Case No. 23-2681

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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DYLAN BRANDT, et al.,
*Plaintiffs-Appellees*,

v.

TIM GRIFFIN, et al.,
*Defendants-Appellants*,

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On Appeal from the United States District Court for the
Eastern District of Arkansas, Central Division
Case No. 4:21-cv-00450 before the Hon. James M. Moody, Jr.

# Brief of *Amici Curiae* GLBTQ Legal Advocates & Defenders and National Center for Lesbian Rights in Support of Plaintiffs-Appellees and Affirmance


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, I certify that *amici curiae* GLBTQ Legal Advocates & Defenders and National Center for Lesbian Rights are nonprofit organizations, neither of which has a parent corporation or issues public stock.

Dated: December 18, 2023

*/s/ Nathaniel P. Bruhn*
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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are GLBTQ Legal Advocates & Defenders and the National Center for Lesbian Rights. *Amici* have strong interests and deep expertise in issues concerning the civil rights of LGBTQ+ people and are committed to ensuring that all people, including LGBTQ+ people, can live their lives free from discrimination, including the freedom to access the health care they need.

*Amicus* **GLBTQ Legal Advocates & Defenders ("GLAD")** works through litigation, public policy advocacy, and education to create a just society free from discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

*Amicus* **National Center for Lesbian Rights ("NCLR")** is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people through litigation, public policy advocacy, and public education. Through its Transgender Youth Project, NCLR

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part, and no money intended to fund preparing or submitting this brief was contributed by a party or party's counsel or anyone other than *amici*, its members, or its counsel. *See* Fed. R. App. P. 29(a)(4).

seeks to promote greater understanding and support for transgender children and their families.

*Amici* seek to eliminate discriminatory barriers to health care for LGBTQ+ people, particularly transgender people, across the United States through impact litigation, education, and public policy work. *Amici* write to urge this Court to apply heightened scrutiny to laws, like Arkansas's, that single out transgender people, and affirm the decision of the District Court.

## SUMMARY OF ARGUMENT

Arkansas Act 626 (the "Act"), codified at Ark. Code Ann. §§ 20-9-1501–1504 (eff. Apr. 6, 2021), forbids health care providers from providing medical treatment to transgender minors if—and only if—the purpose of that treatment is to allow those minors to live their lives consistent with their gender identity. The Act prohibits health care providers from "provid[ing] gender transition procedures" to a minor, or from referring minors to any provider for such procedures. *Id*. § 20-9-1502(a)–(b). The Act's prohibitions on health care for minors are broad, encompassing puberty blockers, hormones, and surgery. *Id.* § 20-9-1501(6)(A). The Act places transgender adolescents at grave risk of physical and psychological harm while also violating their constitutional rights.

The District Court correctly held that Arkansas's ban on gender-affirming care is unconstitutional and that the Act must be permanently enjoined. Because the

Act targets transgender people, it facially discriminates on the basis of sex in violation of the constitutional guarantees of due process and equal protection. As the Supreme Court and multiple Courts of Appeals—including this Court—have repeatedly held, laws and policies that target transgender people inherently discriminate based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753–54 (2020); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023); *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 609 (4th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034, 1051–52 (7th Cir. 2017). Because the Act discriminates on the basis of sex, it should be subject to heightened scrutiny instead of rational basis review. *Craig v. Boren*, 429 U.S. 190 (1976).

Appellants argue that rational basis review is warranted because the Act regulates medical procedures. Appellants' Opening Br. 20–26. That reasoning is flawed. Regardless of what the Act regulates, it discriminates on the basis of sex and is thus subject to a heightened level of scrutiny. To be sure, the State has a legitimate interest in protecting minors from unsafe medical procedures—an interest that may be considered when evaluating whether the law *withstands* heightened scrutiny. But that interest does not transform a sex-based law that targets transgender people into a generally applicable law warranting rational basis review.

The Act cannot withstand heightened scrutiny. Arkansas cannot justify a targeted ban on health care treatment for transgender minors. As the District Court found, based on the voluminous factual record before it, medical care for transgender minors improves their mental health and well-being. Prohibiting it undermines these interests. The State failed to meet its burden of establishing that the Act was substantially related to an important governmental objective. This Court should affirm the District Court's permanent injunction, and preserve the rights of Arkansan teenagers, parents, and doctors to make medically appropriate health care decisions.

