

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

No: 21-2875

Dylan Brandt, by and through his mother Joanna Brandt, et al.

Appellees

v.

Leslie Rutledge, in her official capacity as the Arkansas Attorney General, et al.

Appellants

-----

Keira Bell, et al.

Amici on Behalf of Appellant(s)

Lambda Legal Defense and Education Fund, et al.

Amici on Behalf of Appellee(s)

---

Appeal from U.S. District Court for the Eastern District of Arkansas - Central  
(4:21-cv-00450-JM)

---

**ORDER**

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Stras would grant the petition for rehearing en banc. Judges Gruender, Erickson, Grasz and Kobes join, dissenting from the denial.

Judge Shepherd did not participate in the decision or consideration of this matter.

COLLTON, Circuit Judge, with whom SMITH, Chief Judge, and BENTON, Circuit Judge, join, concurring in the denial of rehearing en banc.

Whatever the merits of the panel opinion, this case is not appropriate for rehearing en banc in its current procedural posture. The present appeal concerns a preliminary injunction entered in July 2021 as to which there has been no request for a stay by the State in fifteen months. The case is now in the midst of a trial in the district court that is scheduled to conclude in less than a month, on December 1, 2022. The present interlocutory appeal will be moot when the district court enters a final judgment after the trial, either because judgment for the State will dissolve the preliminary injunction or because the preliminary injunction will merge into a final judgment for the plaintiffs. *See Shaffer v. Carter*, 252 U.S. 27, 44 (1920). An appeal from the final judgment will present this court with a comprehensive record developed after more than ten months of discovery and a full trial, as opposed to the preliminary record that is before the court in the present appeal. For these reasons, I concur in the denial of the petition for rehearing.

STRAS, Circuit Judge, with whom GRUENDER, ERICKSON, GRASZ and KOBES, Circuit Judges, join, dissenting from the denial of rehearing en banc.

In my judgment, this is a case of “exceptional importance.” Fed. R. App. P. 35(a)(2); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008) (en banc) (granting en banc review of a preliminary injunction in an abortion case). The panel opinion checks two boxes in that regard: it draws a major piece of Arkansas legislation into doubt and recognizes what amounts to a new suspect class.<sup>1</sup>

---

<sup>1</sup>The panel may have drawn inspiration from *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020). The Fourteenth Amendment, however, predates Title VII by nearly a century, so there is reason to be skeptical that its protections reach so far. *See id.* at 1739–41 (interpreting Title VII by looking at what the words meant in 1964); *see also Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (stating that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny”). Indeed, their text is not similar in any way. *Compare* 42 U.S.C. § 2000e–(2)(a)(1), *with* U.S. Const. amend. XIV, § 1.

It is true, as my colleagues recognize, that this case is not the perfect vehicle for answering these “momentous” questions. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 359 (7th Cir. 2017) (en banc) (Sykes, J., dissenting). There is a trial ongoing, which means there is a chance that it will become moot before the appeal is over. Even so, I think it is worth the risk. The panel opinion will frame the debate in the future, if not effectively decide any later appeal. And even if this case never comes back, we may be dealing with its far-reaching consequences for years to come.

For these reasons, I respectfully dissent from the decision to deny rehearing en banc.

November 16, 2022

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

## John Hibbs

---

**From:** ca08ml\_cmecf\_Notify@ca8.uscourts.gov  
**Sent:** Wednesday, November 16, 2022 9:43 AM  
**Subject:** 21-2875 Dylan Brandt, et al v. Leslie Rutledge, et al "Judge Order Filed denying for en banc rehearing also panel rehearing" (4:21-cv-00450-JM)

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.

### Eighth Circuit Court of Appeals

#### Notice of Docket Activity

The following transaction was filed on 11/16/2022

**Case Name:** Dylan Brandt, et al v. Leslie Rutledge, et al  
**Case Number:** [21-2875](#)  
**Document(s):** [Document\(s\)](#)

#### Docket Text:

JUDGE ORDER: The petition for rehearing en banc is denied. The petition for panel rehearing is also denied. [\[5205752-2\]](#) Judge Stras would grant the petition for rehearing en banc. Judges Gruender, Erickson, Grasz and Kobes join, dissenting from the denial.

Judge Shepherd did not participate in the decision or consideration of this matter.

COLLTON, Circuit Judge, with whom SMITH, Chief Judge, and BENTON, Circuit Judge, join, concurring in the denial of rehearing en banc. (SEE ATTACHED ORDER FOR FURTHER DETAILS).

