

No. 22-11707

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

PAUL A. EKNES-TUCKER, et al.,
Plaintiffs-Appellees,

&

UNITED STATES OF AMERICA
Intervenor-Plaintiff-Appellee,

v.

GOVERNOR OF THE STATE OF ALABAMA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-184-LCB

**DEFENDANTS-APPELLANTS' MOTION TO STAY
PRELIMINARY INJUNCTION**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

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6. Alstott, Anne – Amicus Curie;
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212. Unitarian Universalist Association – Amicus Curiae;
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- 236. Walker, Susan Russ – U.S. Magistrate Judge;
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Respectfully submitted this 21st day of November 2023.

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TABLE OF CONTENTS

Certificate of Interested Persons	C1
Table of Contents	i
Table of Authorities	ii
Introduction	1
Background	3
Argument.....	7
I. Defendants Are Likely To Succeed	8
II. Defendants And The Public Will Be Irreparably Injured Absent A Stay	10
III. The Equities Favor A Stay	14
Conclusion	15
Certificate of Compliance	17
Certificate of Service	18

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018).....	11
<i>Baltin v. Alaron Trading Corp.</i> , 128 F.3d 1466 (11th Cir. 1997)	12
<i>Democratic Exec. Comm. of Fla. v. Lee</i> , 915 F.3d 1312 (11th Cir. 2019)	8
<i>Doe v. Thornbury</i> , No. 23-cv-230 (W.D. Ky. July 14, 2023),	12
<i>Eknes-Tucker v. Gov. of Ala.</i> , 80 F.4th 1205 (11th Cir. 2023)	<i>passim</i>
<i>Hand v. Scott</i> , 888 F.3d 1206 (11th Cir. 2018)	11
<i>Johnson v. NPAS Sols., LLC</i> , 43 F.4th 1138 (11th Cir. 2022) (en banc)	14
<i>Koe v. Carlson</i> , 1:23-cv-2904-SEG (N.D. Ga. Aug. 20, 2023).....	2, 9, 12
<i>L.W. by and through Williams v. Skrmetti</i> , 73 F.4th 408 (6th Cir. 2023)	12, 13, 14
<i>Laufer v. Arpan LLC</i> , 65 F.4th 615 (11th Cir. 2023) (en banc)	14
<i>Martin v. Singletary</i> , 965 F.2d 944 (11th Cir. 1992)	2, 8, 9
<i>NetChoice, LLC v. Att’y Gen., Fla.</i> , 34 F.4th 1196 (11th Cir. 2022)	10

Nken v. Holder,
556 U.S. 418 (2009).....10

Otto v. City of Boca Raton,
41 F.4th 1271 (11th Cir. 2022) (en banc)14

Swain v. Junior,
958 F.3d 1081 (11th Cir. 2020)10

Ultracashmere House, Ltd. v. Meyer,
664 F.2d 1176 (11th Cir. 1981)12

United States v. Sec’y Fla. Agency for Health Care Admin.,
21 F.4th 730 (11th Cir. 2021) (en banc)14

Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.,
210 F.3d 1309 (11th Cir. 2000)7

