No. 23-2681

In the United States Court of Appeals for the Eighth Circuit

Dylan Brandt, et al.,

Plaintiffs-Appellants,

v.

Tim Griffin, et al.,

Defendants-Appellees.

State of Missouri, et al.,

Amici on Behalf of Appellant(s).

Appeal from the United States District Court
for the Eastern District of Arkansas – Central, No. 4:21-cv-00450-JM.
The Honorable James M. Moody, Junior, Judge Presiding.

AMICI CURIAE BRIEF OF FAMILY LAW AND CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose scholarship and teaching focus on family law and the Due Process Clause of the Fourteenth Amendment. These scholars have an interest in ensuring that the Fourteenth Amendment is interpreted to protect parents' fundamental right to direct their children's medical care. *Amici* include (in alphabetical order) Barbara A. Atwood, Mary Anne Richey Professor of Law Emerita, The University of Arizona; Kevin M. Barry, Professor of Law, Quinnipiac University School of Law; Meghan M. Boone, Associate Professor, Wake Forest University School of Law; Michael Boucai, Professor of Law, SUNY at Buffalo School of Law; Khiara M. Bridges, Professor of Law, University of California, Berkeley, School of Law; Erwin Chemerinsky, Dean & Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley, School of Law; Maxine Eichner, Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; Marie-Amélie George, Associate Professor of Law, Wake Forest University School of Law; Leigh Goodmark, Marjorie Cook Professor of Law, University of Maryland Francis King Carey School of Law; Joanna L. Grossman, Ellen K. Solender Endowed Chair in Women and the Law & Professor of Law, SMU Dedman School of Law; Josh Gupta-Kagan, Clinical Professor of Law, Columbia Law School; Jennifer S. Hendricks, Professor of Law, University of Colorado Law School; Clare Huntington, Professor of Law, Columbia Law School;

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The institutional affiliations of *Amici* are supplied for the purpose of identification only and the positions set forth below are solely those of *Amici*.[1]

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

INTRODUCTION

In *Brandt v. Rutledge*, this Court affirmed the district court's order preliminarily enjoining Arkansas' ban on transition care for transgender adolescents on grounds that the ban likely violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against Plaintiffs-Appellees on the basis of sex.[2] This Court did not address the district court's conclusion that the Act also violates the Due Process Clause of the Fourteenth Amendment by limiting parents' "fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary."[3]

The right of parents to direct the upbringing of their children is one of the oldest and most unassailable fundamental rights protected by the Constitution. This fundamental right unequivocally includes parents' right to direct their children's medical care. For over a century, the Supreme Court has vigorously defended this right as promoting the best interests of children and of society more generally, including the traditional values of limited government and the sanctity of the family. By prohibiting parents from accessing established medical care for their children, Arkansas' ban infringes parents' fundamental right to direct their children's medical

[2] 47 F.4th 661, 671 (8th Cir. 2022).
[3] *Id.* at 672; *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892–93 (E.D. Ark. 2021).

care. This law grants unprecedented power to the State to supervene the decisions of those who know their children best, are most motivated to support their wellbeing, and are best positioned to assess the tradeoffs that come with medical treatment. In doing so, the law obstructs children's access to the health care that parents and their chosen doctors have jointly determined are necessary to protect their health.[4] For these reasons, *Amici* urge this Court to find that the ban infringes Plaintiffs-Appellees' fundamental rights under the Due Process Clause.[5]

ARGUMENT

I. THE RIGHT OF PARENTS TO DIRECT THEIR CHILDREN'S MEDICAL CARE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT

The Supreme Court has "long recognized" that the Due Process Clause "provides heightened protection against government interference with certain

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[4] This brief does not speak to the issues of whether and when access to medical care would be appropriate when a mature minor *disagrees* with a parent's preferred care plan. As courts have pointed out, though, these situations do not properly raise the issue of whether and when government can intervene in a contested care issue, but instead whether the parent's or mature minor's views should govern in that situation. *See, e.g.*, *In re Green*, 448 Pa. 338, 348–49 (1972) ("We are of the opinion that as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is *not immediately imperiled* by his physical condition. . . . [O]ur inquiry does not end at this point since we believe the wishes of this sixteen-year old boy should be ascertained; the ultimate question, in our view, is whether a parent's religious beliefs are paramount to the possibly adverse decision of the child.").