PUBLISHED ORDER. Hrg June 2022 [5218304] [21-2875] (Amanda Trautt)

#### Notice will be electronically mailed to:

Ms. Lauren R. Adams: [legal@womensliberationfront.org](mailto:legal@womensliberationfront.org)  
Mr. Barrett James Anderson, Attorney: [banderson@cooley.com](mailto:banderson@cooley.com), [mdejesus@cooley.com](mailto:mdejesus@cooley.com)  
Mr. Gabriel Arkles: [Garkles@transgenderlegal.org](mailto:Garkles@transgenderlegal.org)  
Mr. Jess Askew, III: [jess.askew@kutakrock.com](mailto:jess.askew@kutakrock.com), [cassy.peters@kutakrock.com](mailto:cassy.peters@kutakrock.com)  
Mr. Paul V. Avelar: [pavelar@ij.org](mailto:pavelar@ij.org)  
Ms. Shireen A. Barday: [sbarday@gibsondunn.com](mailto:sbarday@gibsondunn.com)  
Mr. Garrard R. Beeney: [beeneyg@sullcrom.com](mailto:beeneyg@sullcrom.com), [garrard-beeney-2307@ecf.pacerpro.com](mailto:garrard-beeney-2307@ecf.pacerpro.com)  
Mr. Boris Bershteyn: [boris.bershteyn@skadden.com](mailto:boris.bershteyn@skadden.com)  
Ms. Carmine D Boccuzzi, Jr.: [cboccuzzi@cgsh.com](mailto:cboccuzzi@cgsh.com), [maofiling@cgsh.com](mailto:maofiling@cgsh.com)  
Ms. Kathleen Boergers: [kathleen.boergers@doj.ca.gov](mailto:kathleen.boergers@doj.ca.gov)  
Mr. Alexander Barrett Bowdre: [barrett.bowdre@alabamaag.gov](mailto:barrett.bowdre@alabamaag.gov)  
Mr. Nicholas J. Bronni: [nicholas.bronni@arkansasag.gov](mailto:nicholas.bronni@arkansasag.gov)  
Mr. John J. Bursch: [jbursch@adflegal.org](mailto:jbursch@adflegal.org), [ceville@adflegal.org](mailto:ceville@adflegal.org)  
Mr. Michael A. Cantrell, Assistant Solicitor General: [michael.cantrell@arkansasag.gov](mailto:michael.cantrell@arkansasag.gov), [crystal.callahan@arkansasag.gov](mailto:crystal.callahan@arkansasag.gov)

Ms. Jennifer C. Chavez: legal@womensliberationfront.org  
Ms. Leslie Cooper: lcooper@aclu.org, sgarcia@aclu.org, ccaicedo@aclu.org  
Mr. Ezra Cukor: Ecukor@transgenderlegal.org  
Mr. Andrew Rhys Davies: andrew.rhys.davies@allenoverly.com, courtnotices@allenoverly.com, kurt.vellek@allenoverly.com  
Ms. Tammy H. Downs, Clerk of Court: ared\_appeals@ared.uscourts.gov  
Ms. Sharon Elizabeth Echols: echols@gill-law.com  
Mr. James D. Esseks: jesseks@aclu.org  
Ms. Sarah C. Everett: sarah@acluarkansas.org  
Mr. Omar Gonzalez-Pagan: ogonzalez-pagan@lambdalegal.org, omar.gp@gmail.com, mhead@lambdalegal.org  
Ms. Lindsay Harris: lharris@cgsh.com  
Ms. Kathleen R. Hartnett: khartnett@cooley.com, mnarvaez@cooley.com, efiling-notice@ecf.pacerpro.com, efilingnotice@cooley.com  
Mr. Alexander S. Holland: holland@nullcrom.com  
Mr. William Racilla Isasi: wisasi@cov.com  
Mr. Dylan L. Jacobs, Assistant Solicitor General: dylan.jacobs@arkansasag.gov  
Ms. Katelyn Kang: kkang@cooley.com, efiling-notice@ecf.pacerpro.com  
Mr. Andrew King: andrew.king@kutakrock.com, suzette.mccasland@kutakrock.com  
Mr. Edmund G. LaCour, Jr., Solicitor General: edmund.lacour@alabamaag.gov, rene.whyard@alabamaag.gov  
Mr. Cortlin Hall Lannin: clannin@cov.com  
Mr. Michael J. Lanosa: mlanosa@cov.com  
Ms. Karen Loewy: kloewy@lambdalegal.org  
Mr. Jesse Ryan Loffler: jloffler@cozen.com  
MO Lawyers Weekly: michaelh@mesjassociates.com, slauck@molawyersmedia.com  
Mr. Peter Drake Mann: mann@gill-law.com, tricia@gill-law.com  
Ms. Mary Elizabeth McAlister: mmcalister@childparentrights.org, lnevitt@childparentrights.org  
Mr. Gary McCaleb: gmccaleb@adflegal.org  
Mr. Christopher Ernest Mills: cmills@spero.law  
Ms. Laura Kabler Oswell: oswell@nullcrom.com  
Ms. Elizabeth F. Reinhardt: ereinhardt@cooley.com  
Ms. Bonnie I. Robin-Vergeer, Senior Attorney: bonnie.robin-vergeer@usdoj.gov, lane.baker2@usdoj.gov, pamelal.marshall@usdoj.gov  
Ms. Barbara Schwabauer: barbara.schwabauer@usdoj.gov, lane.baker2@usdoj.gov, pamelal.marshall@usdoj.gov  
Mr. Paul M. Sherman: psherman@ij.org, mkarten@ij.org  
Mr. Chase B. Strangio: cstrangio@aclu.org, sgarcia@aclu.org  
Mr. Gary L. Sullivan: gary@acluarkansas.org, ali@acluarkansas.org  
Ms. Alison Ann Tanner: atanner@nwlc.org  
Mr. Ernest G. Trakas: etrakas@childparentrights.org, lnevitt@childparentrights.org  
Mr. Christopher L. Travis: travis@gill-law.com, melissa@gill-law.com  
Ms. Julie Veroff: jveroff@cooley.com, julie-veroff-2654@ecf.pacerpro.com, gwilson@cooley.com, efilingnotice@cooley.com, efiling-notice@ecf.pacerpro.com  
Ms. D. Jean Veta: jveta@cov.com  
Ms. Breean Walas: breean@walaslawfirm.com, walaslawfirm@gmail.com  
West Publishing: us.coa.8@content.thomsonreuters.com  
Ms. Stephanie Yu: stephanie.yu@doj.ca.gov  
Mr. Howard S. Zelbo: hzelbo@cgsh.com

