasoning in *Eknes-Tucker v. Marshall*.[165]

A. Substantive Due Process Claim

The Due Process Clause of the Fourteenth Amendment promises that states are forbidden from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ."[166] Additionally, the clause has a "substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"[167] The *Brandt* court found that the liberty interest at stake was "the interest of parents in the

160. *Id.* (cleaned up)
161. *Id.*
162. *Id.* at 422
163. *Id.* at 423
164. *Sixth Circuit Allows Tennessee's Ban on Care for Transgender Youth to Take Effect*, ACLU (July 8, 2023, 11:02 AM), https://www.aclu.org/press-releases/sixth-circuit-allows-tennessees-ban-on-care-for-transgender-youth-to-take-effect.
165. The *Eknes-Tucker* case is an Alabama district court case nearly identical to *Brandt* in which the Alabama district court found an Alabama gender-affirming care ban to be unconstitutional. *See* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131.
166. U.S. CONST. amend. XIV, § 1.
167. Brandt v. Rutledge, 2023 WL 4073727 at *36 (citing Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997)).

care, custody, and control of their children" which has been established as one of "the oldest of the fundamental liberty interests recognized by" the U.S. Supreme Court.[168] Further, included in this fundamental right is the parents' "right to direct their children's medical care,"[169] in which they are "presumed to be acting in the best interest of their children."[170]

Simply because a pediatric medication "involves risks does not automatically transfer the power" to choose that medication "from the parents to some agency or officer of the state."[171] Courts that share the view of the *Brandt* court have correctly found that those who are best qualified to determine whether gender-affirming care is in a child's best interest are the parents, psychologists, and pediatricians, not the State.[172] Additionally, "speculative, future concerns about the health and safety of unidentified children . . . are not genuinely compelling justifications" for violating a fundamental right.[173] The key here is that these concerns are just that—speculative.[174]

The *Eknes-Tucker* court does a great job at differentiating legal issues from family issues, separating the political ideology that drives the introduction of legislation like Act 626 from the constitutional rights bestowed upon parents to look out for the best interest of their children.[175] The defendants in both that case and *Brandt* made baseless claims in an effort to harm transgender youth. The simple truth is this: medical standards of care established by the AMA and APA are followed by physicians and psychologists in the United States for every other medical illness and disorder.[176] As Stewart asked Rutledge in an effort to drive this point home, why does the State attempt to supersede these medical standards and go against the research done by these reputable organizations?[177] The answer is unclear, but it is likely a misguided effort to disadvantage a politically unpopular group, and nothing more. Those who oppose gender-affirming care for minors seem to stand on the common theme that the effects of these medications will be detrimental to the health and safety to transgender youth; however, convincing evidence is almost always missing.

The Sixth Circuit relies heavily on the idea that the State may exercise the power to interject itself into the private matters of the home. In fact, the

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168. *Id.* (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

169. *Id.* (citing Kanuszewski v. Mich. Dep't of Health and Human Serv's, 927 F.3d 396, 419 (6th Cir. 2019)).

170. *Id*. (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

171. Parham v. J.R., 442 U.S. 584, 603 (1979).

172. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022).

173. *Id.*

174. *See Brandt*, 2023 WL 4073727 at *33–36.

175. *See Eknes-Tucker*, 603 F. Supp. 3d at 1146.

176. *See generally* INST. OF MED., IMPROVING DIAGNOSIS IN HEALTH CARE 31–80 (Erin P. Balogh, et al. eds., 2015).

177. *See supra* notes 1–12 and accompanying text.

court states that States have broad power to "limit[] parental freedom" in order to preserve the welfare of children.[178] Interestingly, the case cited here, *Prince v. Massachusetts*, as the governing precedent that permits the State to "limit parental freedom" explicitly states that the Court's ruling was not meant to extend beyond the facts present in that case.[179] The *Prince* case does not involve transgender minors nor new medical treatments. That case affirms that parental rights are not beyond limitation and that the State may act as "parens patriae"[180] in establishing certain legal requirements such as "school attendance"[181] or "regulating or prohibiting the child's labor."[182] The accused in *Prince* was charged with violating Massachusetts' child labor laws, making the case clearly irrelevant to the case at hand.[183]