[5] *Amici* agree with Plaintiffs-Appellees that Arkansas' ban does not survive strict or heightened scrutiny. This brief does not address the arguments supporting that conclusion.

fundamental rights and liberty interests,"[6] including those "deeply rooted in this Nation's history and tradition."[7] According to the Supreme Court, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[8] In a long line of cases dating back a century, the Court has repeatedly confirmed that "[t]he child is not the mere creature of the State," and that parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."[9] This duty is predicated on the "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and that "natural bonds of affection lead parents to act in the best interests of their children."[10]

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[6] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
[7] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).
[8] *Troxel*, 530 U.S. at 65.
[9] *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing fundamental right of parents to "establish a home and bring up children"); *accord Troxel*, 530 U.S. at 66 (recognizing "fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." (citation omitted)).
[10] *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (citing 1 William Blackstone, *Commentaries* *447); *accord Troxel*, 530 U.S. at 68.

Absent threats to the "physical or mental health" of a child, such as "abuse and neglect," the Constitution forbids the State from infringing on parents' "broad . . . authority over [their] minor children."[11] As the Supreme Court has reaffirmed in numerous cases, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), 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 decisions concerning the rearing of that parent's children."[12]

It is well-established that the century-old right of parents to "make decisions concerning the care, custody, and control of [their] children"[13] includes the right to direct their children's medical care under medically-accepted standards.[14] Where

[11] *Parham*, 442 U.S. at 602–03.
[12] *Troxel*, 530 U.S. at 68–69.
[13] *Id.* at 66.
[14] *See, e.g.*, *Parham*, 442 U.S. at 602 ("[O]ur constitutional system long ago . . . asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'" (citation omitted)), 604 ("[Parents], of course, retain plenary authority to seek [medical] care for their children."); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (recognizing parents' right to direct their children's medical care); *see also R.J.D. v. Vaughan Clinic, P.C.*, 572 So. 2d 1225, 1227–28 (Ala. 1990) ("The common law deems parental care for children not only an obligation, but also an inherent right: 'In such matters as deciding on the need for surgical or hospital treatment, . . . [*t*]*he will of the parents is controlling,* except in those extreme instances where the state takes over to rescue the child from parental neglect or to save its life. . . .' The United States Supreme Court followed this common law rule in [*Parham*]." (citations omitted)); 59 Am. Jur. 2d, *Parent and Child*, § 22 (2023).

parents seek medical care for their children, parental autonomy is at its apex.[15] Parents' right to determine their children's medical care stems not only from our constitutional tradition's great respect for parental autonomy, but also from parents' "high duty" to recognize children's physical and mental distress "and to seek and follow medical advice."[16] As the Supreme Court stated in *Parham v. J. R.*, "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[17] Because of this, it is parents, rather than government, who are best positioned to decide what medical care is in their children's interests.

Although government has a role in dictating the medical care that children receive, its authority to do so is narrowly confined. According to the Supreme Court, "as long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened. . . . The decision to provide or withhold medically indicated treatment is, except in highly unusual

[15] *Parham*, 442 U.S. at 604 ("[Parents], of course, retain plenary authority to seek . . . care for their children.").
[16] *Id.* at 602.
[17] *Id.*

circumstances, made by the parents or legal guardian."[18] Furthermore, "[s]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."[19]

The narrow grounds that allow state interference in parental decision-making regarding children's medical care have been articulated most clearly in state neglect proceedings in which government actors seek to intervene with respect to children's medical care. Although these cases address the power of the State to override an individual parent's right to direct the medical care of their children in a particular proceeding, their reasoning applies with equal force to the power of the State to pass a blanket law that prevents all parents from exercising this right.

