IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

DYLAN BRANDT, et al.,

Plaintiffs,

v. No. 4:21CV00450 JM

July 21, 2021
Little Rock, Arkansas
9:01 AM

LESLIE RUTLEDGE, et al.,

Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES M. MOODY, JR.,
UNITED STATES DISTRICT JUDGE

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(Proceedings commencing in open court at 9:01 AM.)

THE COURT: I thank everybody for their patience. We've, as expected, had some technical issues that we had to work out. We had to ramp up another courtroom to take care of some overflow, but I hope we have all those issues worked out. In any event, we're going to have to move forward. For whoever might be in the audience that's part of the press, I hope you've made yourself familiar with our local rules and I'll just leave it at that.

With regard to the lawyers in these proceedings, especially with masks and whatnot, Karen may or may not be familiar with who you are so I ask every time that you stand up, you please identify yourself for the record and who you're speaking for and that will help us greatly in attributing comments to who said them. Some may want to adopt other comments or not, but that will allow us to keep our record straight. So are we ready to proceed and I'll get us rolling?

MS. WALAS: Yes, Your Honor.

MR. WAGNER: Yes, Your Honor.

THE COURT: So we are on the record in Dylan Brandt, et al. versus Amy Embry, et al. Case 4:21CV450. We are here on two motions before the Court. The first motion is Plaintiffs' motion for preliminary injunction, and the second is Defendants' motion to dismiss under 12(b)(1) and 12(b)(6). The parties have graciously worked out how we're going to argue the

facts that are actually not the facts, but the legal arguments, and the plaintiffs are going to go first and argue both the motion for injunction and the motion to dismiss. Defendants will respond and then we'll have another round between the two.

I need to give you the benefit of what I have reviewed. In brief, essentially everything. I have reviewed the plaintiffs' motion for a preliminary injunction and brief, which is docket number 12; I've reviewed Defendants' motion to dismiss in brief, which essentially is docket 18; the response to the motion to dismiss, docket 33; Amicus brief from the medical organizations, which is docket 30; statements of interest to the United States, which is docket 19; other Amicus briefs from business organizations which I have listed as 35-1; the Act itself, which is Act 626; the response to the preliminary injunction and reply to the motion to dismiss, which is docket 44; Amicus briefs of the states which didn't have a docket number in my notebook, but I think we're clear on what that is; and then the reply in support of a preliminary injunction, which is docket 51.

As to docket 11, which is the actual motion for a preliminary injunction, there were 12 exhibits and I've reviewed those. Docket 30, the medical association Amicus brief had two exhibits, I've reviewed those. Docket 45, which is Defendants' addendum to response to the preliminary injunction had 29 exhibits, and I've reviewed all of those. As

to docket 51, Plaintiffs' reply to the preliminary injunction, there were three exhibits, and I've reviewed those. And perhaps finally, at least this is what I have listed, docket 55 is Defendants' addendum to the response to the preliminary injunction, and there are four exhibits which I reviewed.

So I've read in pretty substantially on y'all's situation. I appreciate you agreeing to how this presentation's going to set forth. Are there any questions from counsel about what I've reviewed or how we need to proceed or are we ready to jump in?

MS. WALAS: No, Your Honor.

THE COURT: Then who will speak first for the plaintiffs?

MS. WALAS: Your Honor, Plaintiffs -- Chase Strangio will be speaking on behalf of the plaintiffs.

THE COURT: I only ask that you be next to a mic whether you're standing or seated or whatever. I just need your mouth next to a mic. And the mic at the ELMO works, the mic at the podium works, and I have no preference, it's your presentation and you do what suits you. So with that, let's get started.

MR. STRANGIO: Good morning, Your Honor. Chase Strangio from the ACLU on behalf of the plaintiffs. With me at counsel table is Leslie Cooper also from the ACLU, Duncan Simpson LaGoy from Sullivan & Cromwell, Breean Walas, and then

with us also in the courtroom today are all of our clients who are seated behind counsel's table. Thank you for the opportunity to argue these motions on this expedited timeline.

We're here today because the state's ban on healthcare for transgender minors is set to go into effect next week. And if it does, it will cause severe harm to all of the plaintiffs. These harms will be particularly immediate and devastating for our teenage clients Dylan, Parker, and Sabrina who are currently relying on treatments for gender dysphoria that will be terminated if the law goes into effect. Prior to treatment, Sabrina was depressed, she engaged in self-harm, and she saw no future for herself. Her parents feared for her safety at times being worried about her being left alone. Gender-affirming medical care has transformed her into a happy, confident teenager who is excited about and planning for her future.

Dylan, Parker, and countless other transgender young people across the state have likewise had their lives transformed by gender-affirming treatment and are currently thriving as a result of their care. The consequences of this law will also be devastating for Brooke, who is 9, and has known that she is a girl since she was 2 years old. Her doctors have informed her parents that puberty could begin at any time and they plan to start puberty delaying medication when that time comes. Sabrina, Brooke, Dylan, and Parker's parents are all fearful for their children's well-being if

they're unable to continue, or in Brooke's case, start, gender-affirming medical treatment.

These families, like hundreds of others across the state, are terrified about what will happen if their loved ones are unable to access the medical care that they need. There's already been a spike in suicide attempts since this healthcare ban was introduced, and Dr. Hutchison's office is being flooded with calls of parents who are panicking that their children are expressing suicidal thoughts at the prospect of their gender-affirming treatments being cut off. Though Defendants have argued that this measure is necessary to protect the health and well-being of minors, it does nothing of the sort. As our plaintiffs have explained in detail, if they are cut off from the medical care that has enabled them to thrive, they will face devastating health consequences and many will be forced to try to leave their homes and communities here in Arkansas in order to continue to access the care that they need.

Defendants' attacks on this care, on this gender-affirming care, require this court to accept their narrative that every major medical association in the United States has been taken over by a pro-transgender political conspiracy and is acting unethically, every single one of them. These arguments represent such extreme and outlier views that the defendants are left to rely upon experts that have

previously been discredited by federal courts. But, ultimately, the constitutionality of this law does not depend on the specifics of particular studies, because even if the Court accepts all of Defendants' criticisms of this care as true, and we urge that the Court reject these arguments, but even if the Court were to accept them as true, the fact remains that the state does not apply the same criticism to any other type of medical treatment.

The very treatments banned by the law are permitted when they are prescribed for any other purpose including when they are supported by similar or less evidence and even when they carry similar or greater risks. This would be a totally different case if Arkansas had a generally applicable law requiring proof of health outcomes through randomized trials or a generally applicable law prohibiting off-label uses of medication, just as *Cleburne* would have been a totally different case if the town had a generally applicable policy prohibiting group housing arrangements. But Arkansas has decided to single out treatment for gender dysphoria and only treatment for gender dysphoria for a uniquely onerous standard of medical certainty that does not apply to any other form of treatment. And none of the state's experts dispute that fact.

Nowhere do Defendants dispute that our clients have gender dysphoria and are benefiting from the treatment that the state plans to cut off next week. They, like hundreds of other

people across Arkansas, have a medical need for treatment that they will soon lose if this law goes into effect. All of the plaintiffs have shown that they have standing, that they have stated and are likely to succeed on the merits of their claims, that they will face irreparable harm absent an injunction, the balance of equities weighs in their favor, and it is in the public interest to enjoin this law before it takes effect.

We respectfully ask the Court to deny Defendants' motion to dismiss and preliminarily enjoin this ban to prevent the imminent and devastating harms and maintain the status quo while this case proceeds. As we've shown in our briefing, I think quite extensively on the two motions, Plaintiffs will face immediate and concrete harms when the ban goes into effect next week and have standing to bring their claims.

Unless the Court has specific questions about Plaintiffs' standing, I'll move on to the merits of Plaintiffs' equal protection claims and discuss why they are likely to succeed.

THE COURT: I may have questions later, but I don't at this point so you can continue.

MR. STRANGIO: Thank you, Your Honor. I want to first address the state's argument that the law does not discriminate on the basis of trans status and sex, because I think their arguments are impossible to square with the text of the law and controlling Supreme Court precedent. The healthcare ban only prohibits medical care when it is related

to gender transition. What is prohibited is not the type of treatment but its purpose, and I think if we look at the definition section of the law, this is incredibly clear. In 20-9-1501, section 5, the law defines gender transition as the process in which a person goes from identifying with and living as a gender that corresponds to his or her biological sex to identifying with and living as a gender different from his or her biological sex. And that may involve social, legal or physical changes.

The difference between identifying with one's assigned sex at birth and living in accordance with it and not identifying with one's assigned sex at birth and living in a gender not in accordance with it is the very definition of being transgender. And as such, right on the face of the statute, it bans treatment for people who are transgender. It also conditions treatment based on a person's sex assigned at birth. And I think an example might be helpful in this regard.

