

No. 23-5609

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

JANE DOE, *et al.*,

Plaintiffs-Appellees,

v.

WILLIAM C. THORNBURY, JR., MD,

Defendants,

and

COMMONWEALTH OF KENTUCKY *ex rel.*
ATTORNEY GENERAL DANIEL CAMERON,

Intervenor-Appellant.

On Appeal from the United States District Court
for the Western District of Kentucky,
No. 3:23-cv-230, Hon. David. J. Hale

**PLAINTIFF-APPELLEES' REPLY IN FURTHER SUPPORT OF THEIR
EMERGENCY MOTION TO LIFT STAY OF PRELIMINARY
INJUNCTION**

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. PLAINTIFFS HAVE MORE THAN MET THEIR BURDEN.....	1
II. CAMERON FAILS TO UNDERMINE THE SERIOUS QUESTIONS RAISED BY PLAINTIFFS’ DUE PROCESS CLAIM.	4
III. CAMERON FAILS TO UNDERMINE THE SERIOUS QUESTIONS RAISED BY PLAINTIFFS’ EQUAL PROTECTION CLAIM.	8
IV. A STAY IS NECESSARY TO AFFORD RELIEF TO PLAINTIFFS.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Abigail Alliance For Better Access to Developmental Drugs v. Von Eschenbach</i> , 495 F.3d 695 (D.C. Cir. 2007).....	7
<i>Baker v. Adams County/Ohio Valley School Board</i> , 310 F.3d 927 (6th Cir. 2002)	2
<i>Edmo v. Idaho Dep’t of Corr.</i> , 358 F. Supp. 3d 1103 (D. Idaho 2019), <i>vacated in part on other grounds</i> , 935 F.3d 757 (9th Cir. 2019).....	2
<i>Eknes-Tucker et al. v. Marshall et al.</i> , 603 F. Supp. 3d 1131 (M.D. Ala. 2022).....	2
<i>Kentucky v. Beshear</i> , 981 F.3d 505 (6th Cir. 2020)	2
<i>Lassiter v. Dep’t of Social Services</i> , 452 U.S. 18 (1981).....	4
<i>Nguyen v. I.N.S.</i> , 533 U.S. 53 (2001).....	9
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	1
<i>Norsworthy v. Beard</i> , 87 F. Supp. 3d 1164 (N.D. Cal. 2015).....	2
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979).....	5, 6
<i>Pritchard v. Blue Cross Blue Shield</i> , 2022 WL 17092846 (W.D. Wash. 2022).....	2
<i>Sessions v. Morales-Santana</i> , 582 U.S. 47 (2017).....	9

Students for Fair Admissions v. Harvard College,
2023 WL 4239254 (U.S. June 29, 2023)8, 9

Troxel v. Granville,
530 U.S. 57 (2000).....4

United States v. Tate,
999 F.3d 374 (6th Cir. 2021)2

United States v. Virginia,
518 U.S. 515 (1996).....8

Washington v. Reno,
35 F.3d 1093 (6th Cir. 1994)11

Winter v. Natural Resource Defense Council, Inc.,
555 U.S. 7 (2008).....2

Wisconsin v. Yoder,
406 U.S. 205 (1972).....5

Other Authorities

Ky. Rev. Stat. § 311.372passim

Pediatrics, *Off-label Medication Prescribing Patterns in Pediatrics:
An Update* (Mar. 2019),
<https://publications.aap.org/hospitalpediatrics/article/9/3/186/2669/6/Off-label-Medication-Prescribing-Patterns-in>7

Pediatrics, *Off-Label use of Drugs in Children* (Mar. 2014),
<https://doi.org/10.1542/peds.2013-4060>6

Tjitske M. van der Zanden, et al., *Benefit-Risk Assessment of Off-Label Drug Use in Children: The Bravo Framework* (June 18, 2021),
<https://ascpt.onlinelibrary.wiley.com/doi/full/10.1002/cpt.2336#cpt2336-bib-0003>6

INTRODUCTION

Cameron offers no reason to deny the limited stay Plaintiffs seek. A stay in this case is consistent with the motions-panel majority’s recognition in *L.W. v. Skrmetti* that transgender adolescents who currently receive care may be irreparably harmed by losing care and that the Court’s initial assessment of the merits “may be wrong.” — F.4th —, 2023 WL 4410576, at *2 (6th Cir. 2023). Given the gravity of the stakes for these young people and their families and the balance of the equities, Plaintiffs respectfully ask the Court to grant the limited interim relief requested.