W. Virginia by & through Morrissey v. U.S. Dep’t of the Treasury,
82 F.4th 1068 (11th Cir. 2023)3, 14

Wreal, LLC v. Amazon.com, Inc.,
840 F.3d 1244 (11th Cir. 2016)13

Statutes

28 U.S.C. § 228312

Ala. Code § 26-26-4(a) 4, 8, 15

Rules

11th Cir. R. 36-32, 9

Fed. R. App. P. 8(a)(1).....13

INTRODUCTION

“This case revolves around an issue that is surely of the utmost importance to all of the parties involved: the safety and well-being of the children of Alabama.” *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1231 (11th Cir. 2023). Following extensive factual findings, the Alabama Legislature enacted the Vulnerable Child Compassion and Protection Act last April to protect minors from risky sex-modification procedures. *Id.* at 1211-14. The district court preliminarily enjoined enforcement of certain provisions of the Act, and Defendants appealed. In August, this Court issued a published decision vacating the injunction, recognizing that Alabama has “a compelling interest in safeguarding the physical and psychological well-being of minors” and that the enjoined provisions are “rationally related to that compelling state interest.” *Id.* at 1225 (cleaned up). The Court emphasized that the sex-modification procedures at issue “can cause loss of fertility and sexual function” (among other risks), *id.* (cleaned up), and held that Alabama’s law “seems to undoubtedly clear” the “lenient standard” of rational-basis review, *id.*

Following this Court’s decision, Defendants asked the district court to stay its injunction. As Defendants explained, a stay was needed so Defendants could enforce Alabama’s presumptively valid law while Plaintiffs seek rehearing en banc. *See* Defs’ Time-Sensitive Mot. to Stay Preliminary Injunction, Doc. 313. The district court refused. “The Eleventh Circuit has not, for whatever reason, issued its

mandate,” the court wrote, “and unless and until it does, the preliminary injunction will remain in effect.” Order Denying Defs’ Mot. for Stay, Doc. 368 at 5; *see* Tr. 40, 42-44.

This was error. The mandate has nothing to do with the precedential nature of the Court’s decision, so the fact that a judge on this Court has withheld the mandate has nothing to say about whether Defendants are likely to succeed on the merits of their appeal. This Court has already held they are. “A stay of the mandate ... in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by” this Court’s decision “as binding authority.” *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992); *see also* 11th Cir. R. 36-3, Internal Operating Procedure 2 (“Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.”).

Accordingly, Defendants seek a stay from this Court. Other States within the Circuit have already benefited from this Court’s precedential opinion in this case. *See* Order, *Koe v. Carlson*, No. 1:23-cv-2904-SEG, Doc. 119 (N.D. Ga. Sept. 5, 2023) (staying preliminary injunction of Georgia’s similar law in light of *Eknes-Tucker*). And all the stay factors weigh in Defendants’ favor. First, given this Court’s published opinion vacating the injunction, Defendants are likely to succeed on the merits. *Eknes-Tucker*, 80 F.4th at 1231. Second, Defendants will suffer irreparable

harm absent a stay, as otherwise they cannot enforce Alabama's presumptively valid law. Third, the public interest lies in enforcement of Alabama's law that protects children from risky, sterilizing drugs. Fourth, the Minor Plaintiffs will not be harmed by a stay: the law *protects* them from risky interventions, and it permits their physicians to taper the administration of any puberty blockers or cross-sex hormones they have already prescribed for the purpose of gender transitioning.

Alabama has needlessly suffered for a year-and-a-half as its law protecting vulnerable children has wrongly been enjoined. Trial is currently slated for August 2024, *see* Doc. 368 at 4, and the mandate could take even longer to issue, *see W. Virginia by & through Morrissey v. U.S. Dep't of the Treasury*, 82 F.4th 1068, 1072 n.3 (11th Cir. 2023) (Rosenbaum, J., dissenting from the denial of rehearing en banc) (collecting cases showing timespan between issuance of panel's decision and issuance of order denying rehearing en banc)). The State, the public, and Alabama's children should not have to wait that long for Alabama's presumptively valid law to take effect. The Court should issue the stay now so Alabama can protect its vulnerable children while the appellate process proceeds.

BACKGROUND

As noted, the Alabama Legislature enacted the Vulnerable Child Compassion and Protection Act last April. *See Eknes-Tucker*, 80 F.4th at 1211-14. The Act prohibits prescribing or administering puberty blockers, cross-sex hormones, and

surgical interventions to minors “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex.” *Id.* at 1212-13 (quoting Ala. Code § 26-26-4).