To safeguard parents' constitutional right to direct their children's medical care, courts have declared that "[s]tate intervention in the parent-child relationship is only justifiable under compelling conditions."[20] While different courts have phrased the narrow grounds that support intervention in slightly different ways, courts have authorized intervention only when two circumstances are both present. First, courts have required that the State's preferred course of treatment be

[18] *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality) (quotation marks omitted).
[19] *Parham*, 442 U.S. at 603.
[20] *Newmark v. Williams*, 588 A.2d 1108, 1117 (Del. 1991).

compelling in the sense that all responsible medical authority agree that it is the appropriate course of treatment for the child.[21] Second, they have required that the State's preferred course of treatment for the child be both likely to result in great benefit and pose few countervailing risks to the child.[22]

Only when these two circumstances are present do courts authorize state intervention. Absent such circumstances, as stated by the New York Court of Appeals, "great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same."[23]

Explicating the first requirement, courts hold that situations in which physicians disagree about the correct care plan for the child lack the compelling circumstances to justify state involvement. The reason for this rule is simple. In the words of Professor Joseph Goldstein:

> No one has a greater right or responsibility and no one can be presumed to be in a better position, and thus better equipped, than a child's parents to decide what course to pursue if the medical experts cannot agree. . . . Put somewhat more starkly, how can parents in such situations give the wrong answer since there is no way of knowing the right answer? In

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[21] *See, e.g.*, *In re Storar*, 420 N.E.2d 64, 73 (N.Y. 1981); *In re Hofbauer*, 393 N.E.2d 1009, 1013 (N.Y. 1979); *In re Custody of a Minor*, 393 N.E.2d 836, 846 (Mass. 1979).
[22] *See, e.g.*, *Newmark*, 588 A.2d at 1117–18; *In re Burns*, 519 A.2d 638, 645 (Del. 1986).
[23] *In re Hofbauer*, 393 N.E.2d at 1013.

> these circumstances the law's guarantee of freedom of belief becomes meaningful and the right to act on that belief as an autonomous parent becomes operative within the privacy of one's family.[24]

The New York Court of Appeals applied this principle in the case of *In re Hofbauer*, when it rejected state intervention in parental decision-making despite the unconventionality of the parents' preferred medical treatment for their child. Government, the *Hofbauer* Court declared, may not "assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided."[25] Instead, the appropriate inquiry is whether the parents "have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority."[26]

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[24] Joseph Goldstein, *Medical Care of the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645, 654–55 (1976–1977); *see also id.* at 653 ("There would be no justification . . . for coercive intrusion by the state in those . . . situations . . . in which there is no proven medical procedure, or . . . in which parents are confronted with conflicting medical advice about which, if any, treatment procedure to follow . . . .").

[25] *In re Hofbauer*, 393 N.E.2d at 1014; *see also In re Storar*, 420 N.E.2d at 73 ("Of course it is not for the courts to determine the most 'effective' treatment when the parents have chosen among reasonable alternatives."), 69 n.3 ("[A]s a matter of public policy a medical facility generally has no responsibility or right to supervise or interfere with the course of treatments recommended by the patient's private physician . . . .").

[26] *In re Hofbauer*, 393 N.E.2d at 1014.

Massachusetts' highest court has also declared that government intervention is not authorized absent consensus by all responsible medical authority about the proper course of treatment. In the case of *In re Custody of a Minor*, the Supreme Judicial Court of Massachusetts ordered a child's chemotherapy continued over the objection of the child's parents, and also ordered them to discontinue the "metabolic therapy" in which they had enrolled the child, precisely because the child's doctors agreed that chemotherapy was the proper treatment.[27] The court distinguished the New York Court's holding in *Hofbauer* on the ground that "[t]he medical evidence in that case was sharply conflicting. . . . This is a far cry from the unsupported stance of the parents in the instant case, and the compelling evidence that for this child [the parents' preferred course of treatment] . . . is useless and dangerous."[28] The court went on to state that intervention was appropriate in this case only because of the parents'

> persistence in pursuing for their child a course against all credible medical advice[, which] cannot be explained in terms of despair of a cure, or by the suffering of serious side effects of chemotherapy. . . . Under our free and constitutional government, it is only under serious provocation that we permit interference by the State with parental rights. That provocation is clear here.[29]