Let's say there are two people who go into a doctor's office. One -- and they both identify as female. One is assigned female at birth, so is non-transgender. One is assigned male at birth and is transgender. They both ask the doctor for medical care to affirm their female gender. Under the terms of the law, only the person assigned female at birth is able to receive that medical care. What's different is their sex. One is able to receive care, one is not. And as

the Supreme Court explained in *Bostock* last year, where an actor intentionally penalizes the person identified as male at birth for traits or actions, in this case medical treatment to affirm one's gender that it tolerates in someone identified female at birth, sex plays an unmistakable and impermissible role.

The fact that not all trans people are affected by the law or that the law also creates an age classification does not make it any less of a trans status or sex classification. I think maybe one of the most instructive cases on this point is the seminal sex discrimination case, *Craig v. Boren*, and that's the case that involved an Oklahoma law that prohibited the sale of alcohol to boys and men under 21, but to women and girls under 18. And, of course, that could be understood as an age classification because a male could buy alcohol at 21 but not at 18 or 20, and the Court recognized the law as a sex classification and applied heightened scrutiny.

There's also a long line of Supreme Court cases that have made clear that not all members of a class need to be targeted by a law for it to still be discrimination on the basis of that classification. Under *VMI* and *Morales-Santana* and a host of Supreme Court cases, all sex-based classifications get heightened scrutiny under the Equal Protection Clause. And though the Eighth Circuit has not considered the question of whether trans status independently triggers heightened scrutiny

under the Equal Protection Clause, every circuit to have considered the question has held that it does. And there's no barrier to this court finding that in addition to triggering heightened scrutiny as sex discrimination, that this law triggers heightened scrutiny as a trans status classification.

And as we've detailed in our briefing and as other courts have found and explained including the Fourth Circuit in *Grimm* and the Ninth Circuit in *Karnoski*, trans people and trans status trigger all or meet all of the indicia of a suspect classification identified by the Supreme Court. And that includes a history of discrimination, a distinguishing characteristic that bears no relationship to one's ability to contribute to society, immutability, and what courts have recognized this to be is a characteristic so integral to someone that they should not have to change it in order to obtain their rights, and political powerlessness. And I think it's quite clear that we meet those factors, and that trans status in addition to sex cause this law to be tested under heightened scrutiny.

So we know the statute discriminates on the basis of transgender status and sex. And what that means under *Morales-Santana*, under *VMI*, is that the state has to come forward and show how the law that they passed is substantially related to an important governmental interest. And, Your Honor, I do not think the state can carry that burden here.

And I will ultimately also address that the law is so disconnected from the interest asserted by the defendants that it fails any level of constitutional review. The defendants claim that the law is related to a governmental interest in protecting minors, and the plaintiffs do not contest that that's an important governmental interest, but the problem with the law is the tailoring.

This law does not advance that interest. Defendants raise a series of purported concerns about medical treatment related to gender transition, but none of the concerns raised is unique to the care that the state has banned and many are based on a mischaracterization of the science. I want to walk through each of the arguments raised by Defendants and highlight how it fails to meet the state's demanding burden under heightened scrutiny and ultimately how it fails under any standard of review.

So, first, the defendants claim that the ban is justified because of a lack of evidence of the medical treatment's efficacy, but this argument suffers from both factual and legal problems. As Plaintiffs' experts have detailed, there is a substantial body of research that has tested the efficacy of treatment for transgender minors that has shown that when transgender minors are able to access the very medical care that is banned, that their mental health improves. This research has shown the care to be effective and has formed the

basis of the Endocrine Society guidelines as well as the prevailing view within the American medical community that this care is safe, effective, and necessary for many people.

In his declaration, Dr. Turban details multiple studies that have confirmed the efficacy of his care. Those are in paragraphs 12 to 18 in his declaration. And Dr. Adkins has explained that in her clinical experience of treating over 400 transgender young people, that she has seen marked improvements in their mental health as a result of this care, as has Dr. Hutchison who has treated 200 transgender people here in Arkansas and has similarly found that the care was safe and effective.

Defendants quarrel with this evidence including in their most recent filings, but in addition to being misleading on the science, they also demand a standard of medical certainty that the law imposes on no other form of medical treatment. Meanwhile, the course that they propose upending the status quo and doing nothing, providing no medical treatment, is supported by no evidence. No randomized controlled trials, no observational studies. So in defense of this unprecedented ban on treatment that would withdraw care from hundreds of young people across the state, they ask this court to hold gender-affirming treatment to a standard that they do not impose on the alternative that they suggest.

But in addition to being wrong about the science,

Defendants' argument suffers from being extremely under-inclusive. As Dr. Antommaria explains, there are many commonly utilized forms of care particularly in pediatric medicine that are supported by equal or lower quality evidence than the evidence that supports the efficacy of the gender-affirming treatments that are banned under the law. Much of pediatric medicine cannot be tested by the type of randomized trials that the defendants claim are necessary here, and of course the state seems to know that as they do not ban all forms of treatment that fail to meet this test. This is a unique test and a uniquely onerous test that is applied only to gender-affirming care.

Though the defendants repeatedly in their briefing and in their experts' declaration, characterize treatment for gender dysphoria as experimental, as Dr. Antommaria explains in his declaration, it is neither experimental in the colloquial sense nor in the technical medical sense. In support of this claim, the defendants mention at least 15 times in their brief that the treatments are being prescribed off-label. But even their experts in their most recent filings seem to agree that this is not generally a problem, as many medications are provided off-label once a drug is approved by the FDA for any purpose. And as Dr. Antommaria highlights, in some context, including in pediatric intensive care units, for example, 75 percent of medications are prescribed off-label.

The AAP, the American Academy of Pediatrics, has explicitly cautioned that the fact that a drug is being prescribed off-label does not make it experimental, and of course, the law does not generally prohibit off-label use of medication. It doesn't even generally prohibit medication or treatment that might be considered experimental. It only and singularly prohibits treatment for gender dysphoria, treatment for transgender people. The law does not ban treatment that does not meet a particular evidentiary standard whether that standard be based on randomized controlled trials, whether that standard be based on years of proven efficacy, whether that standard be based on whether or not off-label medication are used. They only ban this care.

And for that reason, the law is both extremely over-inclusive in that it targets treatment and bans it that is known to be effective, and under-inclusive insofar as it fails to prohibit many forms of medication that would meet their critiques that they offer of gender-affirming care. The second justification that Defendants repeatedly rely on is the claim that the risks related to gender-affirming care are so different than the risks of any other form of care that it needs to be banned. But no other treatment is banned due to concerns about risk, only gender-affirming care. And here, once again, the defendants both mischaracterize the risks associated with gender-affirming treatment, ignore the risks of

denying this treatment, and subject this care alone to a uniquely burdensome standard that no other treatment is held to.

They focus on the potential impact on the treatments on a patient's fertility, but again, this is both severely under and over-inclusive. There are many forms of pediatric medicine that can result in impaired fertility and none of those are banned under the law, only this type of care. And as the experts explain, Dr. Adkins in particular, has made clear that many forms of the banned care do not impair fertility. And many of the other risks that they have identified in their papers and in their expert declarations are greatly overstated. And no other medication, no other treatment is banned because of potential risks.

All medicine carries risks, and the way that that is handled in every other context but this one is that the doctor, the patient, and the patient's parents assess the risks and benefits of the treatment and make a decision about what is best for their child. But starting next week if this law goes into effect, these families and families across Arkansas will not be able to do that. Importantly, Defendants ignore the substantial body of medical evidence that shows that there is a significant risk to denying this treatment to transgender young people.

That when young people need this care and do not have

access to it, they experience severely negative mental health consequences, and the prospect of withdrawing treatment from people who are already undergoing that treatment is so unprecedented that we don't even really know the risks. Even in every study cited by the defendants in support of their claim that this ban benefits minors, not one recommends pulling people off the care that they are relying on. And that will result in unprecedented harms that the defendants ignore and that their experts do not respond to.

The third argument that the defendants raise in their concern about in defense of the ban is the erroneous claim that the majority of transgender people will, quote, outgrow being transgender, and that treatment is therefore unnecessary and potentially harmful because they will regret it. But critically in support of this argument, defendants rely on a data set that conflates information about prepubertal children and adolescents once they reach their earliest stages of puberty. And the healthcare ban only targets and bans medical treatment that is given to adolescents once they reach puberty. And for this population, the science is clear that people do not quote, unquote, outgrow their transgender identity in any significant degree and that there is very little evidence of regret of this treatment, and this is extensively detailed in the expert declarations.

Providing a person with medical treatment does not make

them transgender but taking medical treatment away from someone who is transgender who has been evaluated by medical professionals who are following well-established protocols for the screening and assessment of care for this condition and carefully prescribing medication and overseeing that medication through appropriate clinical follow-up, and taking that away, that is incredibly harmful and we know that to be true.

Defendants suggest repeatedly in their briefing and in their expert declarations that care for minors with gender dysphoria is being offered without any meaningful oversight, without appropriate mental health evaluation, but those claims contradict both the well thought out and established guidelines of both the Endocrine Society and the World Professional Association of Transgender Health that require multiple mental health evaluations. They require that any comorbid underlying mental health conditions are managed before treatment is provided. There is no evidence that those standards are not being followed. As Dr. Adkins in her expert declaration explains, in her clinic, every person receiving medical care has to have ongoing psychological treatment and multiple rounds of understanding the risks and benefits of the treatment that they are prescribed. That is also true here in Arkansas as Dr. Hutchison has explained in her declaration.