The Act was challenged by Plaintiffs, who moved for a preliminary injunction. Plaintiffs contended that the Act’s prohibition on providing minors puberty blockers and cross-sex hormones for the purpose sex-modification violated (1) the Parent Plaintiffs’ right under the Fourteenth Amendment’s Due Process Clause to direct the upbringing of their children, and (2) the Minors Plaintiffs’ rights under the Fourteenth Amendment’s Equal Protection Clause by discriminating on the bases of sex and transgender status. *Id.* at 1214. The United States intervened and also sought preliminary relief based on the Equal Protection Clause. *Id.* at 1214-15.

On May 13, 2022, the district court preliminarily enjoined Defendants from enforcing the provisions of the Act related to puberty blockers and cross-sex hormones. *Id.* at 1218. “The ruling was based on, among other things, a determination that Plaintiffs had shown a substantial likelihood of success on the merits as to their substantive due process claim and equal protection claim (Counts I and II), but not as to their other claims.” *Id.*

Defendants appealed the injunction three days later, *id.*, and quickly moved for expedited briefing and appellate review, *see* Unopposed Mot. for Expedited

Briefing and Appellate Review, CA11 Doc. 12. Given that the issues on appeal were “of first impression for this Court” and “warrant[ed] full briefing and oral argument,” Defendants elected not to seek an emergency stay of the injunction. *Id.* at 9.¹ “At the same time,” Defendants asked that the appeal “be resolved on an expedited basis” “given the legislative findings and record evidence about the significant life-long risks of the medical interventions at issue.” *Id.* Defendants thus hoped that an expedited appeal would grant them the relief they needed to enforce Alabama’s law as quickly as possible.

Defendants’ appeal was successful. *See* CA11 Doc. 125. In a published opinion joined by all three members of the panel, the Court held “that the district court abused its discretion in issuing th[e] preliminary injunction because it applied the wrong standard of scrutiny.” *Eknes-Tucker*, 80 F.4th at 1210. The Court explained that “[t]he plaintiffs have not presented any authority that supports the existence of a constitutional right to ‘treat [one’s] children with transitioning medications subject to medically accepted standards.’” *Id.* (second alteration in original). “Nor have they shown that [the Act’s provisions] classifies on the basis of sex or any other protected characteristic.” *Id.* “Accordingly,” the Court held, Alabama’s law “is subject only to rational basis review,” and the district court’s “determination that the plaintiffs have established a substantial likelihood of success on the merits cannot stand.” *Id.* at

¹ Citations are to the ECF-stamped pagination at the top of the page.

1210-11. The Court vacated the preliminary injunction on August 21, 2023. *Id.* at 1211.

Less than three weeks later, on September 6, Defendants asked the district court to stay its preliminary injunction in light of this Court’s ruling. *See* Defs’ Time-Sensitive Mot. to Stay Preliminary Injunction, Doc. 313. Defendants explained that, “[v]ia press release, Plaintiffs’ counsel have indicated that they intend to seek rehearing of [this Court’s] decision, which—as counsel suggest—will delay issuance of the [Court’s] mandate.” *Id.* at 5. “While Plaintiffs are of course free to seek rehearing,” Defendants told the district court, “they are not entitled to the benefits of an injunction when the equities weigh against them.” *Id.* “Because Alabama’s law is presumptively valid under binding precedent, Defendants respectfully request[ed] a stay of the preliminary injunction so they may enforce the law pending final judgment and any further appellate review.” *Id.* at 5-6.

Plaintiffs filed for rehearing en banc five days later, and on September 15 a judge of this Court withheld issuance of the mandate. *See* Pls’ Pet. for R’hg, CA11 Doc. 129; Order Withholding Mandate, CA11 Doc. 132. And below, Plaintiffs opposed Defendants’ motion to stay, while the United States did not respond to the motion. Pls’ Resp., Doc. 316. Rather than addressing the traditional stay factors, Plaintiffs’ response argued that this Court’s decision was not binding on the district court because the mandate had not yet issued and Plaintiffs had sought rehearing en

banc. *See* Doc. 316 at 2-7. Plaintiffs also suggested that it was “not even clear” whether the district court had “jurisdiction to grant the relief that Defendants seek” because Defendants had already appealed the injunction. *Id.* at 7.