Another gap in the logic of the Sixth Circuit's ruling comes from its misguided assertion that gender-affirming care is experimental, as illustrated by the extensive evidence presented at trial in *Brandt*.[184] Indeed, "medical and scientific uncertainty" is not illustrated by the data that exists.[185] The Sixth Circuit cited non-FDA approval as evidence that the treatments are unsafe or experimental, but one should look to other things that are widely accepted, used, and recommended by healthcare professionals, but are not FDA approved: infant formula, dietary supplements, and compounded drugs.[186] In fact, "off-label" use of non-FDA approved drugs is legal and quite common.[187] Though the Sixth Circuit admits its preliminary findings may be incorrect, a trial will likely illuminate the extensive research and evidence that gender-affirming care is not experimental nor is it riskier than any other medical treatment available to minors.[188]

In contrast to the Sixth Circuit's assertions, the Brandt court found that the deeply rooted history and tradition of parents taking control and dominion over their children's medical decisions caused Act 626 to fail strict scrutiny, and was thus, unconstitutional. Upon appeal of the *Brandt* case, the Eighth

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178. L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 417 (6th Cir. 2023) (quoting Prince v. Massachusetts, 321 U.S. 158, 167 (1944)).

179. *Prince*, 321 U.S. at 171.

180. "[T]he state in its capacity as provider of protection to those unable to care for themselves[.]" *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

181. *Prince*, 321 U.S. at 166.

182. *Id.*

183. *Id.* at 159–60.

184. *See* Brandt v. Rutledge, 2023 WL 4073727 at *32–35.

185. *Skrmetti*, 73 F.4th at 417.

186. *Is It Really 'FDA Approved?'*, U.S. FOOD & DRUG ADMIN. (May 10, 2022), https://www.fda.gov/consumers/consumer-updates/it-really-fda-approved.

187. Christopher M. Wittich et al., *Ten Common Questions (and Their Answers) About Off-label Drug Use*, MAYO CLINIC (Oct. 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3538391/.

188. *Skrmetti*, 73 F.4th at 417.

Circuit should affirm the finding of the District Court for the Eastern District of Arkansas and not take into consideration the Sixth Circuit's narrow view of the parents' fundamental rights.

B. Equal Protection Claim

Act 626 violates the Equal Protection Clause as it is contrary to U.S. Supreme Court precedent holding that discriminating based on one's transgender status is discrimination on the basis of sex and thus is unconstitutional.[189]

1. Equal Protection on the Basis of Sex Foundations

The Fourteenth Amendment of the U.S. Constitution promises that "nor shall any State . . . deny to any person . . . the equal protection of the laws."[190] At its core, the Equal Protection Clause "forces a state to govern impartially—not draw distinctions between individuals solely on differences that are irrelevant to a [particular] governmental objective."[191] Overtime, the Supreme Court has created an analytical framework when addressing a potential Equal Protection violation.[192] The first inquiry comes from the text of the allegedly unconstitutional statute—how is the government classifying certain groups of persons?[193] The next inquiry is determining which level of scrutiny will be applied.[194] Of the three levels of scrutiny, intermediate scrutiny is most notably used in cases of discrimination based on gender or sex-based classifications.[195] Intermediate scrutiny requires that the statute at issue be "substantially related to a sufficiently important governmental interest."[196] The third inquiry of an Equal Protection analysis is assessing whether the government's action survives the appropriate level of scrutiny.[197] Under intermediate scrutiny, the government's interest or goal must be "supported by an 'exceedingly persuasive justification.'"[198] The governmental action "must serve important governmental objectives," and the government must show that the

189. Brandt v. Rutledge, 2023 WL 4073727 at *35.
190. U.S. CONST. amend. XIV.
191. *Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection (last visited Jan. 07, 2024).
192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.*
196. City of Cleburne, Tex. V. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976)).
197. *See supra* note 191.
198. Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021).

discriminatory means employed are "substantially related to the achievement of those objectives."[199]

2. Analysis of Act 626

a. Act 626 is Facially Discriminatory

In granting the preliminary injunction, and as reiterated in the grant of the permanent injunction, the *Brandt* court held that heightened scrutiny applied because "Act 626 rests on sex-based classifications and because 'transgender people constitute at least a quasi-suspect class.'"[200] The defendants claimed that Act 626 "does not specifically refer to transgender individuals."[201] However, this contention has no basis. Gender transition procedures are only sought by transgender persons. The. Supreme Court of the United States has held that "some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed."[202] Thus, the Act discriminates against transgender minors on its face.[203]