Ultimately this ban does not advance a state interest in protecting minors. It undermines that interest. And because

the sheer breadth of the law is so far removed from the justifications advanced by the state in defense of it, it's impossible to credit them under any standard of review. Under *Romer v. Evans*, the Supreme Court made clear that even under rational basis, laws that have the, quote, peculiar property of imposing a broad and undifferentiated disability on a single named group are invalid. And that is what Arkansas's ban does. The justifications offered by the state are so far removed from what the ban does that they fail under any standard of review.

Many forms of medical treatment are supported by the exact same type of evidence that supports the banned care, but they are not banned by this law. Many other forms of treatment carry equal or greater risks, but they are not banned by this law. This law uniquely burdens, targets, and bans gender-affirming care.

Unless Your Honor has any questions on the equal protection claims and the likelihood of success on the merits, I'll turn briefly to our due process and First Amendment claims, although I think in large part we have covered those well in the briefing.

THE COURT: You may continue. Go ahead.

MR. STRANGIO: Thank you, Your Honor. In addition to violating the rights of the minor plaintiffs to equal protection, the parent plaintiffs are likely to succeed on their claim that this ban violates their well-established

fundamental right to direct the care, custody, and control of their children. This longstanding fundamental right includes the ability of parents to seek and follow medical advice for their children. Defendants attempt to reframe the right here as a right to demand experimental treatment for one's child. But as the Supreme Court cautioned in *Lawrence v. Texas* when it overruled its prior decision in *Bowers*, narrowly construing a fundamental right is to misapprehend the claim of liberty they're presented, which I think is exactly what's going on here.

As I previously discussed, the care is not experimental as a factual matter, but in terms of the law, I think the proper inquiry is whether this ban on healthcare for transgender minors impermissibly intrudes upon the fundamental rights of parents to direct the custody and care of their children. And we think it clearly does, Your Honor. For example, Aaron and Lacey Jennen, they know their daughter, they worried for her. They were afraid to leave her alone, they prayed for her, and thankfully with the support of their doctor, they found a course of treatment that transformed her life and her health.

But this law infringes upon their fundamental rights as parents to follow that medical advice, to continue that treatment for their daughter. And as Governor Hutchinson explained, when he vetoed this bill before it was overwritten

by the legislature, that it represented a vast government overreach overriding parents and denying best medical practice to transgender youth.

This infringement into the fundamental right of parents triggers strict scrutiny, and as I previously discussed, the law cannot survive any standard of review. And as to the final claim, our First Amendment claim on behalf of all the plaintiffs, the plaintiffs are also likely to succeed on the merits of its stated claims, and again, I believe this has largely been covered in the briefing, but just briefly, the healthcare bans referral prohibition violates the First Amendment rights of all the plaintiffs, the rights of the doctor plaintiffs to speak, to give information to their patients, and the rights of the minor plaintiffs and their parents to receive such information.

By only banning speech that refers patients to gender-affirming care, the ban is both content and viewpoint based and, therefore, presumptively unconstitutional. Unless Your Honor has any questions about the First Amendment claim, I'll go on to address the remaining preliminary injunction factors.

THE COURT: Go ahead.

MR. STRANGIO: In addition to showing that they are likely to prevail on the merits of their claims, the plaintiffs have more than met their burden of showing both irreparable

harm and that the balance of equities weighs in their favor. If the ban goes into effect one week from today, the plaintiffs and transgender minors across the state will lose the treatment that has enabled them to thrive, has enabled them to survive. As Dylan Brandt explains, going back to life as it was before treatment is an unbearable thought. Aaron Jennen similarly said, "We cannot go back." Not only will the plaintiffs suffer physical and psychological harms that are irreparable, many families will be uprooted, they will have to leave their homes and their communities that some of them have lived in for generations. Those are irreparable harms.

And in addition to these severe and irreparable harms, of course the denial of their Fourteenth and First Amendment rights are irreparable injuries that we likewise respectfully ask this court to prevent. And on the other side of the equation, we're simply asking to maintain the status quo while this case proceeds. The state has never had a law like this. No state in the country has a law like this. The harms to the state of not enforcing this law temporarily while this case proceeds pale in comparison to the severe and irreparable harms of our clients. It's also in the public interest to prevent the denial of constitutional rights and to prevent the uprooting and chaos that would flow from cutting off medical care from our clients and the hundreds of transgender people and their families should this law take effect.

We think that the plaintiffs have met their standard -- their burden of showing that they're likely to succeed on the merits of their claim, that they will face irreparable harms, that the balance of equities face strongly in their favor, and that the issuance of a preliminary injunction is in the public interest. Unless Your Honor has any specific questions, I'll save the remainder of my points for rebuttal time.

THE COURT: Thank you, sir. And I'll likely circle back, but I'm going to hear some more before I set you on a task of answering questions, but thank you.

MR. STRANGIO: Thank you, Your Honor.

MR. WAGNER: Good morning, Your Honor. And may it please the Court. Vincent Wagner for the defendants.

THE COURT: Good morning, Mr. Wagner.

MR. WAGNER: With me at counsel table are Nicholas Bronni, Michael Cantrell, Emily Yu, and Kat Guest. Although gender transition procedures have existed for decades, there's no scientifically valid evidence that they lead to long-term benefits. That was the conclusion recently reached by the national healthcare systems of Sweden, Finland, and the United Kingdom. By contrast, the irreversible consequences are obvious of indefinitely halting puberty with permanent infertility and the permanent destruction of healthy breast tissue among other consequences. But this case, and we agree with Plaintiffs, isn't really about whether those long-term

consequences are outweighed by hypothetical unproven benefits. Instead this case is about whether the constitution prohibits Arkansas from determining which experimental procedures are appropriate for minors solely because the plaintiffs can point to some doctors that disagree with Arkansas's determination.

At its heart then, the plaintiffs' claim is that the constitution guarantees parents and doctors the right to choose experimental medical procedures for children, but there is no constitutional right to an experimental medical procedure, which is why the plaintiffs try to frame their claim in terms of discrimination or parental rights or free speech which is anything but the true substance of the constitutional claim here. Creating the new constitutional right that the plaintiffs seek in this case would seriously undermine the state's ability, which is long established, to regulate the medical profession because there's no legal reason for this result. The defendants ask the Court to deny the motion for preliminary injunction and to grant the defendants' motion to dismiss the complaint with prejudice.

As I move through my presentation, I'd like to start where the plaintiffs ended on irreparable harm and then I'd like to say a word about the plaintiffs' standing and then move on to their likelihood of success on the merits. First regarding irreparable harm, a key argument that the plaintiffs make is related to the irreparable harm that they say would

result from withdrawing treatment that is currently ongoing. But their own expert, Dr. Adkins, acknowledges that to safely ramp down even cross sex hormones takes about six weeks, and there's nothing in the SAFE Act that prevents a safe ramping down even after the law takes effect, because continuing to prescribe something like cross sex hormones for the purpose of safely ramping down the procedure would not fall within the definition of a gender transition procedure in the Act.

And in addition to that point, the Act has an express exemption for procedures that are undertaken to undo the effects of a gender transition procedure. And this is in Section 20-9-1502(c)(3). So if a plaintiff here or another child in Arkansas were to continue to receive one of these procedures for the purpose of safely ramping down a currently ongoing procedure, that would not fall within the Act's core prohibition.

THE COURT: Mr. Wagner, don't you make the plaintiffs' point that depending on what you're doing it for, it's safe to do this as long as you're not doing it to cross over, so to speak? You just said that we're not going to let anybody do this, but we're going to let them do it for six more weeks if they're trying to go the other direction with it. So I'm confused.

MR. WAGNER: Your Honor, it's related to the point we've made that the purpose of the procedure makes it a

different procedure. So here, it will have a different outcome depending on the purpose for its use.

THE COURT: That's what I'm trying to get at. Is it the care that you're banning or is it the outcome? Because it appears that you just made the point as long as we're headed toward a different outcome, that care is allowed by the Act.

MR. WAGNER: The point is that it is a different procedure based on the outcome.

THE COURT: How so?

MR. WAGNER: It's as in -- so if you look at the use of cross sex hormones, for instance, and I'll take one in particular to help the discussion. So if you talk about, say, testosterone being used in a boy leads to the development of that boy's sexual and reproductive systems, so the outcome makes it a certain procedure and it's FDA approved for that procedure. It is not approved for a different procedure.

THE COURT: It's the same treatment though, Mr. Wagner, it's just for a different purpose. That's what I'm trying to get at. It's not the drug that you're prescribing, it's not the dose that you're prescribing or the manner in which you're administering it. It's the end result that causes it to be unlawful as opposed to the giving of the drug itself. And that's all based on whether or not you're transitioning or trying to move in a direction of gender identity that was assigned at birth.