In reply, Defendants explained that while “[d]istrict courts cannot *vacate* injunctions that are on appeal,” “they can *stay* them.” Defs’ Reply, Doc. 317 at 5. And they explained—as they had in their initial motion, *see* Doc. 313 at 7-9—that “the formal issuance of the mandate has nothing to do with whether a stay of an injunction is warranted in light of the panel’s precedential ruling.” *Id.*

The district court was not persuaded. Following a hearing, the district court denied the motion on November 17. *See* Order, Doc. 368 “The Eleventh Circuit has not, for whatever reason, issued its mandate,” the court stated, “and unless and until it does, the preliminary injunction will remain in effect.” *Id.* at 5; *see* Tr. 40, 42-44.

ARGUMENT

Four considerations govern “whether a stay is warranted”: “(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (cleaned up). Because these factors “substantially overlap with the factors governing preliminary

injunctions,” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019), this Court’s precedential decision in *Eknes-Tucker* establishes that Defendants are entitled to a stay.

I. Defendants Are Likely To Succeed.

Defendants are seeking a stay pending appeal, so the first factor asks whether they are likely to succeed in obtaining vacatur of the preliminary injunction. This Court has already held that the answer is yes. *Eknes-Tucker*, 80 F.4th at 1231 (“[W]e vacate the district court’s preliminary injunction on the enforcement of section 4(a)(1)–(3) of the Act.”). And even were the question whether Defendants are likely to succeed on the ultimate merits of their case, the answer to that question would be yes, too. As this Court explained, the challenged provisions of the Act are “subject only to rational basis review—a standard that [they are] exceedingly likely to satisfy.” *Id.* at 1230; *see id.* at 1226 (noting that “rational basis review” is “a lenient standard that the law seems to undoubtedly clear”). The first factor is met.

To be sure, as Plaintiffs and the district court point out, the mandate has not issued. That does not matter. The mandate is simply “the official means of communicating [this Court’s] judgment to the district court and of returning jurisdiction in a case to the district court.” *Martin*, 965 F.2d at 945 n.1. A “stay of the mandate” “merely delays the return of jurisdiction to the district court to carry out [this Court’s] judgment in that case.” *Id.* A judge’s decision to withhold the mandate thus

“in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established by [the panel’s decision] as binding authority.” *Id.* So “[a]lthough the mandate” in this case “has not yet issued, it is nonetheless the law in this circuit.” *Id.*; see 11th Cir. R. 36-3, Internal Operating Procedure 2 (“Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.”).

Below, Plaintiffs sought to distinguish *Martin* because “this case,” unlike that one, “does not involve the application of an appellate decision as precedent in a separate, subsequent case.” Doc. 316 at 7. According to Plaintiffs, a different rule should apply where a party seeks relief “*in the same case*” in which the precedential decision was issued. *Id.* But that is not what *Martin* or this Court’s rules say. They say that a precedential opinion immediately becomes “binding authority” for *every* court “in this circuit”—not every court save the one whose decision was under review.

It is not hard to imagine the absurdities Plaintiffs’ theory would create. Near-identical cases would reach different outcomes based solely on which party’s case created the new precedent, with *that* party being unable to take advantage of the precedent it had fought for. This is no hypothetical harm. On August 20, 2023, the Northern District of Georgia entered a preliminary injunction enjoining enforcement of Georgia’s similar law. *Koe v. Carlson*, 1:23-cv-2904-SEG (N.D. Ga. Aug. 20, 2023), Doc. 106. This Court decided *Eknes-Tucker* the next day. The Georgia district

court then stayed its injunction in light of this Court’s decision. *Id.*, Doc. 119. Plaintiffs here seem to agree that that stay was proper, but urged the court below not to follow suit. Why? Because this Court’s decision was in *this* case rather than Georgia’s, thus indicating (somehow) that the district court here was not bound by the decision the way other courts are. *See* Doc. 316 at 8. Plaintiffs offered no justification for such absurdity, and there is none. This Court’s decision is binding for *all* courts in the Circuit.