The Sixth Circuit's assertion that *Dobbs* prevents the court from requiring higher scrutiny for transgender persons is incorrect.[204] It may be true that *Dobbs* would prevent the court from extending *Smith* to cover "irreversible medical treatments [for] minors facing gender dysphoria" because it held that "medical treatments that affect only one sex receive rational-basis review;"[205] however, it is unclear the connection that the Sixth Circuit is trying to make between the treatments being banned on the idea that it only affects one sex. The ban plainly affects both sexes.[206] Even though the law would be equally applicable to all minors, there are still two sexes that are affected by this ban—biological male and biological female.[207] The Sixth Circuit's analysis doesn't change the fact that the determining factor of whether one may receive certain

199. United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

200. *Brandt*, 551 F. Supp. 3d at 889 (citing Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 607 (8th Cir. 2020)).

201. *Id.* at 889.

202. *Id.*

203. Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727 at *35 (E.D. Ark. June 20, 2023).

204. *See* L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 414 (6th Cir. 2023) (citing Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2245–46).

205. *Id.* at 421.

206. *See infra* note 233–34 and accompanying text.

207. *See* TENN. CODE ANN. §§ 68-33-101 to -109 (2023); *See also* ARK. CODE ANN. §§ 20-9-1501 to -1504 (2023) and 23-79-164 (2023).

treatment is solely his or her biological sex.[208] For example, if a biological male wants to pursue testosterone hormone therapy, he may do so; however, if a biological male wants to pursue estrogen hormone therapy, he cannot. His biological sex is the determining factor. Therefore, the Act must inherently discriminate on the basis of sex.

b. Intermediate Scrutiny

Act 626 is properly reviewed using intermediate scrutiny because under Supreme Court precedent, discrimination against transgender individuals is discrimination on the basis of sex.[209] One group's moral disapproval of another cannot stand as a legitimate governmental interest for Equal Protection purposes because the purpose of the law must not be to disadvantage an unpopular group.[210]

Despite the clear statement, this controlling precedent is heavily criticized by amicus in *Brandt* authored by the Women's Liberation Front.[211] Disregarding the reversibility of the actual treatments that are recommended for children (permanent, surgical sex-changes are not recommended by WPATH, AMA, or APA for minors),[212] the authors of the aforementioned *amicus* brief focus heavily on the country's history of garnering support for "medical fads" that we view as unacceptable today.[213] One example used by amicus comes from the Supreme Court case of *Buck v. Bell*, in which the Court held that an individual "may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization."[214] Even ignoring the obvious implication that force was used to implement treatments such as those, the Women's Liberation Front fails to address the irreversibility of sterilization for the purposes of treating mental illness.[215]

Likening reversible gender-affirming care to sterilization is a classic example of fearmongering and the logical fallacy of false equivalence that both the defendants in *Brandt* and its supporters rely so heavily upon.[216] The fact that these former practices garnered support from "medical associations and

208. *See* TENN. CODE ANN. §§ 68-33-101 to 68-33-109.

209. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

210. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003); *see also Moreno*, 413 U.S. at 534 (1973); Cleburne v. Cleburne Living Center, 473 U.S. 432, 446–47 (1985); Romer v. Evans, 517 U.S. 620, 632 (1996).

211. *See* Brief for Women's Liberation Front as Amici Curiae Supporting Appellants, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450).

212. *See infra* note 256.

213. Brief for Women's Liberation Front as Amici Curiae Supporting Appellants at 25, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450).

214. *Id.* at 24–25 (quoting Buck v. Bell, 274 U.S. 200, 207 (1927)).

215. *See id.* at 25.

216. *See id.*

institutions" blatantly ignores the false equivocation of reversible versus non-reversible procedures.[217] Likewise, the extremely common, non-reversible procedure that is conveniently ignored is male circumcision, which would be more logically analogous to sterilization due to its irreversible nature and its effect on the sexual health of males.[218] The amicus continues to outline the "genuine 'parade of horribles'" that would result from transgender minors having access to gender-affirming care, such as the controversial topics of transgender youth in sports, the loss of safe "single-sex spaces" for women, and the loss of free speech.[219] All loosely knit together, the arguments made by amicus are largely hypothetical or based in feeling, not fact.

As stated by the district court in *Brandt*, its reason for applying intermediate scrutiny is by following the binding, Supreme Court precedent, established in *Bostock*, that discrimination based on transgender status or identity is discrimination based on sex.[220] The Women's Liberation Front attempts to work around this straightforward concept by conflating the rule established by *Bostock*.[221] The point-blank language of the case states that, yes, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions."[222] However, the court continues, "[t]hat's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[223] It is impossible to separate one's transgender identity from the clearly discriminatory language of Act 626, and one's transgender identity can in no way be "irrelevant" to the application of the Act when it is entirely targeted at transgender individuals.