## ARGUMENT

### I. The Act Is Subject to Heightened Scrutiny Because It Discriminates Based on Sex.

When laws such as the Act target transgender people, they inherently discriminate on the basis of sex. In *Bostock*, the Supreme Court held unequivocally that "discrimination based on [] transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." 140 S. Ct. at 1747. Laws that discriminate on the basis of sex are subject to heightened scrutiny, as this Court previously recognized in affirming the preliminary injunction in 2022.

#### A. All Sex-Based Classifications Are Subject to Heightened Scrutiny, Regardless of the Ostensible Purpose of the Classification.

The Equal Protection Clause bars a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "At

the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted).

To implement that constitutional guarantee, the Supreme Court requires "all gender-based classifications" to be subjected to "heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (citations omitted). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 531 (citations omitted). Heightened scrutiny serves to "smoke out" illegitimate motives by ensuring that the state can prove—not just assert—that the classification has a sufficiently persuasive justification. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). "[B]enign justifications" for such classifications "will not be accepted automatically"; a court will closely scrutinize whether the classification in fact advances the "alleged objective." *Virginia*, 518 U.S. at 535–36 (internal quotation marks and citations omitted).

Heightened scrutiny applies even to those classifications ostensibly based on physical differences between men and women. For example, laws distinguishing between mothers and fathers are subject to heightened scrutiny. While those physical differences may be relevant to whether the laws *pass* heightened scrutiny, they are

not relevant to whether those laws are subject to heightened scrutiny in the first instance. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (applying heightened scrutiny to statute distinguishing between mothers and fathers, but upholding statute based on physical differences in means of proving parentage); *see also Sessions v. Morales-Santana*, 582 U.S. 47, 57–58 (2017) (applying heightened scrutiny to statute distinguishing between mothers and fathers, and invalidating statute because it relied on outdated gender stereotypes about relationships to nonmarital children).

Constitutional limitations on gender classifications apply with full force to laws that single out people who do not conform to sex stereotypes. Many of the Supreme Court's foundational sex-discrimination cases involve such litigants. Women stereotypically do not attend military school, yet "generalizations about 'the way women are,'" or "estimates of what is appropriate for *most women*," do not justify treating women who do seek to attend military school differently from men. *Virginia*, 518 U.S. at 550. Likewise, even in a world where "nearly 98[%] of all employed registered nurses were female," men and women applying to nursing school must be treated equally, and a legislature may not "perpetuate the stereotyped view of nursing as an exclusively woman's job." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982). As the Supreme Court recently reaffirmed, "[o]verbroad generalizations" concerning gender roles "have a constraining impact, descriptive

though they may be of the way many people still order their lives." *Morales-Santana*, 582 U.S. at 63. "Even if stereotypes frozen into legislation have 'statistical support,'" the Supreme Court's decisions "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Id.* at 63 n.13 (citations omitted).

### B. Laws That Single Out Transgender People Constitute Sex Discrimination And Are Subject To Heightened Scrutiny.

In affirming the District Court's preliminary injunction against enforcement of the Act, this Court, like the Supreme Court in *Bostock*, applied heightened scrutiny: "The 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. The Act is therefore subject to heightened scrutiny." *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022).

Other Courts of Appeals have similarly held that when laws target transgender people, they discriminate on the basis of sex, and are subject to heightened scrutiny. In *Whitaker ex rel. Whitaker v. Kenosha Unified School District Number 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), *abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), the Seventh Circuit explained: "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id*. at 1048. The Seventh Circuit further reasoned that policies such as the Act "cannot be stated

without referencing sex," which renders them "inherently based upon a sex-classification" and requires heightened scrutiny. *Id*. at 1051. And the Seventh Circuit made clear its heightened scrutiny holding applied to the plaintiff's equal protection claim. *Id.* at 1051–54.

The Fourth Circuit held that government action directed at transgender people requires analysis under intermediate scrutiny because it classifies based on sex. *Grimm*, 972 F.3d at 609. The Ninth Circuit also embraced the principle that laws or policies singling out transgender people are a type of sex discrimination subject to heightened scrutiny. *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023) ("[D]iscrimination on the basis of transgender status is a form of sex-based discrimination.").

