

No. 23-12159

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

Jane Doe et al.,
Plaintiffs-Appellees,

v.

Surgeon General, State of Florida et al.,
Defendants-Appellants.

U.S. District Court for the Northern District of Florida, No. 4:23-cv-114
(Hinkle, J.)

DEFENDANTS-APPELLANTS' REPLY BRIEF

Mohammad O. Jazil
Michael Beato
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
119 South Monroe Street, Suite 500
Tallahassee, FL 32301
(850) 274-1690

Counsel for Defendants-Appellants Florida Surgeon General, Florida Department of Health, Florida Board of Medicine and Individual Members, and Florida Board of Osteopathic Medicine and Individual Members

Ashley Moody
Attorney General of Florida

Henry Whitaker
Solicitor General of Florida
PL-01 the Capitol
Tallahassee, FL 32399
(850) 414-3300

Counsel for Defendants-Appellants William Gladson, Florida Surgeon General, and Florida Department of Health

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Per Rule 26.1 and Circuit Rule 26.1, Defendants-Appellants add the following to

its CIP in its initial brief:

1. Abdul-Latif, Hussein, *Amicus*
2. Ahmed, Aziza, *Amicus*
3. Alstott, Anne, *Amicus*
4. Andersen, Alison, *Counsel for Amicus*
5. Blickenstaff, David, *Counsel for Amicus*
6. Bridges, Khiara, *Amicus*
7. Cohen, David, *Amicus*
8. Cohen, I. Glenn, *Amicus*
9. Cryan, Michael, *Counsel for Amicus*
10. Dandeneau, Debra, *Counsel for Amicus*
11. Galarneau, Charlene, *Amicus*
12. Grossman, Joanna, *Amicus*
13. Hartnett, Kathleen, *Counsel for Amicus*
14. Helstrom, Zoe, *Counsel for Amicus*
15. Ikemoto, Lisa, *Amicus*
16. Kamody, Rebecca, *Amicus*
17. Kang, Katelyn, *Counsel for Amicus*

18. Kuper, Laura, *Amicus*
19. Manian, Maya, *Amicus*
20. McNamara, Meredith, *Amicus*
21. Mor, Yuval, *Counsel for Amicus*
22. Oberman, Michelle, *Amicus*
23. Purvis, Dara, *Amicus*
24. Rebouche, Rachel, *Amicus*
25. Silbey, Jessica, *Amicus*
26. Spektrum Health, Inc., *Amicus*
27. SunServe, *Amicus*
28. Szilagyi, Nathalie, *Amicus*
29. Transgender Health Education Network, *Amicus*
30. TransSocial, *Amicus*
31. Ulrich, Michael, *Amicus*
32. Veroff, Julie, *Counsel for Amicus*
33. Vigil, Anegla, *Counsel for Amicus*

Dated: November 27, 2023

/s/ Mohammad O. Jazil

Counsel for Defendants-Appellants
Florida Surgeon General, Florida Department of Health, Florida Board of Medicine and Individual Members, and Florida Board of Osteopathic Medicine and Individual Members

/s/ Henry Whitaker

Solicitor General of Florida
Counsel for Defendants-Appellants
William Gladson, Florida Surgeon General, and Florida Department of Health

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Introduction

Not content with the record, Plaintiffs and their amici create a new one on appeal. Not content with the district court’s intentional-discrimination analysis, Plaintiffs supplement it in their answer brief. Realizing that they don’t even mention “intentional discrimination” or “*Arlington Heights*” in their *four* complaints and preliminary-injunction papers, Plaintiffs now—for the first time—raise an intentional discrimination claim and engage in an *Arlington Heights* analysis. Take a look. It’s not in the record.

Plaintiffs shouldn’t be able to raise a new claim or rely on extra-record hearsay evidence in their answer brief. They shouldn’t be able to perform a new *Arlington Heights* analysis here. The State shouldn’t be forced to respond to these new arguments and new evidence within the confines of a reply brief. Plaintiffs’ new claim, arguments, and evidence, if anything, should be barred and rejected.