The *Brandt* court filled this logical gap by explaining that although the Act does not explicitly mention "transgender" persons, gender transition procedures are only sought by transgender persons.[224] The amicus' confused reading of the rule in *Bostock* ignores the Supreme Court's categorization of homosexual and transgender identities within the scope of "sex."[225] The argument might be viable had the Act not banned care explicitly designed for transgender youth, but the alleged "relevant" inquiries of the patients' "age and the purpose of the surgery or prescription" cannot be separated from the child's transgender status.[226] But for his or her transgender status, the Act

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217. *Id.*

218. See *supra* notes 43–44 and accompanying text.

219. Brief for Women's Liberation Front as Amici Curiae Supporting Appellants at 29, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450) [hereinafter Brief].

220. *See* L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 420–21 (6th Cir. 2023) (discussing Bostock and what level of scrutiny should apply to transgender discrimination).

221. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

222. *Id.* at 1741.

223. *Id.*

224. Brandt v. Rutledge, 47 F.4th 661, 670 (8th Cir. 2022).

225. *Bostock*, 140 S. Ct. at 1754.

226. *Id.* at 31.

would not apply, as the use of the same medical procedures is not banned for cisgender youth,[227] as highlighted by Judge White in her dissent of the Sixth Circuit's decision. [228] The fact of the matter is that the use of puberty blockers and hormone therapies would still be available under the Act for cisgender youth if the end goal is not to change one's gender.[229]

The Women's Liberation Front then attempts to limit the scope of *Bostock*, and gives an offensive mischaracterization of the facts of one of the *Bostock* Plaintiffs' experiences.[230] All this to advance a minor point regarding the ability for a person to avoid adhering to company policies by simply stating that they are transgender.[231] It then illustrates, incorrectly, the late Ms. Stephens' case in which she was fired after informing her employer that she would be presenting and living as a female.[232] The Women's Liberation Front attempts to further the largely fictional notion that most anti-transgender advocates cling to: that allowing for any sort of legal protection for transgender individuals will lead to persons lying about their gender identity in order to work around some policy.[233] To push this narrative through a case in which it did not happen weakens the credibility of the argument and serves no legitimate persuasive purpose. Rather, there is a clear reliance on fearmongering and the weaponization of political outrage in order to discredit the district court's use of *Bostock*. Surprisingly, the Women's Liberation Front lists as one of its focus areas that it works to "support the needs of lesbian and bisexual women."[234] This narrow reading of *Bostock* would no-doubt harm "the needs of lesbian and bisexual women."

The simple truth behind *Bostock* is this: discrimination against a person based on their sexual orientation or transgender status is "simply" sex

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227. *Id.* at 20–21.

228. L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 422–3 (6th Cir. 2023) (White, J., dissenting).

229. Brief for Women's Liberation Front as Amici Curiae Supporting Appellants at 20–21, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450).

230. *Id.* at 32; What is conveniently left out of this illustration is that fact that Ms. Stephens did not one day decide she did not want to adhere to the dress code policy and simply stated that she was transgender to avoid it. Ms. Stephens sought out and began medical treatment for "despair and loneliness," subsequently being diagnosed with gender dysphoria. As part of her treatment plan, her physician suggested that she begin living as a woman. After making this decision with her doctor, she informed her employer and her termination followed. *Id.*

231. *Id.*

232. Brief for Women's Liberation Front as Amici Curiae Supporting Appellants at 30–31, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450) (citing *Bostock*, 140 S. Ct. at 1738).

233. Brief for Women's Liberation Front as Amici Curiae Supporting Appellants at 33–34, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 4:21-cv-00450).