Appellants' reliance on *L.W. by and through Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), is misplaced. *Skrmetti* avoided the Supreme Court's reasoning in *Bostock*—that policies discriminating against transgender people constitute sex discrimination—by arguing "that reasoning applies only to Title VII." *Id.* at 420. There is no principled distinction between the standard articulated in *Bostock* for Title VII and the Equal Protection Clause. Why would a law that discriminates based on sex under Title VII transform into a law that does *not* discriminate based on sex under the Constitution? *Bostock* explained that it is arbitrary to distinguish discrimination based on sex stereotyping from discrimination against transgender

people: If an employer who "fires men who do not behave in a sufficiently masculine way" engages in sex discrimination, why should courts "roll out a new and more rigorous standard" when "that same employer discriminates against . . . persons identified at birth as women who later identify as men"? 140 S. Ct. at 1749. That arbitrariness does not go away when considering discrimination under the Equal Protection Clause as opposed to discrimination under Title VII. Moreover, this Court, as well as the Fourth, Seventh, and Ninth Circuits, have all found that *Bostock's* reasoning extends beyond Title VII. *See Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1001 (8th Cir. 2022) (Fair Housing Act), *cert. denied*, 143 S. Ct. 2638 (2023); *Grimm*, 972 F.3d at 616 (Title IX); *A.C.*, 75 F.4th at 772 (Title IX); *Doe v. Snyder*, 28 F.4th 103, 113–14 (9th Cir. 2022) (Title IX and Section 1557 of the Affordable Care Act); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (Title IX).

When laws target transgender people, they discriminate on the basis of sex. This Court correctly applied heightened scrutiny to the Act once before—it should do the same here.

### C. The Act Discriminates On The Basis Of Sex And Is Therefore Subject To Heightened Scrutiny.

On its face, the Act discriminates on the basis of sex. Under the Act, a health care provider "shall not provide gender transition procedures to any individual under eighteen years of age." Ark. Code Ann. § 20-9-1502(a). The statute defines "gender

transition" as "[a]lter[ing] or remov[ing] physical . . . features that are typical for the individual's biological sex" or "creat[ing] physiological or anatomical characteristics that resemble a sex different from the individual's biological sex . . . ." *Id*. § 20-9-1501(6)(A).

Sex is baked into the statutory text. Not only does the word "sex" appear over twenty times in the statute, but every single time the law will be enforced or applied, a court must ascertain the minor's sex assigned at birth. Such a threshold decision necessarily implicates sex.

Consider an Arkansas seventeen-year-old who, with the consent and support of their parents and under the guidance of a licensed doctor, receives a prescription for estrogen treatment. If the minor's assigned sex at birth was male, the Act applies. But if the minor was assigned female at birth, the Act does not apply. In each case, the minor's sex is outcome-determinative. The Act on its face classifies based on sex. Its application rests directly on the sex of the minor. Therefore, the Act discriminates based on sex.

Moreover, the rationale for applying heightened scrutiny applies with full force here. Heightened scrutiny exists to "smoke out" improper legislative rationales, such as discomfort with those who may be marginalized by parts of society. *J.A. Croson Co.*, 488 U.S. at 493. Although the State contends that it is trying to protect minors from medical treatments it perceives to be potentially

harmful, there are strong reasons to be concerned that this justification is a pretext for a desire to discourage individuals from being transgender.

"[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer v. Evans*, 517 U.S. 620, 633 (1996). For good reason, "[i]t is not within our constitutional tradition to enact laws of this sort." *Id*. Yet Arkansas's law is emblematic of a recent wave of laws targeting transgender people, including legislation that prevents transgender women and girls from competing in school sports teams consistent with their gender identities,[2] and prevents transgender children from using school bathrooms that correspond to their gender identities.[3]

Remarks by Arkansas elected officials about the Act show that some supported the law based on disapproval of transgender persons. Representative Mary Bentley expressed her support for the Act by quoting Deuteronomy 22:5 to the General Assembly: "A woman shall not wear anything that pertains to a man, nor man put on a woman's garments. For all who do so are an abomination."[4] This provides even further reason to conduct the heightened scrutiny analysis by requiring