[27] 393 N.E.2d at 846.
[28] *Id.* at 846.
[29] *Id.*

With respect to the second requirement, even when all responsible medical authority line up against the parents, courts refuse to supervene parental decision-making when the government's proposed course of treatment presents significant risks or lacks a high chance of success.[30] On this ground, the Supreme Court of Delaware refused to order that a child receive a novel form of chemotherapy over his parents' objections.[31] Because the child's "proposed medical treatment was highly invasive, painful, involved terrible temporary and potentially permanent side effects, posed an unacceptably low [40 percent] chance of success, and a high risk that the treatment itself would cause his death," the court held that "[t]he State's authority to intervene in this case, therefore, cannot outweigh the Newmarks' parental prerogative."[32] Concomitantly, courts that have authorized medical treatment for a minor over a parent's objection have noted that intervention would be inappropriate if treatment were inherently dangerous or invasive.[33]

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[30] *See* Goldstein, *supra* note 24, at 653 ("There would be no justification . . . for coercive intrusion by the state in those . . . situations . . . in which, even if the medical experts agree about treatment, there is less than a high probability that the nonexperimental treatment will enable the child to pursue either a life worth living or a life of relatively normal healthy growth toward adulthood.").

[31] *See Newmark*, 588 A.2d at 1118.

[32] *Id.*; *see also In re Phillip B.*, 156 Cal. Rptr. 48, 52 (Cal. Ct. App. 1979) (refusing state's request to repair child's heart defect over parents' objection based on the risks posed by the surgery).

[33] *See Muhlenberg Hosp. v. Patterson*, 320 A.2d 518, 521 (N.J. 1974) ("[I]f the disputed procedure involved a significant danger to the infant, the parents' wishes

II. RECOGNITION OF THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THEIR CHILDREN'S MEDICAL CARE FURTHERS THE BEST INTERESTS OF CHILDREN AND SOCIETY

The Supreme Court's deeply rooted deference to parents' right to direct the upbringing of their children, including their children's medical care, reflects two normative judgments. The first is that this fundamental right is necessary to protect the interests of children.[34] Generally speaking, children, by dint of their age, must rely on others to make important decisions for them.[35] Because parents—not the State or other adults—are generally in the best position to know what is best for their children, and because "natural bonds of affection" generally "lead parents to act in the best interests of their children," recognition of parental rights benefits children.[36] A contrary approach—one soundly rejected by the Supreme Court—in which the child is the mere "creature of the State" would undermine the interests of the child by delegating child-rearing rights to those least familiar with the child's needs.[37]

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would be respected."); *State v. Perricone*, 181 A.2d 751, 760 (N.J. 1962) (strong argument for parents if "there were substantial evidence that the treatment itself posed a significant danger to the infant's life"); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 773 (Ill. 1952) (same).

[34] *See, e.g.*, Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529 (2022).

[35] *See Troxel*, 530 U.S. at 68; *accord Schall v. Martin*, 467 U.S. 253, 265 (1984).

[36] *Parham*, 442 U.S. at 602 (citing 1 William Blackstone, *Commentaries* *447).

[37] *See Pierce*, 268 U.S. at 535.

Importantly, parents have more than a natural incentive to provide for their children: as the Supreme Court has stated, parents have a *legal duty* to do so.[38] If they fail in this duty, the State may criminally prosecute and incarcerate them for child neglect or abandonment, or it may terminate their parental rights altogether.[39] Recognition of parental rights is therefore the logical corollary to the substantial duties imposed on parents: in order to meet their obligation to provide for their children, the State must not prevent parents from fulfilling this obligation.[40] Without parental rights to provide care for their children, the State could take over all decisions related to children's development, both extinguishing fundamental liberty and thrusting government actors and resources into care-giving roles for which they are ill-equipped and likely inadequate. Such an Orwellian world would deny children the love and care of those most proximate and most likely able to advance each child's interests.[41] The prospect of continually facing state interference with parental decisions and care could lead many adults to forgo parenthood altogether.