And if that's what your plan is and that's what the law's about, that's fine, but I thought you just made the point that we'll let these doctors continue these drugs if we're headed the other direction for six weeks or otherwise. Or if it's to maintain the identity that was assigned at birth with somebody, that's okay too, it's all the same treatment, but it's just the purpose or the outcome that makes it illegal, and I think that's the point I understood that you just made. But if I'm wrong, correct me.

MR. WAGNER: You're right that it's the outcome that makes a difference, Your Honor, but that is -- the outcome is what determines what the procedure is in this case.

THE COURT: How does the outcome determine what's safe and not safe if the treatment is the same?

MR. WAGNER: It's the same drug, Your Honor, but this is why the FDA approval point is relevant here because the FDA has approved these for a certain outcome and not for a different outcome.

THE COURT: That's the off-label argument?

MR. WAGNER: That's right, Your Honor.

THE COURT: So all off-label drugs given to children should be banned? Or where do you draw the line? Where do you intend to draw the line?

MR. WAGNER: The point here, this is where we relate to the specific harms caused by these treatments, Your Honor.

This is the focus on the irreversible long-term consequences for these children who are undergoing these treatments. So puberty blockers when they're used as a gender transition procedure will halt indefinitely the maturation of the child's reproductive system and cross sex hormones likely lead to permanent infertility. So these sorts of long-term consequences are what set these procedures apart from other procedures and why Arkansas has decided in this instance to regulate these procedures as opposed to other procedures. And the plaintiffs --

THE COURT: What do you do about hysterectomies?

MR. WAGNER: In what sense, Your Honor?

THE COURT: You just made the argument that this treatment prohibits reproductive future basically. What does a hysterectomy do or what does a vasectomy do and how is that any different than your argument about everyone should be able to have children?

MR. WAGNER: Your Honor, I think the difference there is the population in which it's being performed. So here we're talking about children, and in that case we're talking about adults. So Arkansas has a specific compelling interest that the plaintiffs don't dispute in protecting children, and combined with Arkansas's interest, compelling interest in regulating the medical profession. So it's the difference in the age there. So that's why Arkansas wouldn't -- the same

interest wouldn't justify a ban on vasectomies in adults or hysterectomies in adults because Arkansas has a particular and compelling interest in protecting children. And in this case that comes to light because of the lack of evidence of long-term benefits to support these procedures.

THE COURT: So here's where I'm having the disconnect. It's okay at 18 to change your potential child bearing situations, but you want to allow minors to have children? What is it? Once you're 18, you can do any of this, I guess. And so I'm having trouble following this deal because I suspect that the legislators that pass this law aren't big on minors having kids either.

MR. WAGNER: It's not about minors having children, Your Honor. It's about preserving their capacity to make that choice until adulthood. So when somebody turns 18, it's just well established in American law that the states have less of a compelling interest when we're talking about adults versus minors. So that line is just drawn in the law. And so if we're talking there about an age classification, the Supreme Court has said age classifications can be made. And in particular, age classifications related to protecting minors.

So that's why the line would be drawn at 18 is that the interest in preserving the -- it's about ensuring that minors have that choice to make when they become adults rather than the choice being made pre-emptively while they're still

children.

THE COURT: And the legislature wants to do that on behalf of them and their parents; is that correct?

MR. WAGNER: Yes, Your Honor. And that's related to the legislature's compelling interest that's well established in protecting children. So the legislature has determined that the lack of valid scientific evidence of long-term benefits here combined with the particular reproductive harms we've been discussing means that they have an acute interest in intervening with these particular procedures which are unique in this respect.

The plaintiffs talk in general terms about other procedures, but this morning they're not pointing to any other procedures that raise these same risks without any correlative long-term benefit to justify the significant risks that result from these procedures. And that's what sets these procedures apart from other procedures. And that's, for instance, going back to a particular example why it's not the same to say a boy gets testosterone, a girl gets testosterone. In the girl, it raises particular risks, it has particular consequences and it doesn't have a validly established long-term benefit for the girl like it would for the boy.

So this distinction on the basis of procedure is the true distinction that's at the heart of the SAFE Act. It's not a distinction on the basis of transgender status or a distinction

on the basis of sex. And because it's a distinction on the basis of procedure, it only receives rational basis review, which it passes. The legislature heard testimony from doctors including psychiatrists with experience treating children with gender dysphoria and it also heard testimony from other doctors like the plaintiffs here that disagreed with the SAFE Act's goals, and the legislature credited the testimony supporting the SAFE Act and not the testimony against the SAFE Act.

That's not evidence of any animosity toward a particular population. That's at most evidence of medical uncertainty. And the Supreme Court has made clear, most particularly in *Gonzales v. Carhart* when there's medical uncertainty, the states have wide discretion to pass legislation.

So moving on, the plaintiffs try to take that procedure-based classification and treat it as a sex-based classification, which is an issue you and I have been discussing a little bit so far. But it is not a sex-based classification because it doesn't -- it's a distinction on the basis of procedure so you look at what procedure is being performed, not the identity of the person who's receiving the procedure. And at some level, sex is relevant to that determination, but the Supreme Court hasn't said in the equal protection context that any law that at some level refers to sex receives heightened scrutiny. The plaintiffs' argument on this point is based on a misreading of *Bostock*. *Bostock* was

very clear that it was interpreting the particular language of Title VII. The Court said expressly that it was not deciding the standard for sex discrimination under the constitution or even under any other statutory ban on sex discrimination.

So it would be a misreading of *Bostock* to apply it here. In the Supreme Court's constitutional sex discrimination cases, you've always got a situation where you have a member of one sex who's similarly situated with a member of another sex and is suffering some sort of disadvantage as compared to the member of the other sex. That's what was at issue in *United States v. Virginia*. It was very clear there. You had a woman who was not allowed to go to the all-male school because she was a woman. That's not the same situation that we have here because these are different procedures that boys and girls are receiving.

THE COURT: Let's go back to the testosterone. Boy wants testosterone, girl wants testosterone. Boy can have it; girl cannot. Why is that not based on sex?

MR. WAGNER: So the place I'd start is the boy wanting testosterone, what is it being used for.

THE COURT: No, it's the same exact treatment or modality. I'm assuming for purposes of this argument that we're talking about a tablet of testosterone or a hundred tablets, it doesn't matter, it's the same treatment in purposes of my question to you. That they both want it. Boy wants it,

girl wants it. Boy can have it, but girl cannot. Why is that not sex-based? Because you want to talk about the reason they want it, but why is that not discriminatory based on sex when you have the same treatment and you say but it's for a different purpose? I get that part. I'm not arguing that part. I think that's the whole point. But how do you justify giving it to one sex and not the other and not call that sex discrimination?

MR. WAGNER: Your Honor, you're right. We've talked about this and I do think the point is that while it is still testosterone, whether you're giving it to the boy or the girl, it's not the same procedure and sex is relevant to determining that.

THE COURT: It's the same treatment, Mr. Wagner. I've said for purposes of this argument, we're going to give the exact same medicine, same dose, and in the same manner or that's what they're both asking for, to each of these. But you want to say it's a different procedure because of the perceived desire or why they want it. Why does that make it a different procedure just because you want it for one reason and I want it for another? You want it to make you taller. I want it to make me bigger. Why is that procedure different just because we want different outcomes?

MR. WAGNER: Your Honor, I don't think it's different because of why they want it. It's different because

of what it will do in the child's body. In the boy, the testosterone will lead to development of his sexual and reproductive systems. In the girl, it will not do that. So it's a different procedure because they're taking the same drug and it causes a different outcome in their body.

THE COURT: Perhaps that's something we're never going to agree on. I think it's the exact same procedure that has a different outcome. And maybe we agree on that. But you want to call it a different procedure because of the outcome, and I see it as the same modality or treatment.

MR. WAGNER: I understand your point, Your Honor, and we can move on to discuss -- I don't think it's sex discrimination, but even if it is, then we get to the standard of intermediate scrutiny here and the SAFE Act would pass intermediate scrutiny for many of the same reasons you and I have been discussing. So it's substantially related to Arkansas's compelling interest in protecting children and regulating the medical profession. And my understanding of the plaintiffs' argument is that they don't dispute Arkansas's interest there in protecting children and regulating the medical profession.

THE COURT: That's my understanding too.

MR. WAGNER: Whatever distinctions the SAFE Act draws then, they're based on the enduring physical differences between men and women, which that's a quote from *United States*

v. Virginia. The Supreme Court has said the state can draw distinctions as long as they're based on real physical differences between men and woman. And it is those physical differences between boys and girls that lead to the different outcomes we've been discussing. So to go back to the testosterone example, it develops the boy's reproductive system, it does not develop the girl's reproductive system. Those are different outcomes and different long-term consequences of the procedure.

Arkansas has an interest in ensuring that those sorts of consequences, those sorts of outcomes in a medical procedure performed on children are only performed if they're justified by appropriate benefits. And there is no valid scientific evidence of long-term benefits of these procedures. This is -- the most common one that the plaintiffs discuss has to do with suicide risk, but the best evidence that we have on suicide risk is that -- now, this is a study, as Plaintiffs point out, that was performed on adults who even received surgical treatment, but this data showed that long-term suicide outcomes are actually worsened after full gender transition.