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[2] S.B. 354, codified at Ark. Code Ann. § 6-1-107 (eff. July 28, 2021); S.B. 450, codified at Ark. Code Ann. §§ 16-130-101–105 (eff. July 28, 2021).
[3] S.B. 270, codified at Ark. Code Ann. § 6-21-120 (eff. Aug. 1, 2023).
[4] Max Brantley, *The Link Between Mary Bentley's Creationism Bill and LGBTQ Bigotry*, ARK. TIMES (Apr. 15, 2021 11:58 AM), https://arktimes.com/arkansas-blog/2021/04/15/the-link-between-mary-bentleys-creationism-bill-and-lgbtq-bigotry.

a "searching analysis" into the justifications for the challenged law. *Virginia*, 518 U.S. at 536 (citation omitted). That analysis allows the Court to determine whether the State's asserted motive—protection of children from dangerous medical treatments—*in fact* justifies the Act. *See id*. at 535–36 ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.").[5]

Arkansas's arguments for applying rational basis review instead of heightened scrutiny are irreconcilable with Supreme Court precedent. First, Arkansas argues that the Act "does not prefer one sex to the other" or in any way treat the two sexes differently. Appellants' Opening Br. 22. But applying a sex-based rule to both sexes does not immunize the classification. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42, 142 n.14 (1994); *see also Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 124 (4th Cir. 2022). The "fact of equal application does not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

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[5] *See* Shoshana K. Goldberg, et al., *2023 LGBTQ+ Youth Report*, Human Rights Campaign Found. (Aug. 2023), https://reports.hrc.org/2023-lgbtq-youth-report ("Each year has seen an increase in anti-LGBTQ+ state legislation, with more bills introduced—and passed—in 2022 and 2023 than ever before. The vast majority of these bills directly target LGBTQ+ youth, and transgender, non-binary, gender non-conforming, and other non-cisgender gender-expansive . . . youth in particular, banning or regulating their ability to live openly and freely as their true selves in everywhere from school bathrooms and athletics, to accessing gender-affirming care.").

Indeed, *Bostock* repudiated that exact reasoning. It rejected an interpretation of Title VII that "would require [the Court] to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole," instead explaining that "our focus should be on individuals, not groups." 140 S. Ct. at 1740. The same analysis applies to the Equal Protection Clause. It is hornbook law that the Equal Protection Clause embodies the exact same "basic principle" as Title VII: it "protect[s] *persons*, not *groups*." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Thus, a law that treats groups equally in the aggregate—but *individually* classifies people based on a suspect characteristic—is subject to heightened scrutiny. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007); *accord J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in judgment) (explaining that the Equal Protection Clause bars gender discrimination in jury selection because "[t]he neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups"). If a transgender boy is classified based on sex, that discrimination does not disappear because a transgender girl is also classified based on sex.

Arkansas also argues that the Act mentions the word 'sex' only to distinguish gender-transition procedures from the same medical procedures when the minor seeking the treatment is not seeking to transition. Appellants' Opening Br. 23–25.

Appellants claim that the Act "discriminates between procedures—not the sexes." *Id*. at 25. Appellants are correct that any law targeting health care related to gender transition will necessarily refer to a person's sex. But they draw the wrong inference from that observation. Precisely *because* such laws necessarily refer to a person's sex, heightened scrutiny is warranted. The Act is not a generally applicable law that happens to regulate transgender people. It applies to transgender people only, and hence inherently classifies based on sex every time it is applied. The fact that a law "needs" to refer to sex to regulate transgender health care is not a basis to ratchet the level of scrutiny down—it is the very reason the standard of scrutiny must be ratcheted up. *See Grimm*, 972 F.3d at 608 (if a prohibition "cannot be stated without referencing sex," "heightened scrutiny should apply") (citations omitted); *Doe v. Ladapo*, — F. Supp. 3d —, 2023 WL 3833848, at *8 (N.D. Fla. June 6, 2023), *appeal docketed*, No. 23-12159 (11th Cir. June 27, 2023) ("If one must know the sex of a person to know whether or how a provision applies to the person, the provision draws a line based on sex."); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, — F. Supp. 3d —, 2023 WL 4054086, at *8 (S.D. Ind. June 16, 2023), *appeal docketed*, No. 23-2366 (7th Cir. July 12, 2023) ("[W]ithout sex-based classifications, it would be impossible for S.E.A. 480 to define whether a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted) . . . . At bottom, sex-based

classifications are not just present in S.E.A. 480's prohibitions; they're determinative.").