Here, that decision means that Defendants are likely to succeed on the merits of their appeal, as indeed they already have. They are entitled to a stay. *See NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1209 (11th Cir. 2022) (“Likelihood of success on the merits is generally the most important factor.” (internal quotation marks omitted)).

II. Defendants And The Public Will Be Irreparably Injured Absent A Stay.

After likelihood of success, irreparable injury to the movant is the other “most critical” factor. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As government officials, Defendants’ “interest and harm merge with the public interest.” *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020). Both Defendants and the public have been irreparably injured for the last year-and-a-half by the district court’s erroneous injunction prohibiting enforcement of a presumptively valid law protecting children. They should not have to suffer *more* injury now that this Court has ruled in their favor.

As an initial matter, “the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); see *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that State “would be harmed if it could not apply its own laws”).

And more specific here, “[i]t is well established that states have a compelling interest in safeguarding the physical and psychological well-being of minors.” *Eknes-Tucker*, 80 F.4th at 1225 (cleaned up). “In the same vein, states have a compelling interest in protecting children from drugs, particularly those for which there is uncertainty regarding benefits, recent surges in use, and irreversible effects.” *Id.* Here, “the record evidence is undisputed that the medications at issue present *some* risks”; “[a]s the district court recognized, these medications can cause ‘loss of fertility and sexual function.’” *Id.* Alabama’s law addresses both “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.” *Id.*

Letting the district court’s erroneous injunction continue in force would thus irreparably harm children who “may not be finished forming their identities and may not fully appreciate the associated risks” of these sterilizing interventions. *Id.* at 1230. Absent a stay, these children may face a lifetime of physical and mental harm—permanently immature sex organs, bone density loss, delayed development, and much, much more. See Defs’ Op. Br., CA11 Doc. 33 at 33.

Plaintiffs argued below that Defendants are not entitled to a stay because they did not seek one earlier in the litigation. *See* Doc. 316 at 8-9. As proof, they cited (with a telling “*cf.*”) a lone overruled case from 1981 that is, to say the least, inapposite. *Id.* at 9 (citing *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981), *overruled on other grounds as recognized by Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 n.8 (11th Cir. 1997)). The Court’s decision in *Ultracashmere* concerned the refusal of a federal district court to stay state-court proceedings pursuant to 28 U.S.C. § 2283 in favor of a party who waited until “four days before the state court trial and almost nine months after initiation of the state court proceedings” to seek relief in federal court. What that case has to do with this one is anyone’s guess.

Nor does Plaintiffs’ logic fill the gap. Plaintiffs attempted to distinguish the stay granted in *Koe*—and another one granted by a federal court in Kentucky after the Sixth Circuit granted Tennessee’s stay application in *L.W.*, *see Doe v. Thornbury*, No. 23-cv-230 (W.D. Ky. July 14, 2023), Doc. 79—on the grounds that in those cases the district courts granted stays “before any meaningful appellate review of [the] preliminary injunction had commenced.” Doc. 316 at 8. Based on this distinction, Plaintiffs argued, “Defendants should not be permitted to obtain [a stay] now so as to sidestep the timeline for issuance of the mandate provided in the Federal Rules.” *Id.* Of course, Plaintiffs did not explain why “the timeline for issuance of the

mandate” wasn’t “sidestepped” in those cases, too; as in every case in which an injunction is stayed *pending appeal*, mandates had not issued in those cases, either.