Oral argument isn’t needed, but a quick reversal is.

Background

To reorient this Court, Plaintiffs moved for a preliminary injunction and challenged portions of SB254, a Florida Board of Medicine rule, and a Florida Board of Osteopathic Medicine rule, all of which regulate puberty blockers and cross-sex hormones as treatments for gender-dysphoric minors. Doc.30. They argued that the laws (1) violate substantive due process and (2) constitute sex-based and transgender-based discrimination. Doc.30.

Those arguments have now been effectively dropped: in their answer brief, Plaintiffs concede that *Eknes-Tucker v. Governor of the State of Alabama*, 80 F.4th 1205 (11th Cir. 2023), bar those arguments, leaving them to “respectfully disagree with” *Eknes-Tucker*’s “holding.” Ans. Br. 19 n.3 & 21. So Plaintiffs pivot to arguing intentional discrimination—even though “intentional discrimination” is never mentioned in their pleadings. Nor is “purposeful discrimination,” “animus,” or even “*Arlington Heights*.” Doc.1 (initial complaint); Doc.29 (amended complaint); Doc.59 (second-amended complaint); Doc.118 (third-amended complaint). The preliminary-injunction motion and reply contain no such argument, either. Doc.30 (motion); Doc.58 (reply).

Argument

Before discussing Plaintiffs’ (new) intentional-discrimination claim, the State first corrects inaccuracies in Plaintiffs’ answer brief and highlights an important concession. Then the State discusses the new intentional-discrimination claim—why it can’t be raised now and why it nevertheless fails. The State concludes by briefly responding to Plaintiffs’ amici briefs.

I. Plaintiffs’ Answer Brief Contains Inaccuracies and an Important Concession.

Plaintiffs’ answer brief requires some clarifications. Start with the first sentence on page one. There, Plaintiffs state that “the Florida Board of Medicine, the Florida Board of Osteopathic Medicine,” “and the Florida Legislature each enacted *a total ban*

on the use of puberty blockers and hormones to treat transgender people under the age of eighteen.” Ans. Br. at 1 (emphasis added). That’s not true.

Plaintiffs fail to mention that SB254, the Florida Board of Medicine rule, and the Florida Board of Osteopathic Medicine rule all contain grandfather provisions, allowing minors to continue receiving puberty blockers and cross-sex hormones to treat their gender dysphoria, if the treatments were obtained before the laws went into effect. The provisions are pretty clear—particularly the board rules:

(2) Minors being treated with puberty blocking, hormone, or hormone antagonist therapies prior to the effective date of this rule may continue with such therapies.

Rule 64B8-9.019, Fla. Admin. Code; Rule 64B15-14.014, Fla. Admin. Code; *see also* § 5 Fla. Sen. Bill 254 (2023).

The challenged provisions, therefore, aren’t “total bans.” The provisions themselves make that clear.

Nor are the challenged provisions “extraordinary.” Ans. Br. at 1. Plaintiffs apparently forget that this Court recently reviewed, and approved, a similar Alabama statute that regulated gender-dysphoria treatments for minors in *Ecknes-Tucker*.

Plaintiffs also state that puberty blockers and cross-sex hormones are safe, reversible, and effective. Ans. Br. at 7-8. In response, the State simply points to pages 4 to 9 in its initial brief, where Plaintiffs’ own experts and preferred organizations and preferred guidelines all say, in their own words, that these treatments may not be safe, may not be reversible, and may not be effective. That portion of the initial brief also

explains that gender identity *isn't* biologically based, contrary to Plaintiffs' assertions and those of Plaintiffs' preferred sources of medical information. Ans. Br. at 3-4. To the extent that the district court agreed with Plaintiffs for these propositions, the district court clearly erred.