And the plaintiffs don't point to any contrary long-term scientific evidence to show that it lowers suicide risk. And as we've explained, they attempted to fill some of this evidentiary gap with their supplemental declaration from Dr. Turban filed last Friday, but each of our experts who filed

supplemental declarations here have explained the problems with Dr. Turban's analysis. That Dr. Hruz, in his supplemental declaration, systematically demonstrates the evidentiary problems with the studies that Dr. Turban cites. And Dr. Regnerus similarly explains how nothing in Dr. Turban's analysis materially improves the scientific evidence of benefit. And these sorts of evidentiary problems are why Sweden, Finland, and the United Kingdom have reviewed the evidence of benefit and said that they found the evidence lacking to support, to justify, continuing these procedures just as a blanket rule.

Now, it's not necessarily a total ban in those countries, but they found considerable lack of valid scientific evidence to justify, to support the benefits that Plaintiffs claim here. And Dr. Levine in his supplemental declaration also points out how the plaintiffs and their experts keep moving the goalpost on what benefits matter here. There's at some level a claim that these procedures will improve gender dysphoria, but that's not what the studies that Dr. Turban sites demonstrate. They're short-term follow-up surveys about various other mental health outcomes, but they don't actually establish a lowered amount of gender dysphoria after transition procedures.

And I would like to make one more point about the fertility issue. The plaintiffs dispute this, but a key piece of evidence that they and Dr. Adkins cite on this is related to

the fertility preservation counseling that patients receive prior to undergoing gender transition procedures. This is like, for example, egg freezing. So if the medical profession is advising these patients before undergoing these procedures to consider fertility preservation treatments, that seriously undermines Plaintiffs' claim that there aren't serious concerns about fertility raised by these treatments.

THE COURT: Well, don't they do the same thing with chemo?

MR. WAGNER: Yes, Your Honor, that's right. And the distinction there, I think, goes back to the benefit point that if a child's facing life threatening cancer, the risk-benefit analysis is a different sort of analysis.

THE COURT: What if a doctor, and let's just say we're talking about a good doctor, a doctor that's conscientious and he determines that the risk-benefit favors this treatment to a given patient, I don't care how you dial it in, similar to I know that this child may never have kids again, but the chemo will save their lives. Let's say that a doctor makes that conclusion on this particular patient A. How do you justify the chemo but not this treatment?

MR. WAGNER: The justification here is that Arkansas is allowed to look at these things in the aggregate and legislate about them. Arkansas is not required by the constitution to defer to an individual doctor's determination.

THE COURT: Let's say we got a hundred doctors that got this same patient. I think the testimony was they treated 200 patients in Arkansas alone. And we can do the numbers, we can play with statistics like the experts in this deal did and said, well, if we count this, it's different. And big surprise, experts in other sides of this case don't agree, and I get that. That's part of the deal. I'm not being critical to either side about that. But the points you bring up keep circling back, and I can't understand the state's interest in one particular procedure but not the other based either on reproductive rights or survival of the child or things of this nature, preserving eggs, all of which can be done.

And you say the fact that the doctor's even telling these patients to preserve their eggs for whatever reason is different for this procedure than it would be for chemotherapy or maybe others that I'm not aware of. I don't know if you do it for dialysis or any other affliction that would cause you to go through treatment that would stress your reproductive system, but y'all aren't banning any of those. And it's because they want to do it for a different reason, and I think we agree on that proposal or that statement. Is that fair?

MR. WAGNER: I don't know if I would quite agree with the way you framed it there at the very end. Again, I don't think it's because of the reason the child wants the procedure. I do think it's because of the particular outcome

of the procedure.

THE COURT: I think we can agree that the people want that outcome. I mean, that's my point is it's not like they're asking to do this and realizing that this outcome might happen. That's the whole point, they're asking for this outcome, and it's that asking for that outcome that is the basis for the ban as I understand the law. And I think we can agree on that. And if we can't, we can just move on and I'll make a decision about what I think, but I don't think I'm putting words in your mouth or interpreting the law any differently that it's the fact that the patient in this particular instance wants this outcome and because that's the outcome that's being worked toward, this treatment will be banned.

MR. WAGNER: I think I understand your point, Your Honor. And I'd say, I think, two things in response. First, that would implicate, say, a constitutional right to a particular procedure which isn't how the plaintiffs have framed this case. They framed it as a --

THE COURT: I'm saying that you're denying it because of the transgender nature of these people, because only transgender people want this outcome.

MR. WAGNER: Then framing it that way, Your Honor, implicates the pregnancy discrimination cases that we've cited in our briefing which the Supreme Court says that even though

only women can get pregnant, it is not necessarily constitutional sex discrimination to draw a classification on the basis of pregnancy. This is in *Bray* versus I think it's Virginia Women's, or I've forgotten the exact. *Bray* is the first party.

THE COURT: That'll get us there, I hope. But go ahead.

MR. WAGNER: But so that framing of only this class of people wants this thing, or it's like discrimination by proxy which is the sort of theory that the Supreme Court has rejected in other equal protection contexts like we've just discussed, the sex discrimination context. So that won't get Plaintiffs all the way to their Equal Protection Clause claim here. So it's really about the procedure itself. And the other point I wanted to make to double back on your previous question about X number of doctors disagree with Arkansas here. This is related to Plaintiffs' claims about WPATH and the Endocrine Society and other professional organizations. And this is exactly where the Supreme Court --

THE COURT: Mr. Wagner, for my record, spell out WPATH for my court reporter.

MR. WAGNER: W-P-A-T-H. So WPATH, the Endocrine Society, other groups that are advocacy groups that are made up of doctors, they disagree with Arkansas's determination here, but the Supreme Court doesn't require Arkansas to defer to

their determinations. The clearest example of this was in the abortion cases. It's been noted that the American College of Obstetricians and Gynecologists disagreed with the Supreme Court's reasoning in some of those cases and the Supreme Court didn't defer to those groups.

But in any event, nothing in those guidelines contradict what Arkansas has done here. The Endocrine Society guidelines are the place where they've attempted to grade the scientific evidence of benefit, and at each turn, they determined that there's very low quality evidence of benefit or just low quality evidence of benefit. So not only is Arkansas not legally required to defer to these groups' recommendations, but the groups themselves readily acknowledge that there's a lack of scientifically valid evidence of benefit. So because of that lack of valid evidence of benefit, Arkansas is allowed to regulate these procedures by the constitution.

At the absolute most, Plaintiffs have established medical uncertainty here, and in the face of medical uncertainty, Arkansas and other states have the power to regulate these procedures. If Your Honor has any further questions about the Equal Protection Clause claim, I'm happy to discuss them, but I can also move on to the other points in the briefing.

THE COURT: I'll let you move on. Thank you.

MR. WAGNER: So to return to an issue that I bypassed earlier, there's a problem with Plaintiffs' standing

here that we haven't addressed yet this morning. The doctors who are plaintiffs here do not have third party standing to assert claims on behalf of their patients. The cases that the plaintiffs cite are all in the abortion context, and the abortion context is factually dissimilar from this one. The Supreme Court said in *Singleton v. Wulff* that because any particular pregnancy only lasts nine months, any particular woman's claim is likely to become moot before a federal court can review it. It's factually different here.

Even Plaintiffs point out that the cutoff stops at the age of 18, but that still gives them years to bring their own challenge, which is what the plaintiffs have done in this case. That's why there are families of patients that are plaintiffs here.

THE COURT: It would give some.

MR. WAGNER: That's right, Your Honor. And they haven't pointed to any particular patient that would not have the ability to do that here, so they haven't said here is someone who's about to age out, this person needs as-applied relief. Instead, they've included their doctors who are seeking a facial injunction of the statute, and there's no basis for allowing them to assert third party standing for a facial injunction of the SAFE Act.

THE COURT: This may be a rhetorical question, Mr. Wagner, but when do you think this is going to be done?

MR. WAGNER: This litigation, Your Honor?

THE COURT: Yes, sir.

MR. WAGNER: Your Honor may have a better idea of that than I do.

THE COURT: I'm not talking about this step. I can't imagine a scenario where this case isn't going to be immediately appealed to the Eighth Circuit and then maybe beyond. So we're talking about your nine-month timeline and how long it takes to get something done and how long people have to resolve this issue. I'm not sure I see the distinction between the analysis in the abortion cases on third party standing in this case or cases like this. And the notion that a pregnancy lasts nine months isn't helping me around that.

That's why I asked the question. This is an expedited hearing, but only because -- perhaps not only, y'all are important and I would get you in as soon as possible, but the notion that this law may go into effect on the 28th is driving the timeline. Everybody knows that. But when the final hearing if it's granted, is allowed, may be in the spring, I don't know. I don't know how quickly y'all can get all that together. And then it gets appealed to the Eighth Circuit and then, meantime, these people are getting older or the gestation period is moving on.

So I'm just asking you is there any other thing other than this nine-month distinction that would cause me to analyze

the third party standing issue from the doctors' perspective differently than the abortion courts did?