Ms. Elizabeth Baia: ebaia@cov.com (*daily summary*)  
Ms. Lily Grace Weaver, Deputy Attorney General: lily.weaver@doj.ca.gov (*daily summary*)

**Notice will be mailed to:**

Mr. Andrew Bonzani  
INTERPUBLIC GROUP OF COMPANIES, INC.  
24th Floor  
909 Third Avenue  
New York, NY 10022

Ms. Gretchen Borchelt  
NATIONAL WOMEN'S LAW CENTER  
Suite 800  
11 Dupont Circle  
Washington, DC 20036-0000

Ms. Vernadette R. Broyles  
CHILD & PARENTAL RIGHTS CAMPAIGN, INC  
Suite G310  
5805 State Bridge Road  
Johns Creek, GA 30097

Ms. Sunu Chandy  
NATIONAL WOMEN'S LAW CENTER  
Suite 800  
11 Dupont Circle  
Washington, DC 20036-0000

Mr. JD Colavecchio  
CLEARY & GOTTLIEB  
One Liberty Plaza  
New York, NY 10006-0000

Mr. Caleb B. King  
SKADDEN & ARPS  
One Manhattan West  
New York, NY 10001-8602

Mr. Thomas A. Mars  
WALMART  
702 S.W. Eighth Street  
Bentonville, AR 72716-8313

Ms. Dorianne Mason  
NATIONAL WOMEN'S LAW CENTER  
Suite 800  
11 Dupont Circle  
Washington, DC 20036-0000

Mr. William J. O'Brien  
SKADDEN & ARPS  
One Manhattan West  
New York, NY 10001-8602

Mr. Justin L. Ormand  
ALLEN & OVERY

1221 Avenue of the Americas  
New York, NY 10020

Ms. Mary C. Ross  
SKADDEN & ARPS  
One Manhattan West  
New York, NY 10001-8602

Mr. Andrew J. Schrag  
SKADDEN & ARPS  
One Manhattan West  
New York, NY 10001-8602

Ms. J. G. Piper Sheren  
SKADDEN & ARPS  
One Manhattan West  
New York, NY 10001-8602

Mr. Steven W. Shuldman  
ALLEN & OVERY  
1221 Avenue of the Americas  
New York, NY 10020

Mr. Joel H. Thornton  
CHILD & PARENTAL RIGHTS CAMPAIGN, INC  
Suite G310  
5805 State Bridge Road  
Johns Creek, GA 30097

The following document(s) are associated with this transaction:

