

No. 23-2681

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DYLAN BRANDT, et al.,
Plaintiffs-Appellees,

v.

TIM GRIFFIN,
in his official capacity as the Arkansas Attorney General, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Arkansas
No. 4:21-CV-00450 JM (Hon. James M. Moody, Jr.)

**Defendants-Appellants' Unopposed Motion for Abeyance of Briefing Schedule
Pending Ruling on Petition for Initial Hearing En Banc; Or in the Alternative,
an Extension of Time to File Their Opening Brief**

Defendants-Appellants respectfully request that the Court hold the briefing schedule in this case in abeyance pending resolution of their Petition for Initial Hearing En Banc, which was filed today. Plaintiffs-Appellees consent to Defendants' request to hold the briefing schedule in abeyance.¹ In the alternative, should this Court deny Defendants' request to hold the briefing in abeyance, Defendants

¹ Counsel for Plaintiffs requested that Defendants note that Plaintiffs' consent to holding the briefing schedule in abeyance should not be construed as supporting Defendants' petition for initial hearing en banc.

request that the Court grant an extension of their time to file their opening brief up to and including 30 days from that denial.

Defendants' opening brief is currently due September 11, 2023. As explained in Defendants' Petition, Defendants seek initial hearing en banc so the full Court can overrule the prior panel decision in this case, *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). That case holds that intermediate scrutiny, rather than rational basis, is the appropriate standard of review in cases challenging state regulations of gender-transition procedures. *Id.* at 669-70. Defendants seek initial hearing en banc to resolve a split of authority that has emerged between this Court and the Sixth and Eleventh Circuits. *See Eknes-Tucker v. Governor of Alabama*, No. 22-11707, --- F.4th ---, 2023 WL 5344981 (11th Cir. Aug. 21, 2023); *L. W. by & through Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023).

This appeal will require very different briefing if it is before a three-judge panel, which would be bound by *Brandt*, versus the en banc Court, which is not. Thus, holding the briefing in abeyance until Defendants' petition is resolved will preserve both judicial and governmental resources and avoid the potential need for supplemental briefing if Defendants' petition is granted. *See, e.g., Clerk Order, Nestle Purina Petcare Co. v. Comm'r*, No. 09-01381 (8th Cir. Mar. 31, 2009) (holding briefing in abeyance pending resolution of initial en banc petition). Plaintiffs consent to Defendants' request to hold the briefing schedule in abeyance.

Defendants therefore respectfully request that the Court hold briefing in abeyance pending the Court's resolution of Defendants' petition. Alternatively, Defendants request that their opening brief be due 30 days from the Court's order denying their request to hold briefing in abeyance.

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 384 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 27(d)(1)(E), I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Dylan L. Jacobs

Dylan L. Jacobs

CERTIFICATE OF SERVICE

I certify that on September 7, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Dylan L. Jacobs

Dylan L. Jacobs