MR. WAGNER: That's the only possible hindrance that the plaintiffs have suggested here. And the plaintiffs themselves, like I've said, include families of patients, so that is -- that would be an extension of current doctrine to say that doctors necessarily have standing to assert claims on behalf of their patients. But the primary distinction is the different timelines, that this doesn't moot itself after nine months, that's right, Your Honor.

THE COURT: Okay. Because I'm not -- obviously not a doctor, didn't get through medical school, but really the question is not until they turn 18, but how long do they have until they reach puberty. That's the date they're pushing up against. It's not they're 9, they've got nine years to file this litigation. It's really however old they are until they reach puberty, because we're talking about these puberty blockers and whatnot, which my understanding of the science is is to delay certain development so they can make decisions about what to do on a permanent basis.

And we may disagree as to whether or not these permanent blockers have permanent effects, but that's all for a bigger hearing and not for what I'm here to decide. But with regard to the standing issue and your motion to dismiss on the 12(b)(1) stuff, I've struggled with the notion being a devil's

advocate how I would analyze that standing issue any differently than the abortion courts did from a similar perspective.

MR. WAGNER: The only other point I'd make, Your Honor, is your discussion there of the onset of puberty. The onset of puberty wouldn't moot an individual's claim in the same way that the end of a pregnancy would moot an individual woman's claim.

THE COURT: Completely agree on that.

MR. WAGNER: Okay.

THE COURT: But it still pushes them beyond any meaningful recovery as a result of the litigation.

MR. WAGNER: I'm not sure that that's quite right, Your Honor.

THE COURT: It would affect it to some degree, I think we can agree on that. That's really the date we're talking about is puberty, not majority. Because that's the race against time for these patients, as I understand, to figure out what we're going to do because you can't reverse puberty. And I may be wrong in that statement, but that's kind of my understanding that once you get down that road, you might be able to, like adults might do, to surgically change things, but you're still developed much further along because of puberty.

And so I'm only making the point that it's not years,

meaning people who are 9 have nine years to get the litigation through the pipeline. It's really a much shorter term. And we don't have to argue the science about it, but I think you and I can agree that time is not on these litigants' side, whether it's majority, puberty or some other date that we pick. And you offered that nine-month period as the distinction of about why I wouldn't treat the doctors' standing in this context differently than the abortion cases do. And that was my only point. We either labor it or we don't, it's your record, but I wanted to explain where I was headed with that in case I got the science completely wrong.

MR. WAGNER: Yes, Your Honor. And I think the only other thing I would say is that puberty is a significant point, the onset of puberty, but it's a gradual thing. So it's not that they can't get any relief after that point, it's that the relief will be somewhat different after that point. Which I believe you said that it's not moot in the same way a pregnant woman's claim becomes moot, but the relief does change.

THE COURT: We can agree on that.

MR. WAGNER: I would like to move on to the likelihood of success on the merits of the other two claims. First, regarding the parental rights claim, the constitutional right to raise children doesn't include a right of access to a particular experimental procedure. So the plaintiffs aren't likely to succeed on this claim. They don't claim that

children have a right of access to particular experimental procedures. That's because courts have rejected similar claims fairly consistently. But they claim that the parents have a free-standing right of access to these procedures even when the child would have no right to the procedure, but the Supreme Court hasn't said that.

And one of the citations they rely on quite a bit is *Kanuszewski v. Michigan Department of Human Services*. And there the Sixth Circuit said that the Supreme Court's parental rights precedent, quote, does not address the issue of parents' right to control their children's medical care. That's at page 415. So granting relief on their parental rights claim here would extend the precedent on the right to raise children under principles of substantive due process, and it would extend the precedent in the way that would undermine the state's ability to regulate the practice of medicine. So all it would take under their theory is a single doctor who disagrees with the state's determination of whether or not this procedure is appropriate, and under that theory, the state would then have to justify any regulation of that procedure under strict scrutiny.

That doctor's opinion would be enough to guarantee the parents a right of access to an experimental procedure, but none of their cited authorities create such a sweeping parental rights theory. And in any event, the SAFE Act would also

satisfy strict scrutiny, which is what they argue would apply under their parental rights theory. So we've talked a lot about the procedures and the particular concerns raised by these procedures. And the SAFE Act prohibits only the particular procedures that raise these concerns about fertility and other developmental issues. And the SAFE Act prohibits these procedures only for minors. It doesn't prohibit them across the entire population.

Because Arkansas has a particular and compelling interest in protecting children, and is compounded by Arkansas's interest in regulating the medical profession. So because it's narrowly tailored by only prohibiting particular procedures and only prohibiting those procedures for minors, the SAFE Act would even satisfy strict scrutiny, and the plaintiffs aren't likely to succeed on their parental rights claim.

And then finally is their free speech claim. So in addition to prohibiting gender transition procedures for minors, Arkansas also prohibits practitioners from sending a minor to another practitioner for a gender transition procedure that is prohibited. So practitioners remain free to advocate for these procedures and remain free to counsel the children about these procedures. They simply must not actually send a minor to another practitioner to receive a prohibited procedure. That's why this what Plaintiffs call the referral prohibition, it regulates practitioners' conduct and doesn't

regulate practitioners' speech. But regardless, even if it did somehow touch on practitioners' speech, the referral prohibition would also satisfy strict scrutiny because we've gone over why this law is narrowly tailored in that it prohibits particular procedures that raise particular concerns and prohibits those procedures only on minors.

If it allowed doctors then to send minors elsewhere and if the law were to go into effect, you'd presume that it would be sending them out of state to Memphis or Tulsa or something like that, for these procedures, that would create a significant loophole in the law that would do ongoing damage to the compelling interests that Arkansas has asserted here. So by closing that loophole in the law, the referral prohibition is also narrowly tailored to serving the interests that justify the SAFE Act here. So Plaintiffs aren't likely to succeed on their free speech claim because this governs only conduct, and regardless it would satisfy strict scrutiny.

Which comes back again to the question of the balance of the harms here and the other preliminary injunction factors. So as I discussed at the outset, the SAFE Act doesn't require an immediate termination of these procedures because it has an exception for remedying the effects of gender transition procedures whether or not they were performed in compliance with the law. So if this court grants an injunction, there will be more gender transition procedures performed, and

children will undergo these irreversible procedures in Arkansas. And if the Court doesn't grant an injunction, then these children will proceed through puberty according to biology, and on balance of those two options, the defendants submit that a preliminary injunction would do more harm than good.

So we ask the Court to deny the motion for a preliminary injunction and to grant the motion to dismiss the complaint with prejudice.

THE COURT: Thank you, Mr. Wagner.

MR. WAGNER: Thank you, Your Honor.

THE COURT: We're going to take a brief recess before we go into round two and let my court reporter stretch her fingers for a minute. There's nothing magic about the time I'm going to take. We'll come back roughly around 10:30. We'll be in recess for a little while.

(Recess from 10:22 AM until 10:32 AM.)

MR. STRANGIO: Thank you, Your Honor. Chase Strangio again on behalf of the plaintiffs. So I want to just quickly address the question of the nature of the classification, though I think it has been largely well covered, but I think the testosterone example is one that perfectly shows exactly how this is sex discrimination, and all of the defendants' responses about risks, about other concerns, ultimately go to the tailoring. But it's really difficult to

see how this is anything other than a trans status and a sex classification.

So going to the heightened scrutiny analysis, which again, I think applies because of the nature of the classification at issue, the question is whether the law that Arkansas actually passed substantially advances any important governmental interest. And I do want to clarify that the plaintiffs agree that protecting minors is an important governmental interest for these purposes. We did not say anything in the briefing about the regulation of the medical profession. Just want to clarify that briefly. But while the state can, of course, regulate medicine, they cannot do so in such a way that violates the equal protection rights of individuals.

And all of the defendants' arguments again suffer from the problem that Your Honor identified which is that each concern applies to other form of treatment, but it is only this treatment that is categorically banned. And that's true both in terms of the efficacy and in terms of the risks. And the state, nor the state's experts -- they do not dispute that this treatment is being held to a uniquely burdensome standard. And I think the hysterectomy example is a good one. For example, if there is a interest or concern about fertility, under the law, a minor who has cancer, for example, or some other concern, could have a hysterectomy.

It's not banned under the law, even though that would significantly impact fertility. But a transgender minor could not have chest surgery despite the fact that that has no impact on fertility, so again, I think we see the mismatch between the asserted interest and what the law actually does. Additionally the law permits all of the banned care expressly in the terms of the statute when that care is being performed on intersex minors including surgical intervention on intersex minors that can be sterilizing.

Just one -- two quick points on the science. Although, again, I think that because of the legal issues that we've identified about the differential burden, that nothing turns on an individual study, but the defendants said that all of the major medical groups agree that there's no valid evidence of the efficacy of this care. That is not accurate. Every major medical group in the United States weighed in as Amici here, and the Endocrine Society guidelines explicitly state that what is considered, quote, low quality evidence in medicine does not mean that there's no valid evidence. And that I think is important too because as Dr. Antommaria explains in his declaration, many forms of care are supported particularly in pediatrics by what might be considered low quality but is still deemed to be effective and widely used.