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[38] *See id.* (discussing parents' "high duty . . . to recognize and prepare [their children] for additional obligations").
[39] *See generally Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 32 (1981).
[40] *See Meyer*, 262 U.S. at 400 ("Corresponding to the right of control . . . is the natural duty of the parent to give his children education suitable to their station in life . . . ."); *see also Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart of the responsibilities they have assumed.").
[41] *See* Huntington & Scott, *supra* note 34, at 2532–33.

The Supreme Court's parental rights jurisprudence also reflects the legal judgment—backed by centuries of tradition and practices across this continent and indeed the world—that parental rights serve society's interests more generally. Societies with good reason have elevated the sanctity of the family and the United States has committed to limited government with the care and support of each new generation as central goals.[42] Whether drawn from consistent lines of judicial precedent or from conceptions of history and tradition informing constitutional interpretation, legal protection for parental decisions stands as an enduring commitment revered across communities and generations in this country.

As the Supreme Court has repeated in various formulations over the years, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[43] Because "[i]t is through the family that we inculcate

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[42] *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

[43] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see, e.g.*, *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course[.]"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is

and pass down many of our most cherished values, moral and cultural,"[44] many consider this deeply rooted tradition of parental authority to be necessary to the maintenance of a free society and "a strong hedge against tyranny."[45] Denying state control over childrearing is essential to maintaining a system of limited government, for "[e]ven if the system remains democratic, massive state involvement with

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basic in the structure of our society."); *Trimble v. Gordon,* 430 U.S. 762, 769 (1977) (characterizing "the family unit" as "perhaps the most fundamental social institution of our society"); *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010) ("The concept of 'family' is one of the fundamental building blocks of American society. Parental autonomy is the cornerstone of this concept.").

[44] *Moore*, 431 U.S. at 503–04 (plurality); *see also People v. Bennett*, 501 N.W.2d 106, 121 n.2 (Mich. 1993) (Riley, J., concurring in part and dissenting in part) ("[T]he cultural patterns of American family life have contributed enormously to the ultimate purposes of a democratic society by providing the stability and the structure that are essential to sustaining individual liberty over the long term. . . . Only in the master-apprentice relationship of parent and child, committed to one another by the bonds of kinship, can the skills, normative standards, and virtues that maintain our cultural bedrock be transmitted." (quoting Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. R. 463, 473, 478 (1983)); Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* 87–88 (2022) ("Families pass on the cultural norms, moral values, and political commitments of groups within a society. Families prepare children for participating in the economic, political, and social life of the various communities they will be part of as adults.").

[45] *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting); *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality) ("Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.").

childrearing would invest the government 'with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.'"[46]

Beginning a century ago with the invalidation of compulsory public school attendance laws and laws regulating language instruction in private schools and continuing to the present, the Supreme Court has vigorously protected parents' child-rearing decisions—religious and otherwise—from substitution by State decision-makers.[47] *Wisconsin v. Yoder* is emblematic of the deference accorded to parental rights and the skeptical inquiry that awaits state infringements of those rights.[48] In *Yoder*, the Court invalidated Pennsylvania's compulsory school attendance law that would have exposed Amish children, at a "crucial adolescent stage of development," to worldly influences considered detrimental by their parents and the Amish faith community.[49] By forcing children to accept instruction from public teachers only, the law undermined the "diversity [society] profess[es] to admire and encourage," leaving Amish parents with an impossible choice: "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[50] According to the Court, "[t]he fundamental theory of liberty upon

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[46] *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting) (quoting Hafen, *supra* note 44, at 480–81).
[47] *See, e.g.*, *Pierce*, 268 U.S. at 536; *Meyer*, 262 U.S. at 403; *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).
[48] 406 U.S. 205.
[49] *Id.* at 217–18.
[50] *Id.* at 218, 226.

which all governments in this Union repose excludes any general power of the State to standardize its children" and must yield to the traditional right of parents to control the upbringing of their children.[51]

III. TRANSITION CARE BANS INFRINGE PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE MEDICAL CARE OF THEIR CHILDREN