Finally, a concession. Plaintiffs' substantive due process claim requires them to prove that their purported fundamental right—that parents have a right to obtain puberty blockers and cross-sex hormones to treat their children's gender dysphoria—is deeply rooted in our nation's history and traditions. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). Relevant here, this Court has said that access to “decidedly modern” treatments, like treatments that became available in the 1970s, isn't deeply rooted in our nation's history and traditions. *Morrissey v. United States*, 871 F.3d 1260, 1269-70 (11th Cir. 2017) (holding that there's no right to obtain in vitro fertilization, a treatment that came out in the 1970s).

In their answer brief, Plaintiffs concede that puberty blockers and cross-sex hormones, as gender-dysphoria treatments, are decidedly modern: “[g]ender dysphoria is a serious medical condition that has been recognized and treated *for decades*.” Ans. Br. at 4 (emphasis added). They also state that “[f]or more than *four decades*, medical practitioners have developed evidence-based standards for the treatment of gender dysphoria.” Ans. Br. at 5 (emphasis added). Plaintiffs thus agree with this Court that the at-issue treatments are new and therefore aren't “deeply rooted,” which defeats their substantive due process claim. *Ekenes-Tucker*, 80 F.4th at 1221 n.11 &12 (concluding that

puberty blockers and cross-sex hormones to treat gender dysphoria are modern treatments).

II. Plaintiffs' Intentional-Discrimination Claim Fails.

Plaintiffs' new intentional-discrimination claim and arguments are unavailing. The arguments and evidence were never presented to the district court, which bars Plaintiffs from making them for the first time in their answer brief. The arguments are also meritless, relying on extra-record hearsay evidence and cherrypicked facts.

A. An appellate court shouldn't consider claims raised for the first time on appeal. *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1332 (11th Cir. 2020) (“[W]e may not consider claims raised for the first time on appeal,” and we “are a court of review, not of first review.” (cleaned up)). An appellate court also shouldn't consider arguments and evidence raised for the first time on appeal. *See generally United Mine Works of Am. Combined Benefit Fund. v. Toffel*, 911 F.3d 1121, 1151 n.35 (11th Cir. 2018); *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1544-45 (11th Cir. 1994). That's because a district court should have an “opportunity to consider” the arguments and evidence. *Reider v. Phillip Morris USA, Inc.*, 793 F.3d 1254, 1258 (11th Cir. 2015). That's particularly true of evidence.

Here, Plaintiffs didn't raise an intentional-discrimination claim in their complaints or make *Arlington Heights* intentional-discrimination arguments in their preliminary-injunction papers. More specifically, the hallmarks of an *Arlington Heights* claim—discussing procedural departures, reviewing background history, evaluating alternative options—are contained nowhere in the pleadings or Plaintiffs' preliminary-injunction

papers. Nor did Plaintiffs provide or rely on that kind of evidence below; the record contains no legislative or administrative transcripts and no expert historical analysis, for example.

True, the district court made a (terse, dictum) intentional-discrimination finding in its preliminary-injunction order (untethered to any claim before it), Doc.90 at 26, and on appeal, the State disputes that finding, Int. Br. at 22-23. But at least both the district court and the State rely on the arguments and evidence developed below.

Plaintiffs don't do that on appeal. They bring in new facts, new evidence, new sources of authority—all on top of their new claim and arguments—in their answer brief. The new evidence takes up practically three pages in their table of authorities' "other sources" section. Ans. Br. at vii-ix. Plaintiffs, in doing so, don't give the district court the opportunity to consider their claim, arguments, or evidence; they force this Court to evaluate a new claim, arguments and evidence for the first time on appeal; and they require the State to respond in a reply brief, with a 6,500-word deficit.

All of that is improper.

B. It's also unavailing. Plaintiffs' intentional-discrimination analysis, along with the district court's analysis, fail. The district court's (terse, dictum) analysis is very brief:

Discouraging individuals from pursuing their gender identities, when different from their natal sex, was also a substantial motivating factor. In a "fact sheet," the Florida Department of Health asserted social transitioning, which involves no medical intervention at all, should not be a treatment option for children or adolescents. Nothing could have motivated this remarkable intrusion into parental prerogatives other than opposition to transgender status itself.