I think the only other point I just want to briefly respond to is on the due process claim. The Supreme Court in,

Parham did say that parents generally have the right coupled with the high duty to recognize and prepare their children for additional obligations including a duty to recognize symptoms of illness and to seek and follow medical advice. And here, just to highlight what's at stake, we're dealing with the prevailing medical view of every major group in the United States' recommended treatment to parents that they are providing to their children that the state is now proposing to ban.

Unless Your Honor has any other questions, I don't know that I have any other responsive points beyond what was in our briefing to what we've heard today.

THE COURT: Thank you.

MR. STRANGIO: Just a quick final point that I would like to make though. Because we're here today and our plaintiffs are here, I do want to close by reiterating Aaron and Lacey Jennen's words about their daughter. They said that if the healthcare ban takes effect, Sabrina's hormone therapy will be cut off. "If this occurs, we fear for her survival. Sabrina is an amazing, smart, and beautiful person and an incredible daughter. We love her. We cannot bear to lose the thriving young woman that Sabrina has become. We can't go back."

If the healthcare ban goes into effect next week, the harm that Sabrina, Aaron, Lacey, and all of the plaintiffs will

face is severe and irreparable. They will lose their healthcare, they may have to leave their homes, their communities, their families here in Arkansas. We respectfully urge that the Court deny Defendants' motion to dismiss and grant Plaintiffs' motion for a preliminary injunction. Thank you so much again for the time to argue these on this expedited timeline before the law goes into effect.

THE COURT: Mr. Wagner, are you the last word?

MR. WAGNER: I am, Your Honor.

THE COURT: It's all you.

MR. WAGNER: Thank you, Your Honor. Vincent Wagner for the defendants again.

THE COURT: Thank you again.

MR. WAGNER: First I'd like to return briefly to this issue of the different procedures that we were discussing earlier. And the issue here is that the outcome of a procedure -- I'm sorry, the purpose of a procedure defines what the treatment is. And in our evidence, this is made most clear in Dr. Lappert's discussion of how plastic surgery works where the purpose of a plastic surgery determines whether or not that surgery is medically necessary or cosmetic, so it's the purpose that actually determines what the procedure is in a given case.

So here, it's the purpose of the procedures that makes these different procedures, and the outcome is wrapped up in that purpose. Where are we going with this procedure? So

these are different procedures we're talking about depending on the outcome that we're aiming for. That brings me to the other issue of the fit. We've talked a lot about essentially how narrowly tailored is Arkansas's law to the interest that it's asserted, and particularly under intermediate scrutiny. We don't need a perfect fit between the interests and the law itself, it just has to be substantially related to them. And so the other treatments that the plaintiffs have identified where they say Arkansas's law is under-inclusive by not regulating, for instance, counsel has just discussed hysterectomies.

Hysterectomy is performed for cancer. They might raise similar fertility issues, but they don't raise the same problems when it comes to evidence of long-term benefit if it is to treat the cancer that is a well-established benefit established by valid scientific evidence of long-term benefit, which is lacking for the gender transition procedures at issue here. Another one that is discussed a lot is intersex children or children born with disorders of sexual development, and these procedures are just not comparable to the procedures that Arkansas has regulated here which is why the legislature expressly carved them out from the statute.

This is most clearly explained toward the end of Dr. Hruz's supplemental declaration. It talks about what sorts of procedures are actually performed on children with disorders

of sexual development. And a couple of the most common ones that he discusses are these children are often born with obstructions of the urinary tract that lead to chronic urinary tract infections, so they might perform a surgery on a child to ensure that that child doesn't suffer chronic urinary tract infections or there might be other -- there can be physical disorders of the reproductive anatomy that lead to lifetime increases of cancer risk for the child, so that kind of goes back to the hysterectomy example again where these are different because we're treating something that we know this treatment will lead to certain particular benefits in this child's life. And there's no comparable evidence for the procedures that Arkansas has regulated in this case.

The final point is the plaintiffs have raised *Parham* to say that there is a constitutional right for parents to choose particular medical procedures, but regardless of that particular quote there, that wasn't *Parham*'s holding, and in fact, the issue in *Parham* had to do with whether the state had given parents too much power to direct a child's medical care. The issue there was whether the parents could involuntarily commit a child. And the Supreme Court was addressing a different sort of issue, and it was addressing it primarily in the context of the procedures that are needed before someone is involuntarily committed.

So this also doesn't establish that there's a substantive

due process right to a particular experimental procedure, whether the child him or herself or the child's parents access it on behalf of the child. So none of Plaintiffs' claims are likely to succeed on the merits, and, in fact, they failed to state a claim. For the reasons we discussed this morning and in our briefing, we ask that this court would deny their motion for a preliminary injunction and grant our motion to dismiss.

THE COURT: Thank you, Mr. Wagner.

MR. WAGNER: Thank you, Your Honor.

THE COURT: A little bit of commentary. I want to commend both sides on the manner in which this was presented to the Court. As to the briefing, if you can't be brief, be relevant, and you were not brief but you were relevant in your written presentations to the Court. Both sides clearly knew their subject and it was presented to me in an efficient and brief -- considering my worst case scenario in my mind went well beyond lunch, so I want to commend both sides for the way it was presented to me, and I appreciate the work y'all put into it.

This is a serious case that's going to go beyond me, so I wanted to thank both sides for that. I'm going to take about a 20 to 30 minute recess to collect my thoughts and I'm going to rule from the bench when I do that, which may be a surprise to some and not to others, so that's what you'll get from me in a little while. Don't hold me to 30 because I may not be as

efficient as I think I might be, but I'll leave it at that and court will be in recess for a while.

(Recess from 10:44 AM until 11:30 AM.)

THE COURT: We are back on the record. It is not lost on me that ruling from the bench on an issue like this is unusual. Based on the lawyers' reactions, like, surely not. So I have a war story to tell that will put in context my preparation and sometimes people's misunderstanding of how much we do before we get to a hearing. When I was on the state court bench, I had an issue on an injunction about drinking beer in Burns Park. And there was an ordinance that said that there will be no drinking in Burns Park. Well, Burns Park hosted the national softball tournament which apparently is big on drinking beer, and the concession on the beer was worth about $250,000 to Burns Park. So we had a day and a half hearing on whether or not it was appropriate to drink beer at Burns Park. So I studied the briefs and I went over stuff and listened to about nine or ten hours of argument on this issue.

And one whole side of the courtroom was full of Mothers Against Drunk Driving who was against drinking at Burns Park, and the other side had their baseball caps on backwards. And so I ruled from the bench about 4:00. And when I got home to watch the 6:00 news, a reporter, who will go unnamed, Betsy Pilgrim, stated that Judge Moody, with little or no thought or reflection, ruled that drinking would be allowed at Burns Park.

And I'm standing there in my living room going, you -- so that experience is not lost on me in reporting these findings to you at this time. And I'm not making light of this, but because of the deadlines that we're facing on the 25th or the 28th, I thought it was important and imperative that I come to these findings.

So I'm going to struggle through getting through everything I need to get through. I ask that y'all be patient, and in certain circumstances, you can ask for clarification. But I've been working on this for about a month. And my voice sounds like I'm getting emotional, and I may or may not be, but I don't want the fact that I'm ruling from the bench to indicate to either side of this lawsuit that this hasn't been well thought out. And I listened to everything y'all said today and I read everything you presented. And it's a big deal and I don't want ruling from the bench or the impression that I'm shooting from the hip to be taken any farther than it needs to, because this is something we've been working hard on.

So to get to it, and I will explain further in detail, but the Court is going to deny the motion to dismiss both on the 12(b)(1) and the 12(b)(6), and I'm going to enter a preliminary injunction on Act 626. I'm going to start with the motion to dismiss and deal first with the standing issues, or the 12(b)(1) issues, and then I will move on to the 12(b)(6) issues and then we'll get into the analysis on the preliminary

injunction.

So with regard to the standing of the parents and the minor plaintiffs re the prohibition of services and the 12(b)(1) which I'll just call the standing issue one in the motion to dismiss, the defendants contend that the parents and minor plaintiffs lack standing because they did not allege that any of the minors fall outside the Act's exceptions. In reading 626, and the way the entire act is set up, the exemptions don't apply to anyone seeking transgender care at all. The exemptions are basically we'll provide this stuff so long as your sexual identity conforms with your sex aligned at birth. So it's an exception without a meaning because none of these plaintiffs could fall under the exceptions, and therefore, I find that they have standing regarding the prohibition of services.

They've all alleged that they have or will request gender transition procedures, and the Act defines gender transition procedures to include medical or surgical services. With regard to the standing of the minor and parent plaintiffs regarding the private right of action, defendants argue that the minor and parent plaintiffs are not subject to a private right of action and that the Act prohibits the actions of physicians and other healthcare providers or professionals. The minor and patient plaintiffs can have no injury caused by the private right of action.