Transition care presents *neither* of the two exceptional circumstances that courts have held are necessary to justify government infringement of parents' fundamental right to direct medical care for their children. Accordingly, the State's ban on such care represents a gross breach of parents' fundamental right to direct their children's medical care.[52]

Contrary to the first requirement—that the State's preferred care plan be compelling in the sense that all responsible medical authority agree that it is the appropriate course of care[53]—the qualified medical experts at trial in this case uniformly supported the availability of transition care and its use in appropriate

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[51] *Id.* at 233; *see also Meyer*, 262 U.S. at 402 (invalidating legislation that attempted "to foster a homogeneous people" by standardizing language instruction in schools).
[52] *See, e.g.*, *Brandt v. Rutledge*, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023) (holding that transition care ban infringed parents' "fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary").
[53] *See, e.g.*, *In re Hofbauer*, 393 N.E.2d at 1013; *In re Storar*, 420 N.E.2d at 73; *In re Custody of a Minor*, 393 N.E.2d at 846.

cases.[54] As the district court stated, "[t]hree of Plaintiff's experts and two Arkansas doctors detailed the significant mental health benefits of gender-affirming medical care for adolescents with gender dysphoria which they have observed clinically. Drs. Karasic, Turban, and Adkins have collectively treated thousands of patients with gender dysphoria and testified about their own clinical experiences witnessing the positive, life-changing impact of gender-affirming medical interventions on their adolescent patients as well as the comparable experiences of their colleagues around the country."[55] Even the State's expert witness "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 for the doctor and have met with the doctor numerous times, and the doctor who has a relationship with the patient.'"[56]

Thus, not only is the exceptional circumstance of all responsible medical authority lining up against transition care *not* present, all of the qualified doctors who testified at trial lined up in support of this treatment's availability in appropriate cases. Furthermore, as the district court found, transition care is backed by the research and expertise of specialists in the field and every leading medical and

[54] *Brandt*, 2023 WL 4073727, at *30 (stating that all but one of "the State's expert witnesses . . . were unqualified to offer relevant expert testimony and offered unreliable testimony").
[55] *Id*. at *32.
[56] *Id.*

mental health organization in the country.[57] Accordingly, the experts in this case and mainstream medical experts support rather than disapprove of allowing parents to choose transition care for their children in appropriate circumstances.[58] The fact that the Food and Drug Administration ("FDA") has not specifically approved the use of puberty blockers and hormone therapy to treat adolescents with gender dysphoria does not alter this conclusion. Many established medical treatments, particularly those for children, involve off-label uses of FDA-approved medications.[59]

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[57] *Id.* at *33; *accord Brandt*, 47 F.4th at 670 (finding "substantial evidence in the record" to support the district court's factual findings that transition care "conforms with the recognized standard of care for adolescent gender dysphoria, [and] . . . is supported by medical evidence that has been subject to rigorous study" (internal quotation marks omitted)), 671 ("[S]everal studies have shown statistically significant positive effects of hormone treatment on the mental health, suicidality, and quality of life of adolescents with gender dysphoria. None has shown negative effects.").

[58] *See Brandt*, 2023 WL 4073727, at *32–33; *cf. Pickup v. Brown*, 740 F.3d 1208, 1223, 1225 (9th Cir. 2014) (no fundamental right to access treatment that State has "*reasonably* deemed harmful" based on the "well-documented, prevailing opinion of the medical and psychological community," and noting that "[a]lthough the legislature . . . had before it some evidence that [LGBT conversion practices are] safe and effective, the *overwhelming consensus* was that [such practices were] harmful and ineffective" (emphases added)).

[59] *See* Am. Acad. Pediatrics Comm. on Drugs, *Policy Statement*, *Off-Label Use of Drugs in Children*, 133 PEDIATRICS 563, 563 (2014) (stating that off-label use of FDA-approved medications "does not imply an improper, illegal, contraindicated, or investigational use"); *accord Brandt*, 2023 WL 4073727, at *18; *cf. Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 711–12 (D.C. Cir. 2007) (en banc) (no fundamental right to access "experimental" drugs not yet approved by the FDA for public use for *any* purpose).