ARGUMENT

I. PLAINTIFFS HAVE MORE THAN MET THEIR BURDEN.

Cameron misunderstands the applicable standard. Of course, the likelihood-of-success factor is important and listed “first among equals.” Opp. 1 (*L.W.*, 2023 WL 4410576, at *2). But the Supreme Court has made clear—especially in the stay-pending-appeal context—that “[t]he first *two* factors ... are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (emphasis added). Plaintiffs overwhelmingly demonstrated, and the district court found, that their inability to continue receiving the banned medical treatments will result in severe and

irreparable mental and physical harm—a reality Cameron does not (and cannot) meaningfully dispute.¹

Instead, Cameron urges the motions panel to overrule the clear holding of *Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927 (6th Cir. 2002), that a plaintiff who demonstrates significant irreparable harm need only raise “serious questions” on the merits for a stay to be warranted. *Id.* at 928. The panel lacks the ability to do so. *See United States v. Tate*, 999 F.3d 374, 382 (6th Cir. 2021) (“[W]e are bound by Sixth Circuit precedent unless it is overruled by either our court sitting en banc or the Supreme Court.”). Nothing in *Winter v. Natural Resource Defense Council, Inc.*, 555 U.S. 7 (2008), overruled *Baker*’s standard, which this Court continues to apply. *See, e.g., Kentucky v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020). Nor did *L.W.* overturn that standard *sub silencio*. *See Tate*, 999 F.3d at 382.

¹ Cameron now claims that “plaintiffs’ assertions of harm are very much disputed,” Opp. 16, even though he urged the district court to resolve the preliminary injunction motion without an evidentiary hearing. Response, R.44. Regardless, Cameron supports his newly asserted factual dispute with the testimony of individuals who have been found to have little or no credibility by other courts. *See, e.g., Eknes-Tucker et al. v. Marshall et al.*, 603 F. Supp. 3d 1131, 1142–43 (M.D. Ala. 2022) (giving “very little weight” to testimony of Dr. Cantor); *Pritchard v. Blue Cross Blue Shield*, 2022 WL 17092846, at *4 (W.D. Wash. 2022) (stating Dr. Laidlaw’s expertise was “a close question”); *Edmo v. Idaho Dep’t of Corr.*, 358 F. Supp. 3d 1103, 1125–26 (D. Idaho 2019), *vacated in part on other grounds*, 935 F.3d 757 (9th Cir. 2019) (giving “virtually no weight” to testimony of Dr. Levine); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188 (N.D. Cal. 2015) (giving “very little weight” to Dr. Levine’s testimony).

Plaintiffs have more than satisfied this settled standard. Plaintiffs' strong showing of irreparable harm is complemented by indisputably serious questions on the merits. Those questions divided the *L.W.* motions panel, and other than the panel majority, *every federal judge to consider these issues has agreed with Plaintiffs. See* Emergency Mot. at 9-10 (collecting cases). If this Court ultimately resolves this appeal against Plaintiffs, it will create a circuit conflict. *See L.W.*, 2023 WL 4410576 at *9 (White, J., concurring in part and dissenting in part) (“Indeed, until today, every federal court addressing similar laws reached the same conclusion as [the Eighth Circuit in] *Brandt*.”). These questions are serious and paradigmatic.

In response, Cameron argues that the Kentucky General Assembly has already determined that Ky. Rev. Stat. § 311.372(6) sufficiently protects Plaintiffs from harm. That presumes the legislature's purported determination is lawful and that Cameron will prevail on appeal. The irreparable harm inquiry, however, requires the Court to consider the harm Plaintiffs will suffer if the law takes effect, regardless of which party ultimately prevails. Cameron's argument also disregards the district court's findings that Plaintiffs will suffer irreparable harm and the panel-majority's conclusion in *L.W.* that the continuing-care provision of Tennessee's law would enable the plaintiffs in that case to avoid irreparable harm while the case proceeds. There is no such provision in Kentucky's law, as Plaintiffs explained in their motion.

See also Mot. Ex. A at 3 (“[T]his case is distinguishable from *L.W.* with respect to the balance of harms[.]”).

If this Court grants a stay, Plaintiffs can avoid irreversible physical changes and emotional harm that they, their parents, and their doctors believe will negatively affect the rest of their lives. In contrast, even if this Court ultimately concludes—contrary to much evidence and the consensus of medical experts and providers in this field—that Kentucky has a sufficient justification for completely banning this care, Plaintiffs’ ability to maintain the medical care they and their parents wish them to receive for a few more months will have no appreciable negative impact. Simply put, a short delay in forcing Plaintiffs to terminate their medical care will have no significant impact on anyone, but forcing Plaintiffs to terminate their care now may inflict potentially devastating harm. The former option preserves the status quo for the moment; the latter upends it dramatically, with irreversible consequences.