Plaintiffs point out that in abortion law cases where an unconstitutional statute provides for enforcement both through official acts and private suits, the plaintiffs may also challenge the constitutionality of these private suits. Mr. Wagner and I had a discussion about whether or not I thought these abortion cases ought to apply and whether or not there was a meaningful distinction when looked at these plaintiffs, and I'm going to decide at least for purposes of the standing and the motion to dismiss that there aren't any meaningful distinctions between the two analysis in those cases.

With regard to the first party standing of the practitioners, I move back to Count 1, I guess, of the complaint, that the minor and doctor plaintiffs allege a violation of their equal protection rights. I'm not sure I'm on the right deal. The first party standing. Yes. The doctors allege and have standing because they are prohibited from providing certain medical care to their transgender patients, but they are permitted to provide that same care to non-transgender patients, and also doctors who do not treat transgender minors are permitted to provide whatever care they want.

The minor plaintiffs allege they are denied medical care and insurance coverage for that care because of their sex and because of their transgender status, and I believe because of

what's alleged in the comments and conversations we've had during this hearing that they also have standing.

Third party standing of the practitioners. Again, we go through an analysis of the abortion cases, primarily *June Medical Services*, which is a Supreme Court case, 140 Supreme Court at 2118 through 19. The Court lists examples of case types where they have allowed a party to invoke a third party's rights, and in such cases, the Court explains the obvious claimant and the least awkward challenger is the party upon whom the challenged status imposes legal duties and disabilities. In this case, that clearly falls on the practitioners.

Do the parties believe that that covers the waterfront on the standing issues or have I left one out? I just don't want to miss something and get it remanded.

MR. WAGNER: No, Your Honor, I think that covers everything.

MR. STRANGIO: We agree, Your Honor.

THE COURT: With regard to the Rule 65 analysis on the equal protection claim, I think it makes sense before I determine whether or not there's a likelihood of success on the merits I determine what level of scrutiny will be applied to these claims. I basically have three choices. One is strict scrutiny, another would be intermediate scrutiny based on a quasi suspect group of people or class, and then last would be

rational basis. I need to state at the outset that I believe that there would be a likelihood of success under any of those standards of review.

But with regard to the equal protection claim, I go through a four point factor test to determine whether or not there's heightened scrutiny. And I think, if I read carefully, that's probably the *Bowen v. Gilliard* case, but potentially also we're going to get into *Grimm* and some *Cleburne* issues as well. But under a rational basis review, if the state classification of a group of people is rationally related to a legitimate state interest, courts will uphold that classification. However, when the state classifies a suspect or quasi suspect group of people, I'll use a heightened scrutiny.

So the four factors we're talking about about heightened scrutiny, and I'm going to refer to this as intermediate scrutiny as opposed to strict scrutiny, is whether the class has historically been subjected to discrimination. And it wasn't clear to me whether or not the state was arguing that transgender people have not been discriminated against or not. I kind of read that they were objecting to everything they needed to to preserve their record, but I don't think it's subject to debate whether or not the transgender community, minors or otherwise, have been subjected to discrimination.

So I'm making a factual finding for purposes of

determining my level of review that they have. Two, whether the class has defining characteristics that bear no relationship to their ability to perform or contribute to society. Their identifying characteristic is simply put, that their sexual or gender identity does not conform with that assigned at birth. I can't think of any more distinct or I don't want to say unique characteristic that would define them. So I also find that that factor's been met.

The third factor, I'm not even sure I can say this word, whether the class has obvious immutable or distinguishing characteristics that define them as a discrete group. I don't really find that as a separate characteristic, but for some reason, they list it, and for the reasons I've already stated, I think they qualify as that as well. I looked up immutable and I understand what the word is, but I have trouble pronouncing it.

Whether the class is a minority lacking political power. The government made the argument that because Biden has appointed or put people of transgender status in particular offices means that they are not powerless. I can't swallow that argument and I don't believe that they have any one that they're clearly a minority, and I believe that perhaps due to that minority or otherwise, they lack political power. So based on all of these, I think I could find on this analysis that strict scrutiny should be applied.

Out of an abundance of caution, I'm probably going to apply the intermediate scrutiny as opposed to the rational basis, but as I mentioned before, I think the plaintiffs likely would succeed on any of those standards of review. The *Grimm* case says multiple courts have held that transgender status is immutable. Being transgender is not a choice. Rather it is as natural and immutable as being cisgender. Further, transgender people share a distinguishing characteristic, that their sex assigned at birth does not align with their gender identity. Cites other cases that most was picked up in the briefing.

As a class, transgender people are a minority or politically powerless. Some district courts have already ruled because of that. Because of a sex-based classification or quasi suspect, they are subject to a form of heightened scrutiny, and that goes into the *Cleburne* case. Regarding the Rule 65 analysis of the due process claim, I likewise find that the plaintiffs are likely to succeed on the merits again under any form of review. With regard to the 12(b)(6) arguments on all of the substantive claims, I review the plaintiffs, unlike in the 12(b)(1), I rule -- or I'm supposed to view the allegations in the complaint made as true.

Suffice it to say that review of that complaint does state a claim for purposes of a motion to dismiss. I have some comments here that I'm not sure that are particularly enlightening so I'm trying to wade through my notes to stick

with what is relevant. With regard to the First Amendment claim, it's well settled law that a loss of First Amendment freedoms for even minimal periods of time constitute irreparable injury.

I'm going to get into in a minute about irreparable harm, the weighing of the equities, and how I deal with combining certain factors in a moment. But the notion that telling a doctor he cannot refer a patient to another doctor in state or out of state is only regulation of conduct and not speech is something that I just can't process in my mind. Since I believe it is clearly speech, there's also a likelihood of success on the First Amendment. I'm not sure that based on that finding that there wouldn't be strict scrutiny on the First Amendment thing, but I'll work those out before the final hearing on what actual level of scrutiny will be applied.

For purposes of this hearing, I'm going to say that intermediate scrutiny would happen, but again, that they would likely succeed on any standard review, rational basis or otherwise. Plaintiffs argue that the Act is content-based and viewpoint discriminatory because it bars a practitioner from referring gender-affirming medical care. And I agree with that contention as well as the fact that, for purposes of 12(b)(6), I'm to consider it as true. We've had a lot of discussion about irreparable harm.

Mr. Wagner, I meant no disrespect by challenging you on

some of the things we talked about. You have done an excellent job representing the state with what you had. But I think it's clear even by the statements that you made that while the Act probably doesn't allow it, we're still going to allow them to step down or step away from this care by allowing them six more weeks or whatever of this care. To pull this care midstream from these patients or minors would cause irreparable harm.

The status quo for a very long time has been that there's been no ban. The notion that the legislature woke up as soon as the United Kingdom issued a deal or a paper saying this was experimental medicine and that they needed to rush in and protect these children is not credible to me. So the balancing of the interest, the public interest and the equities while in favor of these plaintiffs, the notion that they could be suffering any mental health effects because of their lack of this care is also irreparable in my opinion. And so for these reasons, I'm going to grant the preliminary injunction.

Does anybody need any further explanation or clarification from me? I'll look to the plaintiffs first.

MR. STRANGIO: No, Your Honor. Thank you.

THE COURT: Mr. Wagner?

MR. WAGNER: No, Your Honor.

THE COURT: I'm not sure if there will be an interlocutory appeal, but how long would y'all need to prepare for a final hearing? Or do you need to talk about that?

MR. WAGNER: Your Honor, we need to discuss that.

THE COURT: That's fair enough. I'm just trying to anticipate in light of the pandemic waves and all of that, what rush on the judiciary's resources are going to be coming down the pike. So as soon as y'all can get an idea and let me know, the sooner I'll be able to block off time for you guys and not have to push you back because of -- my point is it's already getting crowded, and the sooner y'all get in line, the easier it is I'll be able to find time for you. And I'm going to make it a priority to find time for you, but it's easier to give you a day than a week and it's easier to give you a week when you ask sooner than later.

And I don't know what y'all anticipate needing to get ready or how long it would take to argue this case on merits. So I would appreciate y'all letting me know as soon as you figure it out. Fair enough? I'm not going to give you a time deadline, it's up to y'all to figure that out, but it's about to get ugly for us, I'm afraid.

MR. WAGNER: Certainly, Your Honor.

THE COURT: Anything else? Did everybody have an opportunity to fully make their record? Either writing or verbally?

MR. STRANGIO: Yes, Your Honor. Thank you.

MR. WAGNER: I think the only question we have, Your Honor, is when to expect a final order reflecting your findings

and your order here on the record this morning.

THE COURT: You just got it. No further order will be forthcoming.

MR. WAGNER: Thank you, Your Honor.

MR. STRANGIO: Your Honor, so does that mean there will be no written opinion corresponding? This is the final order and written opinion?

THE COURT: Exactly.

MR. STRANGIO: Thank you.

THE COURT: Is that it? We're in recess. Thank y'all.

(Proceedings adjourned at 11:53 AM.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Karen Dellinger, RMR, CRR, CCR
---------- Date: July 26, 2021
United States Court Reporter