To the broader point, it is true that stays are equitable orders, and equity can consider dilatory actions by a party seeking relief. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (affirming denial of preliminary injunction where party had an “unexplained five-month delay in seeking” relief). But Defendants have not sat on their hands. They sought expedited briefing and review on appeal. *See* CA11 Doc. 12. Then, within two-and-a-half weeks of this Court issuing its decision—and soon after Plaintiffs’ counsel issued a press release proclaiming that they were relying on the injunction remaining in effect while they sought en banc review—Defendants asked the district court to stay its injunction by September 22. Doc. 313 at 6, 11; *see* Fed. R. App. P. 8(a)(1) (“A party must ordinarily move first in the district court....”). When the district court finally ruled on November 17, Defendants filed this motion less than a week later. There was no delay.

To prevent further harm, Defendants should be able to start enforcing Alabama’s law *now*. “If the injunction remains in place during” further aspects of the appeal, the State “will suffer irreparable harm from its inability to enforce the will of its legislature, to further the public-health considerations undergirding the law, and to avoid irreversible health risks to its children.” *L.W. by and through Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023) (staying injunction of similar law in

Tennessee). That these harms have been occurring for the past year-and-a-half is bad enough. They should not continue for another year (or more²) while Defendants wait for the mandate to issue or final vindication on the merits.

III. The Equities Favor A Stay.

The remaining equities favor a stay for similar reasons. The public interest lies in the enforcement of Alabama's presumptively valid law. Alabama's "elected representatives" made the "precise cost-benefit decisions" regarding the sex-modification "treatments" at issue and concluded that they are too dangerous to administer to minors. *L.W.*, 73 F.4th at 421. Whether "the procedures create health risks that cannot be undone" or "the absence of such procedures creates risks that cannot be undone" is not a choice "for judges to make." *Id.* "[T]hese types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action." *Eknes-Tucker*, 80 F.4th at 1231.

Moreover, as Defendants previously explained, "[n]ot only is it impossible to tell who would benefit from the interventions if they worked the way Plaintiffs and

² "See, e.g., *Laufer v. Arpan LLC*, 65 F.4th 615 (11th Cir. 2023) (en banc) (denying rehearing en banc rehearing on panel opinion issued on March 23, 2022); *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138 (11th Cir. 2022) (en banc) (denying rehearing en banc on panel opinion issued on Sept. 17, 2020); *Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. 2022) (en banc) (denying rehearing en banc on panel opinion issued on Nov. 20, 2020); *United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730 (11th Cir. 2021) (en banc) (denying rehearing en banc on panel opinion issued on Sept. 17, 2019)." *W. Virginia*, 82 F.4th at 1072 n.3 (Rosenbaum, J., dissenting from the denial of rehearing en banc).

their *amici* say, but the evidence does not even show that the treatments offer long-term benefits even when they are administered under the most conservative conditions.” Defs’ Op. Br., CA11 Doc. 31 at 59. And Alabama’s medical professionals can manage Plaintiffs’ mental health in other ways, including through existing or innovative psychotherapy. *See id.* at 31; Declaration of Dianna Kenny, Doc. 69-7 at 37-44.

Last, it should be noted that any Minor Plaintiffs using sex-modification procedures—and nearly all the Plaintiffs who are still minors do *not* appear to be using such procedures (Doc. 159 at 15-16, 19-24)—can be safely tapered off them by their physicians. As Defendants explained below, “the Act permits appropriate and necessary medical care, as long as the purpose of the procedure is not ‘to alter the appearance of or affirm the minor’s perception of his or her gender or sex.’” Doc. 74 at 156 (quoting Ala. Code § 26-26-4(a)). “Thus, prescribing medications to safely *end* a gender-transition procedure does not fall within the Act’s prohibition.” *Id.* And children in Alabama—including those not before the Court, but who are nevertheless still impacted by the continuing injunction—can continue to access safe, proven therapies for gender dysphoria. *Id.* at 12.

CONCLUSION

The Court should stay the district court’s preliminary injunction pending appeal.