State action motivated by purposeful discrimination, even if otherwise lawful, violates the Equal Protection Clause. The statute and rules at issue were motivated in substantial part by the plainly illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities. This was purposeful discrimination against transgenders.

Doc.90 at 26 (citations and footnote omitted).

The district court never cited *Arlington Heights* or evaluated its factors. Instead, it used a Florida Department of Health fact sheet to impute bad faith on the Florida House of Representatives *and* the Florida Senate *and* the Governor *and* the Surgeon General *and* the Florida Board of Medicine *and* the Florida Board of Osteopathic Medicine. Set aside for a moment that the district court substituted its perspective for that of a surgeon general, in an area where even Plaintiffs' preferred guidelines acknowledge that an incongruence among minors desists for most and is actually exacerbated through social transition. *See generally* DX24 at 8-9 (Endocrine Society). Even then, these various officials and entities have different duties, with different constituencies. No cats-paw theory links them. *See Brnovich v. DNC*, 141 S. Ct. 2321, 2350 (2021). So, the fact sheet is flimsy evidence of intentional discrimination—made flimsier still by the failure to identify a single representative or senator or gubernatorial official or board member who actually read or principally relied on this single document when taking gender-dysphoria actions.

C. Plaintiffs' new arguments don't fare any better. Again, these arguments weren't presented to the district court.

Presumption of Good Faith. Plaintiffs contend that the State isn't entitled to the presumption of good faith. They rely on *Virginia v. United States*, 518 U.S. 515 (1996), for the proposition that the presumption isn't afforded when heightened scrutiny applies. Ans. Br. at 39-40. That's wrong. For starters, *Virginia* never mentions the presumption of good faith, so Plaintiffs can't rely on it for their proposition. And in *Arlington Heights* cases from this Court, the presumption of good faith has been applied in race-based cases that trigger the highest of heightened scrutiny. *League of Women Voters of Fla. v. Fla. Sec'y of State*, 66 F.4th 905, 923 (11th Cir. 2023) ("LWVFL"); *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("GBM"). If the presumption applies when dealing with matters that require heightened scrutiny, then surely it applies to this case which isn't a heightened-scrutiny case. That presumption hasn't been overcome for the reasons explained in the initial brief. Int. Br. at 16-17.

Impact. Plaintiffs are right that gender dysphoria only affects transgender individuals. Ans. Br. at 25. But it bears noting that not all transgender individuals have gender dysphoria, and that SB254 and the board rules all contain grandfather provisions that allow treatment continuation under certain circumstances. Even if this factor favors Plaintiffs, "impact alone is not determinative" of discriminatory animus. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Historical Background. Litigants usually rely on an expert historian when analyzing this factor. Plaintiffs rely on extra-record newspaper articles (hearsay). Ans. Br. at 26-29. That's not evidence of intentional discrimination.

Nor are the actions of earlier Florida Legislatures or the Florida Board of Education. Ans. Br. at 26-29. The actions of differently constituted bodies shine no light on the intent of the 2023 Florida Legislature, the 2023 Florida Board of Medicine, and the 2023 Florida Board of Osteopathic Medicine—in essence what the *Arlington Heights* factors try to get at. *Arlington Heights*, 429 U.S. at 265-66 (the goal of the analysis is to determine whether a “discriminatory purpose” was “a motivating factor” for the enacting governmental body); *GBM*, 992 F.3d at 1325. Plaintiffs also omit pertinent information about those earlier laws. For example, Plaintiffs reference House Bill 1557, Ans. Br. at 27-28, yet omit that the law was challenged but was not enjoined. *See M.A. v. Fla. State Bd. of Educ.*, 4:22-cv-134 (N.D. Fla. Feb. 15, 2013); *Cousins v. Sch. Bd. of Orange Cnty.*, 6:22-cv-1312 (M.D. Fla. Oct. 20, 2022).