II. CAMERON FAILS TO UNDERMINE THE SERIOUS QUESTIONS RAISED BY PLAINTIFFS’ DUE PROCESS CLAIM.

The fundamental right Plaintiffs assert is not new, as Cameron suggests. It is “perhaps the oldest of the fundamental liberty interests.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

In this country, parents, not the government, are primarily responsible for raising children. *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 27 (1981). Parents have the concomitant right to make decisions about their children’s medical care

subject to accepted medical standards—a right “to recognize symptoms of illness and to seek and follow medical advice.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979). In other words, the Supreme Court has already held that parents’ right to seek accepted medical care for their children is on par with the right to make decisions regarding a child’s education or religious upbringing. *Id.*

Whether the drafters of the Fourteenth Amendment specifically contemplated medical treatment for transgender adolescents is no more relevant here than showing that the drafters specifically contemplated all contemporary educational or religious practices in a religious liberties case. A parent has a constitutional right to send her child to a Montessori school or raise her child as a member of the United Methodist Church even though Montessori education and the United Methodist Church did not exist in 1868. The Supreme Court has defined the right at issue at the proper level of generality: “to recognize symptoms of illness and to seek and follow medical advice.” *Id.*

Contrary to Cameron’s argument, SB 150 cannot be reconciled with this established right. When a child has a medical condition for which there is an established treatment, parents take for granted they may “seek and follow medical advice.” *Id.* That assumption is “an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Only in extraordinary circumstances may the state intervene to override a parent’s decision-making authority, and only for compelling

reasons. *See Parham*, 442 U.S. at 603. That precedent cannot be disregarded simply because Plaintiffs belong to a socially disfavored group or require a form of treatment that, while widely accepted in the medical community, is politically controversial.

As the district court found, medical care for transgender adolescents is guided by a well-established standard of care. More than two decades of research shows they are safe and effective in alleviating gender dysphoria and helping transgender adolescents lead healthy, productive lives. In contrast, untreated gender dysphoria causes serious harms, including depression, anxiety, and suicidality. *See Order*, R.61, PageID#2311.

Cameron attempts to disregard this medical evidence because the banned treatments are not yet FDA-approved to treat transgender minors. That argument proves too much. Most medications prescribed for minors involve off-label use,² which is not a code for either experimental or improper,³ and does not signify that the FDA is unwilling “to put its credibility and careful testing protocols behind th[is]

² Tjitske M. van der Zanden, et al., Benefit-Risk Assessment of Off-Label Drug Use in Children: The Bravo Framework (June 18, 2021), <https://ascpt.onlinelibrary.wiley.com/doi/full/10.1002/cpt.2336#cpt2336-bib-0003>.

³ “In most situations, off-label use of medications is neither experimentation nor research.” Am. Academy of Pediatrics, *Off-Label use of Drugs in Children* (Mar. 2014), <https://doi.org/10.1542/peds.2013-4060>.

use.” Opp. 12. Nor are such inferences warranted. The FDA has not tested the great majority of pediatric medications because there are serious obstacles, unrelated to safety or efficacy, to doing so.⁴ Thus, that the banned treatments are off-label does not provide even a rational basis for SB 150, much less one that satisfies heightened review.

For similar reasons, this is not a case like *Abigail Alliance For Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), where patients with a fatal illness asserted a right to obtain experimental and otherwise prohibited drugs. In stark contrast, Plaintiffs challenge an unprecedented *change* in existing law that has now banned non-experimental, well-established treatments that have been prescribed and administered to transgender minors for more than twenty years. Unlike the plaintiffs in *Abigail*, Plaintiffs are not seeking an exemption from an established regulatory framework that applies to all patients or a new fundamental right to experimental treatments for their children. Rather, they are challenging an extraordinary, targeted departure from the ordinary regulation of medical care and a

⁴ “Children present challenges in clinical trials owing to scientific, clinical, ethical, and logistic concerns.” Am. Academy of Pediatrics, *Off-label Medication Prescribing Patterns in Pediatrics: An Update* (Mar. 2019), <https://publications.aap.org/hospitalpediatrics/article/9/3/186/26696/Off-label-Medication-Prescribing-Patterns-in>. These concerns have “limited and even discouraged the testing of medications in children,” and as a result, “the majority of medications used in the care of children has historically been used off label.” *Id.*

highly unusual intrusion in an area of decision making traditionally reserved for parents, not the state.