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NOVEMBER 21, 2023

CERTIFICATE OF COMPLIANCE

1. I certify that this motion complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,761 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Federal Rule of Appellate Procedure 32(f).

2. In addition, this motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for State Defendants

CERTIFICATE OF SERVICE

I certify that on November 21, 2023, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for State Defendants

No. 22-11707

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

◆
PAUL A. EKNES-TUCKER, et al.,
Plaintiffs-Appellees,

&

UNITED STATES OF AMERICA
Intervenor-Plaintiff-Appellee,

v.

GOVERNOR OF THE STATE OF ALABAMA, et al.,
Defendants-Appellants.

◆
On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-184-LCB

**APPENDIX TO DEFENDANTS-APPELLANTS' MOTION TO STAY
PRELIMINARY INJUNCTION**

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November 21, 2023

INDEX

TAB

Corrected Opinion & Order Granting Preliminary Injunction	112-1
Eleventh Circuit Opinion Vacating Preliminary Injunction	308
Defendants’ Time-Sensitive Motion to Stay Preliminary Injunction	313
Eleventh Circuit Order Withholding Issuance of Mandate	314
Private Plaintiffs’ Response to Defendants’ Time-Sensitive Motion to Stay Preliminary Injunction.....	316
Defendants’ Reply in Support of Time-Sensitive Motion to Stay Preliminary Injunction.....	317
Order Denying Defendants’ Motion to Stay Preliminary Injunction	368
Motions Hearing Transcript Excerpts (Nov. 2, 2023) ¹	A
Certificate of Service	B

¹ The district court held a motions hearing and status conference on November 2, 2023, at which the court heard argument on a number of matters, including Defendants’ motion to stay the preliminary injunction. Part of that hearing, unrelated to Defendants’ motion to stay, was closed to the public, so the transcript is denoted as “Sealed.” The transcript excerpts reproduced here are only of the portions of the hearing related to the motion to stay. The courtroom was not closed to the public during that portion of the hearing, so Defendants do not seek to file the transcript excerpts under seal.

TAB 112-1

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

PAUL A. EKNES-TUCKER, *et al.*,)
)
Plaintiffs,)
)
v.)
)
STEVE MARSHALL, *et al.*,)
)
Defendants.)

Case No. 2:22-cv-184-LCB

OPINION & ORDER

Several individuals and the United States challenge the constitutionality of the Alabama Vulnerable Child Compassion and Protection Act.¹ In part, the Act restricts transgender minors from utilizing puberty blockers and hormone therapies. Because the Supreme Court and the Court of Appeals for the Eleventh Circuit have made clear that: (1) parents have a fundamental right to direct the medical care of their children subject to accepted medical standards; and (2) discrimination based on gender-nonconformity equates to sex discrimination, the Court finds that there is a substantial likelihood that Section 4(a)(1)–(3) of the Act is unconstitutional and, thus, enjoins Defendants from enforcing that portion of the Act pending trial. However, all other provisions of the Act remain in effect, specifically: (1) the

¹ Based on their oral representations during a May 4, 2022 hearing, Plaintiffs seek to enjoin only Section 4(a)(1)–(3) of the Act. For purposes of this opinion, all references to “the Act” refer to these subdivisions unless noted otherwise.

provision that bans sex-altering surgeries on minors; (2) the provision prohibiting school officials from keeping certain gender-identity information of children secret from their parents; and (3) the provision that prohibits school officials from encouraging or compelling children to keep certain gender-identity information secret from their parents.

I. BACKGROUND

Regarding a child's belief that they might be transgender, Merriam-Webster's Dictionary defines a "transgender" person as one whose gender identity is different from the sex the person had or was identified as having at birth. *Transgender*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). The Dictionary defines "gender identity" as a person's internal sense of being a male or a female. *Gender Identity*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). These terms and definitions are largely consistent with those used by the parties. Accordingly, the Court relies on these terms throughout this opinion, but recognizes that they might mean different things to different people and in different contexts.