To the extent that Plaintiffs cite other, separate legislation passed by the 2023 Florida Legislature, that, too, is unhelpful. Some of the references are overstatements or mischaracterizations. For instance, Plaintiffs reference House Bill 1521, stating that it “excludes transgender people from public restrooms.” Ans. Br. at 28. That’s a mischaracterization. The bill states that if a covered entity has a “water closet,” it must either have an exclusive female restroom and an exclusive male restroom, or a unisex restroom. § 1 Fla. H. Bill 1521 (2023). The bill also enumerates circumstances where members of the opposite sex can (and can’t) enter the other’s restrooms. *Id.*

Either way, neither the bills from earlier legislatures nor the 2023 legislature concern the specific bill or rules at issue—SB254 and the Board of Medicine and the Board

of Osteopathic Medicine rules. The bill actually being challenged is the focus. *GBM*, 992 F.3d at 1323 (“[W]e are confined to an analysis of discriminatory intent as it relates to [the at-issue law], and the [evidence] Plaintiffs identify were not made about the law at issue in this case and thus do not evidence discriminatory intent behind it.”).

Finally, Plaintiffs find no support in other provisions in SB254, like the provision that concerns child custody. Ans. Br. at 28-29. The custody provision isn’t being challenged. It’s also a mirror image of the policy perspective taken in California, Cal. Sen. Bill 107, showing that it’s perfectly sensible for a state that takes a cautious approach to gender transition (like Florida) to make the change, just as a state that takes a more permissive approach (like California) to make a corresponding change. In short, it’s not evidence of animus. At most, it’s evidence of consistency with a policy approach. And even if this provision is somehow relevant, it says nothing of the board rules, which have nothing to do with custody.

Legislative History, and Procedural and Substantive Departures. Plaintiffs’ discussion of these factors is deeply flawed. First, it recounts a “rapid succession of events”—spanning over a long year—from the federal government and the State government. Ans. Br. at 30-34. Plaintiffs devote several pages to the actions of a State agency that’s not a defendant in this case, the Florida Agency for Health Care Administration, calling its actions on gender dysphoria “predetermined.” Ans. Br. at 32-34. True, AHCA’s actions are subject of a *different* case, which is currently before this Court. *Dekker v. Sec’y, Fla. Agency for Health Care Admin.*, No. 23-12155. But AHCA’s actions

say nothing of the Florida House's, Florida Senate's, Governor's, Surgeon General's, Board of Medicine's, and Board of Osteopathic Medicine's actions in this case.

To get around this, Plaintiffs again rely on extra-record evidence to tie AHCA's actions to the Florida Legislature's actions. Plaintiffs' best argument is contained within a footnote, saying that "SB 254 relied on the flawed" actions of AHCA, and citing three legislative staff documents. Ans. Br. at 34 n.7. Yet this gets Plaintiffs nowhere. Plaintiffs fail to establish that any legislator actually read or relied on AHCA's work product when voting for SB254. And legislative staff documents are irrelevant to gleaning the boards' intent, because the boards are separately constituted bodies.

Plaintiffs are then left with an evidence-free conclusion that "SB 254 and the Board Rules were driven by predetermined opposition to providing medical care for transgender people and marked by repeated departures from normal process." Ans. Br. at 34. What departures? Plaintiffs never fully explain. They reference no legislative or board rule that was violated. This is a critical omission. *See generally Hall v. Holder*, 117 F.3d 1222, 1230 (11th Cir. 1997) ("Appellants also point to no procedural departures from the ordinary policy-making process in the decision to maintain the system; that is, they do not argue that the referendum was somehow deficient.").