Contrary to the second requirement—that the State's preferred course of treatment for the child be likely to result in great benefit and pose few countervailing risks to the child[60]—the ban on transition care poses considerable risks to minors experiencing gender dysphoria. As the trial court found, "[g]ender dysphoria is a serious condition that, if left untreated, can result in other psychological conditions including depression, anxiety, self-harm, suicidality, and impairment in functioning."[61] The Court further found that delaying transition care until those with gender dysphoria reach adulthood—the State's preferred course of treatment—"puts patients at risk of worsening anxiety, depression, hospitalization, and suicidality. . . . Not all adolescents with gender dysphoria will live to age 18 if they are unable to get gender-affirming medical treatment."[62] While the court found that transition care also presented some risks, these risks "are comparable to the risks associated with many other medical treatments that parents are free to choose for their adolescent children after weighing the risks and benefits."[63] Indeed, as the Supreme Court has observed, "[f]ew if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk."[64]

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[60] *See, e.g.*, *Newmark*, 588 A.2d at 1117–118; *In re Burns*, 519 A.2d at 645.
[61] *Brandt*, 2023 WL 4073727, at *4.
[62] *Id.* at *24.
[63] *Id.* at *18.
[64] *United States v. Rutherford*, 442 U.S. 544, 555–56 (1979) ("[A] drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.").

To be clear, the fact that transition care may pose medical risks, in addition to the great benefits many children experience, not only does not justify the State's ban, it properly places the decision-making for children's gender dysphoria squarely on the shoulders of parents.[65] It is parents, in concert with their chosen physicians, who are best positioned to weigh the considerable risks of not getting transition care against the risks of such care in individual cases. Unlike government actors, the parents in this case will have spent virtually every day of their lives with their children and are far better positioned to assess whether the toll of untreated gender dysphoria on their child's mental health justifies the risks of treatment.

Whether children or parents have a personal right to medical treatment is not the question; parents by law are required to meet their children's needs.[66] For this reason as well as longstanding recognition of the centrality of family formation and guidance to human liberty, parents have an obligation and the corresponding right to determine their child's medical care regardless of whether the child or the parent has a fundamental right to medical treatment. The same can be said for parents' other obligations: although the Supreme Court has not recognized a fundamental right to

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[65] *See Parham*, 442 U.S. at 603 ("Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. . . . Parents can and must make those judgments.").

[66] *Pierce*, 268 U.S. at 535 ("[Parents] have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.").

education, shelter, or subsistence,[67] parents have an obligation and the corresponding right to determine what kind of education their child receives, where they live, and what they eat.[68]

To hold that parents have a fundamental right to direct their children's medical care *unless* the State, without evidence, says that such care is experimental or harmful would reduce the fundamental right to a nullity. As demonstrated by the case before this Court, such a determination would also disregard all responsible medical authority, jeopardize children's health, and leave parents with an impossible choice: remain in their home state as their child's health deteriorates, or, assuming they have the resources to do so, "migrate to some other and more tolerant region"—precisely the type of harm that the Supreme Court condemned in *Yoder*.[69] This awesome power to force parents to either risk their children's lives or uproot their families is antithetical to a free society, Western civilization concepts of the family, and "the diversity we profess to admire and encourage."[70]

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[67] *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (rejecting argument that "education is a fundamental right or liberty" and observing that there is likewise no fundamental right to "decent food and shelter").
[68] *See, e.g.*, *In re Adoption of C.D.M.*, 39 P.3d 802, 809 (Okla. 2001) (discussing parental obligation to provide education, food, and adequate domicile to child).
[69] *Yoder*, 406 U.S. at 218.
[70] *Id.* at 226.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief contains 6,217 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Century Schoolbook font.

Dated: December 13, 2023

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CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s/ Aldo A. Badini
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 13, 2023, an electronic copy of the *Amici Curiae* Brief of Family Law and Constitutional Law Scholars in Support of Appellees and Affirmance was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that all participants in this case are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system.

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