**Document Description:**

**Original Filename:** /opt/ACECF/live/forms/AmandaTrautt\_212875\_5218304\_OrderDenyEnbancRHRPUB\_529.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1105112566 [Date=11/16/2022] [FileNumber=5218304-0]

[9af2bb427a002c8afc5d2444a59e620f3c9014aa6da49ec91a3a2f399c09128b595fcd88d99e8b01f4ad689ea0c9da262cb8  
8b15b1a04b443eeafae02da51a8d]]

**Recipients:**

- [Ms. Lauren R. Adams](#)
- [Mr. Barrett James Anderson, Attorney](#)
- [Mr. Gabriel Arkles](#)
- [Mr. Jess Askew, III](#)
- [Mr. Paul V. Avelar](#)
- [Ms. Elizabeth Baia](#)
- [Ms. Shireen A. Barday](#)
- [Mr. Garrard R. Beeney](#)
- [Mr. Boris Bershteyn](#)
- [Ms. Carmine D Boccuzzi, Jr.](#)
- [Ms. Kathleen Boergers](#)
- [Mr. Andrew Bonzani](#)
- [Ms. Gretchen Borchelt](#)
- [Mr. Alexander Barrett Bowdre](#)

- [Mr. Nicholas J. Bronni](#)
- [Ms. Vernadette R. Broyles](#)
- [Mr. John J. Bursch](#)
- [Mr. Michael A. Cantrell, Assistant Solicitor General](#)
- [Ms. Sunu Chandy](#)
- [Ms. Jennifer C. Chavez](#)
- [Mr. JD Colavecchio](#)
- [Ms. Leslie Cooper](#)
- [Mr. Ezra Cukor](#)
- [Mr. Andrew Rhys Davies](#)
- [Ms. Tammy H. Downs, Clerk of Court](#)
- [Ms. Sharon Elizabeth Echols](#)
- [Mr. James D. Esseks](#)
- [Ms. Sarah C. Everett](#)
- [Mr. Omar Gonzalez-Pagan](#)
- [Ms. Lindsay Harris](#)
- [Ms. Kathleen R. Hartnett](#)
- [Mr. Alexander S. Holland](#)
- [Mr. William Racilla Isasi](#)
- [Mr. Dylan L. Jacobs, Assistant Solicitor General](#)
- [Ms. Katelyn Kang](#)
- [Mr. Andrew King](#)
- [Mr. Caleb B. King](#)
- [Mr. Edmund G. LaCour, Jr., Solicitor General](#)
- [Mr. Cortlin Hall Lannin](#)
- [Mr. Michael J. Lanosa](#)
- [Ms. Karen Loewy](#)
- [Mr. Jesse Ryan Loffler](#)
- [MO Lawyers Weekly](#)
- [Mr. Peter Drake Mann](#)
- [Mr. Thomas A. Mars](#)
- [Ms. Dorianne Mason](#)
- [Ms. Mary Elizabeth McAlister](#)
- [Mr. Gary McCaleb](#)
- [Mr. Christopher Ernest Mills](#)
- [Mr. William J. O'Brien](#)
- [Mr. Justin L. Ormand](#)
- [Ms. Laura Kabler Oswell](#)
- [Ms. Elizabeth F. Reinhardt](#)
- [Ms. Bonnie I. Robin-Vergeer, Senior Attorney](#)
- [Ms. Mary C. Ross](#)
- [Mr. Andrew J. Schrag](#)
- [Ms. Barbara Schwabauer](#)
- [Ms. J. G. Piper Sheren](#)
- [Mr. Paul M. Sherman](#)
- [Mr. Steven W. Shuldman](#)
- [Mr. Chase B. Strangio](#)
- [Mr. Gary L. Sullivan](#)
- [Ms. Alison Ann Tanner](#)
- [Mr. Joel H. Thornton](#)
- [Mr. Ernest G. Trakas](#)
- [Mr. Christopher L. Travis](#)

- [Ms. Julie Veroff](#)
- [Ms. D. Jean Veta](#)
- [Ms. Breean Walas](#)
- [Ms. Lily Grace Weaver, Deputy Attorney General](#)
- [West Publishing](#)
- [Ms. Stephanie Yu](#)
- [Mr. Howard S. Zelbo](#)

The following information is for the use of court personnel:

**DOCKET ENTRY ID:** 5218304

**RELIEF(S) DOCKETED:**

for en banc rehearing also panel rehearing

also for panel rehearing

PUBLISHED ORDER

**DOCKET PART(S) ADDED:** 7157916, 7132521, 7132522, 7157917, 7157918