Contemporaneous Statements. Plaintiffs here cherry-pick out-of-context statements from a whopping total of four Florida House representatives. Ans. Br. at 35-37. The State can identify statements of its own—quoting board members, too—and has done so in its trial brief. Doc.190 at 21. Even assuming that the four statements

should be considered, those statements can't be imputed to "the legislature as a whole," and can't be imputed on separate governmental entities. *Brnovich*, 141 S. Ct. at 2349-50; *see also LWVFL*, 66 F.4th at 932.

To the extent that Plaintiffs rely on the Florida Department of Health's fact sheet, Ans. Br. at 35, the document lists some uncontroverted information: low-quality evidence supports certain gender-dysphoria treatments, and other countries are urging caution regarding these treatments. *Dekker* DX5. That's not intentional discrimination.

Less Discriminatory Alternatives. Plaintiffs argue that because the Florida Legislature and boards didn't pass what Plaintiffs want—such as "requir[ing] compliance with established guidelines" like WPATH's or banning puberty blockers and cross-sex hormones as treatment options for minors for all medical conditions—the State acted with animus. Ans. Br. at 37-38. But the "fact that the Florida Legislature" and boards "did not include the alternative options that Plaintiffs would have preferred is not evidence of discriminatory intent." *LWVFL*, 66 F.4th at 940 (quoting *GBM*, 992 F.3d at 1327).

State Justifications. Finally, Plaintiffs agree with the district court's rejection of the State's justifications for the challenged provisions. Ans. Br. at 38-51. Both Plaintiffs and the district court, however, perform the wrong analysis and reach the wrong conclusions. Gender-dysphoria regulations, under *Ekenes-Tucker*, undergo rational-basis review, not heightened scrutiny. 80 F.4th at 1227. Granted, it's not a toothless review, but it's extremely deferential, as explained in the State's initial brief. Int. Br. at 23-24.

Plaintiffs contend that the district court's analysis is proper even under rational-basis review. Ans. Br. at 38-51. That's just not so, again, as the State explained in its initial brief. Int. Br. at 29-32.

Compare this Court's rational-basis analysis in *Eckes-Tucker* with the district court's "rational-basis analysis" in this case. In *Eckes-Tucker*, this Court held that a State could reasonably decide to regulate gender-dysphoria treatments, given the risks involved. 80 F.4th at 1225. This Court said that there's a rational basis to conclude that "the medications at issue present *some* risks." *Id.* (emphasis in the original). But, in this case, the district court rejected the same justification. Doc.90 at 32 ("That there are risks of the kind presented here is not a rational basis for denying patients the option to choose this treatment.").

In *Eckes-Tucker*, this Court held that a State could rationally decide to align itself with European countries, who are scaling back their gender-dysphoria positions. 80 F.4th at 1225 ("[S]everal European countries have restricted treating minors with transitioning medications due to growing concern about the medications' risks."). But, in this case, the district court held that to be an unreasonable rationale. Doc.90 at 35 (rejecting Florida's argument that it's joining the international consensus: the "assertion is false. And no matter how many times the defendants say it, it will still be false").

In *Eckes-Tucker*, this Court held that a State could rationally decide to put guardrails on gender-dysphoria treatments, because parents and children might not be informed about the risks and consequences involved. 80 F.4th at 1225 ("[I]here is at least

rational speculation that some families will not fully appreciate those risks and that some minors experiencing gender dysphoria ultimately will desist and identify with their biological sex.”). But, in this case, the district court found this to be an irrational reason, Doc.90 at 36-37, even though, in the *Dekker* case, a *medical intern*—with ten hours of gender-dysphoria training—approved a plaintiff’s request for top surgery. *Dekker* Tr.675:25 – 676:10, 678:13 – 679:6.

As such, the district court clearly erred in this case. The court should have concluded that the justifications for the challenged laws are rational, reasonable, and therefore constitutional. Int. Br. at 29-31.