III. CAMERON FAILS TO UNDERMINE THE SERIOUS QUESTIONS RAISED BY PLAINTIFFS' EQUAL PROTECTION CLAIM.

There is no dispute that, under *Bostock's* interpretation and logic, SB 150 discriminates on the basis of sex. *See* Opp. 9. Cameron insists that *Bostock's* logic is limited to statutes, like Title VII, that expressly prohibit discrimination on the basis of “sex” and is thus inapplicable in the context of the Equal Protection Clause, which undeniably prohibits discrimination on the basis of sex. *United States v. Virginia*, 518 U.S. 515, 555 (1996). That distinction, which may have some relevance when comparing different language in different statutes, is without a difference here. Indeed, the Supreme Court and this Court have long recognized that the “sex” discrimination the Constitution and the Civil Rights Act prohibit is at least coextensive. *See* Mot. 8–13. Either a law classifies based on sex or it does not. In the case of SB 150, the statute’s reliance on sex is apparent on its face.

Cameron’s reliance on Justice Gorsuch’s concurrence in *Students for Fair Admissions v. Harvard College*, 2023 WL 4239254 (U.S. June 29, 2023) (Gorsuch, J., concurring), is misplaced. Justice Gorsuch was clear that while the Equal Protection Clause permits a defendant to *justify* discrimination based on race if it is narrowly tailored to achieve a sufficiently compelling justification, Title VI allows no justification and instead prohibits race discrimination “to any degree or for any

purpose.” *Id.* at *60. Justice Gorsuch nowhere asserts that discrimination based on race means one thing under the Equal Protection Clause and another under Title VI. He says just the opposite. *Id.*

This well-known distinction—that discrimination may be justified if there is a sufficiently strong governmental interest under the Equal Protection Clause, but not under the Civil Rights Act—is critical to understanding why Cameron’s additional argument also fails. Defendant suggests that *Bostock*’s definition of sex discrimination does not apply to SB 150 because *Bostock* was about employment, where sex is not relevant, not medical care, where it may be. Opp. 10. But while the Supreme Court has held that in some cases, physical differences between men and women may *justify* a sex-based law, it has never held that the invocation of such differences insulates a sex-based law from heightened scrutiny in the first instance. To the contrary, even in the rare case in which the Court has found that physical differences between the sexes justify a sex-based rule, it has applied heightened scrutiny. *See, e.g., Nguyen v. I.N.S.*, 533 U.S. 53, 60–61 (2001) (applying heightened scrutiny to an immigration law that imposed different requirements for a child’s acquisition of U.S. citizenship depending on whether the citizen parent is the mother or the father). The Court could scarcely be more explicit: “heightened scrutiny now attends all gender-based classifications.” *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) (cleaned up).

Finally, neither *Geduldig* nor *Dobbs* holds that a sex-based law is immune from heightened scrutiny so long as it is about a medical condition experienced only by one sex. To the contrary, those cases do no more than affirm the Supreme Court’s longstanding distinction between disparate treatment and disparate impact. A law that facially classifies based on sex is presumed to be unconstitutional and may be upheld only if it is substantially related to an important governmental interest. In contrast, a law that merely has a disparate impact on persons of one sex is presumed to be constitutional unless a plaintiff can show that its facial neutrality is a pretext for intentional discrimination. *Geduldig* and *Dobbs* simply reiterate that longstanding doctrinal distinction.

SB 150 facially classifies based on sex. It singles out minors whose perception of their “sex” differs from their “sex” at birth. This is disparate treatment, not disparate impact, so heightened scrutiny applies.

SB 150 cannot survive heightened scrutiny. Contrary to Cameron’s argument, the mere existence of outlier views by individual doctors with little or no expertise in the field cannot outweigh the substantial evidence that these treatments are safe, effective, and medically necessary for some transgender youth.

IV. A STAY IS NECESSARY TO AFFORD RELIEF TO PLAINTIFFS.

The scope of the preliminary injunction thus of the narrower requested stay— is necessary and appropriate. Absent a stay that permits providers at least to continue

treating existing patients without threat of losing their licenses, it is unclear how the relief provided by an injunction that applies only to Plaintiffs would be anything other than “illusory indeed.” *Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994). The district court rightly concluded that “it would be virtually impossible to fashion” a narrower injunction that would avoid irreparable harm to Plaintiffs. PI Order, R.61, PageID#2312. As it did below, before this Court Cameron “notably fails to offer a more narrowly tailored injunction that would remedy Plaintiffs’ injuries.” *Id.*

CONCLUSION

For the reasons stated above as well as those in Plaintiffs’ Opening Brief, Plaintiffs respectfully ask this Court to grant the requested relief.

Dated: July 24, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing response was computer-generated in 14-point Times New Roman proportional font and contains 2,510 words, and thus complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)-(2).

/s/ Stephanie Schuster

CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Stephanie Schuster _____