Arkansas's reliance on *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is also misplaced. *Dobbs* involved a law restricting abortion, which Arkansas cites for the proposition 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 members of one sex or the other.'" *Id.* at 2245–46; Appellants' Opening Br. 21. *Amici* respectfully disagree with this proposition: the statement in *Dobbs* was dictum.[6]

In any event, this language from *Dobbs* is inapplicable here. The Court in *Dobbs* stated that the Mississippi statute in question did not facially discriminate based on sex because it targeted medical treatment, not women. Here, in contrast, the words of the challenged laws manifest the invidiousness by identifying the targeted characteristic—sex—and describing the targeted group—a minor whose gender identity is different from their sex, in other words, a transgender minor. For

[6] Justice Alito discussed an *amicus* brief arguing that abortion rights are grounded in the Equal Protection Clause, *see Dobbs*, 142 S. Ct. at 2245–46, because there was no equal protection claim active in the case. Rather, the plaintiffs amended their complaint years prior to *Dobbs* to drop their equal protection challenge to Mississippi's statute. *See Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

that reason, the Act is plainly subject to heightened scrutiny because it is expressly rooted in classifications based on sex.

As this Court found when previously addressing the Act, a law that "distinguishes between those who may receive certain types of medical care and those who may not" on the basis of the "biological sex of the minor patient" constitutes a sex-based classification subject to heightened scrutiny. *Rutledge*, 47 F.4th at 669–70.

## II. The Act Cannot Withstand Heightened Scrutiny.

The Act bans *all* medical treatment for transgender minors seeking to live according to their gender identity. Even if the minor, the minor's parents, and the minor's doctor are unanimous that the medical treatment would be safe and beneficial, the State has declared such care to be flatly illegal across the board.

There is no "exceedingly persuasive justification" for this law. *Whitaker*, 858 F.3d at 1053. As explained in the District Court's detailed findings, the State's asserted interests related to protecting minors do not justify the Act. As the District Court concluded after carefully reviewing and rejecting each of the State's purported justifications: "Rather than protecting children or safeguarding medical ethics, the evidence showed that the prohibited medical care improves the mental health and well-being of patients and that, by prohibiting it, the State undermined the interests it claims to be advancing. Further, the various claims underlying the State's

arguments that the Act protects children and safeguards medical ethics do not explain why only gender-affirming medical care—and all gender-affirming medical care—is singled out for prohibition. 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." App. 305; R. Doc. 283, at 74. Those findings are not clearly erroneous, and they necessarily establish that Arkansas cannot justify a targeted ban on health care treatment for transgender minors.

The State expressed concern that gender-transition treatment prohibited by the Act has not been approved by the FDA. *See* Appellants' Opening Br. 4–5. The fact that the FDA has not approved these drugs or procedures for the treatment of gender dysphoria does not indicate that the treatment is not safe or effective when used for that purpose. *See Dekker v. Weida*, — F. Supp. 3d —, 2023 WL 4102243, at *19 (N.D. Fla. June 21, 2023), *appeal docketed*, No. 23-12155 (11th Cir. June 27, 2023) ("That the FDA approved these drugs at all confirms that, at least for one use, they are safe and effective."). Off-label use of drugs or treatment is a commonplace practice across the medical profession. If Arkansas had chosen to ban *all* off-label uses of FDA-approved drugs, an equal protection challenge to such a ban would likely be subject to rational basis review, even if it had the incidental effect of restricting medical care for transgender people. Instead, the State allows physicians

discretion to prescribe drugs for off-label uses *except* when they prescribe drugs to transgender minors for purposes of gender transition. *See* Ark. Code Ann. § 20-9-1502(c). That aspect of the Act should raise concern that the State's asserted justification is pretextual.

For the reasons stated by the District Court, Appellees, and *amici*, the Act cannot survive under heightened scrutiny. Laws like the Act, which discriminate on the basis of sex without adequate justification, are unconstitutional.

## CONCLUSION

For the foregoing reasons and those articulated by Appellees, *amici* respectfully request that this Court affirm the District Court's grant of a permanent injunction.

Dated: December 18, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,222 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2021 in 14-point Times Roman font for text and footnotes. Additionally, pursuant to Eighth Circuit Local Rule 28A(h), I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

Dated: December 18, 2023

*/s/ Nathaniel P. Bruhn*
Nathaniel P. Bruhn

## CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on December 18, 2023. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF users.

Dated: December 18, 2023

*/s/ Nathaniel P. Bruhn*
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