234. *Abolishing Gender Ideology*, WOMEN'S LIBERATION FRONT, https://womensliberationfront.org/our-work (last visited Jan. 07, 2024).

discrimination.[235] Thus, since courts apply intermediate scrutiny to alleged Equal Protection violations based on sex classifications, then it follows that intermediate scrutiny should be applied to Equal Protection challenges based on transgender classifications as well.[236] In the end, "sex discrimination is sex discrimination is sex discrimination."[237] Pursuant to the plain language of *Bostock*, transgender status is another category of sex discrimination.[238] There would be no reason for a court to apply this logic to the context of a Title VII violation and not in the context of an Equal Protection violation.[239]

c. Act 626 Fails Intermediate Scrutiny

It is clear that protecting children is a legitimate and compelling government interest.[240] The Sixth Circuit's assertion that Tennessee's ban did not discriminate on the basis of sex because it applied to all sexes equally is unfounded.[241] In fact, Tennessee's exceptions to the ban for allowing procedures when the biological sex aligns with the procedure further proves that the basis on which a treatment may or may not be administered comes down to biological sex. As stated by the *Brandt* court, Act 626's purpose is not to stop certain treatments but to "ban an outcome that the State deems *undesirable*."[242] Act 626's bar against gender-affirming care was not supported by an "exceedingly persuasive justification," and thus, fails intermediate scrutiny. The defendants' lack of credible scientific evidence led to the Act's failure to create an "exceedingly persuasive justification" for its creation.[243] This was further proven by the extensive evidence put on at the trial which was unsuccessfully refuted by the State. Therefore, Act 626 fails intermediate scrutiny and is unconstitutional. As such, the Eighth Circuit should affirm the finding of the District Court for the Eastern District of Arkansas and should not follow the Sixth Circuit's analysis.

C. Proposed Legislation

It is arguably clear that the Arkansas legislature was motivated in an effort to disadvantage transgender youth due to a political distain for the group.

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235. Kaleb Byars, Bostock*: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 487 (2022).

236. *Id.*

237. *Id.* at 513.

238. *Id.*

239. *Id.* at 514.

240. Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L.R. 427, 429 (2000).

241. *See* L. W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419 (2023).

242. Brandt v. Rutledge, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021) (emphasis added).

243. *Id.* at *32.

Although the means through which Arkansas has chosen to serve its interest in protecting children serve the opposite purpose, protecting children from irreversible gender transition procedures is arguably a legitimate governmental interest. In an effort to not completely bar transgender Arkansan children from life-saving medical treatment, such as hormones and puberty blockers, the following proposal for legislation would serve the alleged governmental interest and not harm transgender children.

To survive an Equal Protection claim, the legitimate governmental interest in protecting children from irreversible or harmful medical procedures would have to be substantially related to the means proposed in the statute. Under the rule in *Bostock*, intermediate scrutiny would continue to apply as the statute would discriminate against transgender individuals, preventing the permanent transition of minor transgender children. If the legislature were to limit "gender-affirming care" to strictly irreversible surgical procedures, such as mastectomies or hysterectomies, then the Act may survive an Equal Protection claim. By tailoring the legislation to ban specifically irreversible procedures, those means would likely be substantially related to the governmental interest in protecting children from irreversible gender transition procedures.

The biggest challenge would be overcoming the Substantive Due Process claim. The U.S. Supreme Court has established that parents have a fundamental right to make medical decisions for their children.[244] The question must be asked then: where do we draw the line for what is a harmful permanent procedure and what is not? This divide is best illustrated by the dichotomy between male and female circumcision.

Male circumcision is seemingly the most widely accepted exception to the general public policy that society does not question parents' decisions to allow physicians to make permanent alterations to their children's bodies.[245] The widespread acceptance of this practice in the United States, despite the overwhelming evidence of risk and the potential negative effects on the child that have persuaded other countries to reconsider its necessity, begs the question of why this procedure is viewed as acceptable while reversible gender affirming-care is not.[246]

Female circumcision, on the other hand, is outlawed in the United States.[247] Presumably, this practice is a key exception to the rule established in *Troxel* that parents are free to make medical decisions for their children. Though it has deep ties to cultural and religious roots, the practice is seen as

244. Troxel v. Granville, 530 U.S. 57, 68 (2000).
245. *See supra* notes 43–44 and accompanying text.
246. *See supra* notes 43–44 and accompanying text.
247. 18 U.S.C. § 116.

a human rights violation in the United States.[248] This is not the case globally.[249] The practice is "estimated to be at least 6,000 years old" and has been practiced by a variety of religions, particularly the Islamic religion.[250] Despite those who partake in this practice hold genuine religious, cultural, and societal beliefs about it, the practice is outlawed in the United States.[251] Aside from the obvious barbarity of the practice, a possible reason for this is because, in the states, one group's beliefs do not guide or sway accepted medical standards.[252] Medical standards are set by medical professionals.[253]