Would Have Been Passed Regardless. Even if Plaintiffs had brought an intentional-discrimination claim below (which they didn’t), and even if there was a discriminatory motive behind the challenged laws (which there wasn’t), the laws would have been passed regardless. Puberty blockers and cross-sex hormones, as gender-dysphoria treatments, carry risks for permanent, negative health consequences. Int. Br. at 4-11. The studies that support these treatments are backed by limited, low-quality evidence. Int. Br. at 4-11. Other countries are turning away from these treatment options and are urging caution. Int. Br. at 4-11. All of this is beyond dispute. And under these circumstances, the State may and should act to protect its citizens—particularly minors. The challenged laws would thus have been passed regardless of any discriminatory motive.

Remaining Preliminary-Injunction Factors. The State reaffirms the arguments made in its initial brief regarding irreparable harm, the balance of harms, and the public interest. Int. Br. at 32-33.

III. Plaintiffs’ Amici Don’t Move the Needle.

Finally, a word on Plaintiffs’ amici. The amici’s arguments don’t assist Plaintiffs. Their briefs contain errors, *e.g.* Biomedical Ethics Br. at 3 (arguing that the challenged laws are categorical bans), and focus on the actions of *different* State agencies not sued in this case, *e.g.*, TransSocial Br. at 7-8 (discussing AHCA’s actions).

The amicus brief from WPATH, the Endocrine Society, and the American Academy of Pediatrics is particularly ironic, given that the State served them with discovery in *Dekker*, and given that the organizations fought that discovery all the way to the D.C. Circuit Court of Appeals. *In re Subpoenas Served on AAP*, 23-mc-00004 (D.D.C. 2023); 23-7025 (D.C. Cir. 2023).

And though the amici concede that the “district court’s preliminary injunction” “was based on an unusually robust factual record,” Abdul-Latif Br. at 4, each brief adds their own extra-record (and hearsay) evidence into this appeal. The Abdul-Latif amicus brief goes so far as to provide this Court with effectively a supplemental appendix, listing “twenty studies finding benefits of transitioning medications in transgender adolescents.” Abdul-Latif Mot. for Leave, 56-2, e-page 52 (Nov. 10, 2023).

Little good it does them. Take any study in their list—*Psychological Support, Puberty Suppression, and Psychosocial Functioning in Adolescents with Gender Dysphoria*, for example.

That study admitted that “there are limited longitudinal studies on puberty suppression outcome in GD [gender dysphoria]. Also, studies on the effects of psychological support on its own on GD adolescents’ well-being have not been reported.” 2015 J. Sex Med. 2206 (Nov. 9, 2015). The State agrees.

In sum, Plaintiffs’ amici briefs are little help.

Conclusion

For these reasons, this Court should reverse the district court. *Ekenes-Tucker* and Plaintiffs’ failure to develop their (new) intentional-discrimination claim below warrant this conclusion. Just so this Court is aware, trial is set to begin in December 2023; a speedy resolution of this appeal would therefore benefit the parties.

Dated: November 27, 2023

/s/ Mohammad O. Jazil

Mohammad O. Jazil
Michael Beato
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
119 South Monroe Street, Suite 500
Tallahassee, FL 32301
Phone: (850) 391-0503
Facsimile: (850) 741-1023
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com

*Counsel for Defendants-Appellants Surgeon
General, Florida Department of Health, Florida
Board of Medicine and Individual Members, and
Florida Board of Osteopathic Medicine and In-
dividual Members*

/s/ Henry Whitaker

Solicitor General of Florida
PL-01 the Capitol
Tallahassee, FL 32399
Phone: (850) 414-3300
joseph.hart@myfloridalegal.com
*Counsel for Defendants-Appellants William
Gladson, Florida Surgeon General, and Florida
Department of Health*

CERTIFICATE OF COMPLIANCE

This brief contains 3,856 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it's prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: November 27, 2023

/s/ Mohammad O. Jazil

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing certificate was filed on ECF.

Dated: November 27, 2023

/s/ Mohammad O. Jazil