In proposing modified legislation, the distinction between female and male circumcision could play a key role in redefining gender-affirming care. Though controversial, the American Medical Association has found that "evaluation of current evidence indicates that the health benefits of newborn male circumcision outweigh the risks and that the procedure's benefits justify access to this procedure for families who choose it."[254] The AMA's standards for nonsurgical gender-affirming care for children creates the standard that the proper course of treatment for gender dysphoria can include puberty blockers and hormones for minors.[255] Surgical transition procedures are explicitly not recommended for minors.[256]

On the other end of the spectrum, female circumcision is condemned by the American Medical Association, considering it a form of child abuse.[257] Additionally, the AMA "supports legislation to eliminate the performance of female genital mutilation in the United States and to protect young girls and women at risk of undergoing the procedure."[258] This policy illustrates the AMA's proclivity to condemn a dangerous, irreversible practice that permanently alters children.

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248. Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP. HEALTH L. & POL'Y 325, 326–27 (1996).

249. *Id.*

250. *Id.* at 327–28.

251. 18 U.S.C. § 116.

252. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022).

253. Susan Blank et al., *Circumcision Policy Statement*, AM. ACADEMY PEDIATRICS (Sept. 1, 2012), https://doi.org/10.1542/peds.2012-1989.

254. *Neonatal Male Circumcision H-60.945*, AM. MED. ASS'N POLICYFINDER, https://policysearch.ama-assn.org/policyfinder/detail/circumcision?uri=%2FAMADoc%2FHOD.xml-0-5039.xml (last visited Jan. 07, 2024).

255. *What is Gender Dysphoria*, *supra* note 15.

256. *AMA Strengthens Its Policy On Protecting Access To Gender-Affirming Care*, ENDOCRINE SOCIETY, https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care (last visited Jan. 07, 2024).

257. *Expansion of AMA Policy on Female Genital Mutilation H-525.980*, AMA POLICYFINDER, https://policysearch.ama-assn.org/policyfinder/detail/Expansion%20of%20AMA%20Policy%20on%20Female%20Genital%20Mutilation%20H-525.980?uri=%2FAMADoc%2FHOD.xml-0-4716.xml.

258. *Id.*

A key point to illustrate for the legislature and the public is to remove gender-affirming care from its political context and liken it to the widely accepted practice of male circumcision. In addition, it would be key to liken the practice of female circumcision to permanent gender transition procedures for minors. By doing so, the legislature will have made a logical, scientifically-backed distinction that will allow for transgender minors to receive their life-saving medical treatments, while also assuring the public that its interest in protecting children from permanent, body-altering procedures is being supported. In making this distinction, the revised legislation is unlikely to violate the Due Process clause and will allow for a reasonable compromise for all parties.

Finally, the new legislation should avoid violating the First Amendment by allowing medical providers to freely refer patients and fully inform them and their parents of the options surrounding treatment of gender dysphoria.

IV. CONCLUSION

The *Brandt* court correctly found that Act 626 is highly unlikely to survive the constitutional challenges it faces as it exists today. It is apparent that the purpose behind the Act comes from a desire to harm, disadvantage, and alienate transgender youth in Arkansas by denying them the life-saving care that they deserve. However, if the state of Arkansas truly cares about the well-being of all its children, it will heed the advice of those who are in charge of setting the medical standards that are followed in this country. Doing so will still allow the State to stop children from undergoing permanent procedures and will allow transgender youth to seek the care that is recommended by their healthcare providers. Upon appeal, the Eighth Circuit should affirm the decision of the District Court for the Eastern District of Arkansas, and disallow legislators from acting as medical professionals when they simply are not.

Falyn Traina[*]

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[*] J.D. Candidate, University of Arkansas at Little Rock, William H. Bowen School of Law, 2024, B.A. in English with a concentration in Literature, University of North Texas, 2021. As I reflect on the journey that has led to the publication of my Note, I would like to express my heartfelt appreciation to those who have been instrumental in this endeavor. First and foremost, to my dad, Terry Traina, your dedication to your work and your pursuit of success have inspired me in every way. It is with deep gratitude and love that I dedicate this Note to you. Your support and lessons in resilience, perseverance, and the pursuit of excellence have been invaluable in shaping my journey into the legal field. To Professor Beth Levi, your wisdom, guidance, and unwavering belief in my abilities have propelled me to reach new heights. I admire your dedication to nurturing the minds of your students, and it is an honor to acknowledge your role in my academic and professional growth. To my colleagues, closest friends, and biggest supporters, Maddy Goolsby and Alexis Smith, your unwavering support, late-night study sessions, and

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