According to the uncontradicted record evidence, some transgender minors suffer from a mental health condition known as gender dysphoria. *Tr.* at 30.² Gender dysphoria is a clinically diagnosed incongruence between one's gender identity and

² "*Tr.*" is a consecutively paginated transcript of the two-day preliminary injunction hearing the Court held on May 5–6, 2022. For clarity, the Court cites to the internal pagination of the transcript rather than the ECF pagination.

assigned gender. *DSM-5* (Doc. 69-17) at 4. If untreated, gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. *Tr.* at 20. According to the World Professional Association for Transgender Health (WPATH), an organization whose mission is to promote education and research about transgender healthcare, gender dysphoria in adolescents (minors twelve and over) is more likely to persist into adulthood than gender dysphoria in children (minors under twelve). *WPATH Standards of Care* (Doc. 69-18) at 17.³

In some cases, physicians treat gender dysphoria in minors with a family of medications known as GnRH agonists, commonly referred to as puberty blockers. *Id.* at 24; *Tr.* at 103. After a minor has been on puberty blockers for one to three years, doctors may then use hormone therapies to masculinize or feminize his or her body. *Tr.* at 108–11, 131. The primary effect of these treatments is to delay physical maturation, allowing transgender minors to socially transition their gender while they await adulthood. *Id.* at 105–06, 110–11. For clarity and conciseness, the Court refers to puberty blockers and hormone therapies used for these purposes as “transitioning medications.”

Like all medications, transitioning medications come with risks. *Tr.* at 121–22. Known risks, for example, include loss of fertility and sexual function. *Id.*

³ Plaintiffs, the State, and the United States individually introduced the WPATH standards into evidence during the May 5–6 preliminary injunction hearing.

at 132–33. Nevertheless, WPATH recognizes transitioning medications as established medical treatments and publishes a set of guidelines for treating gender dysphoria in minors with these medications. *WPATH Standards of Care* (Doc. 69-18) at 19. The American Medical Association, the American Pediatric Society, the American Psychiatric Association, the Association of American Medical Colleges, and at least eighteen additional major medical associations endorse these guidelines as evidence-based methods for treating gender dysphoria in minors. *Tr.* at 97–98; *Healthcare Amici Br.* (Doc. 91-1) at 15.⁴

The Alabama Vulnerable Child Compassion and Protection Act states in pertinent part:

Section 4. (a) . . . [N]o person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex as defined in this act:

- (1) Prescribing or administering puberty blocking medication to stop or delay normal puberty.
- (2) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females.
- (3) Prescribing or administering supraphysiologic doses of estrogen to males.

⁴ For a full list of the twenty-two major medical associations that endorse these guidelines, see *infra* note 12.

(4) Performing surgeries that sterilize, including castration, vasectomy, hysterectomy, oophorectomy, orchiectomy, and penectomy.

(5) Performing surgeries that artificially construct tissue with the appearance of genitalia that differs from the individual's sex, including metoidioplasty, phalloplasty, and vaginoplasty.

(6) Removing any healthy or non-diseased body part or tissue, except for a male circumcision.

...

(c) A violation of this section is a Class C felony.

Section 5. No nurse, counselor, teacher, principal, or other administrative official at a public or private school attended by a minor shall do either of the following:

(1) Encourage or coerce a minor to withhold from the minor's parent or legal guardian the fact that the minor's perception of his or her gender or sex is inconsistent with the minor's sex.

(2) Withhold from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex.

S.B. 184, ALA. 2022 REG. SESS. §§ 4–5 (Ala. 2022). The Act defines a “minor” as anyone under the age of nineteen. *Id.* § 3(1); ALA. CODE § 43-8-1(18). The Act defines “sex” as “[t]he biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles.”

S.B. 184, ALA. 2022 REG. SESS. § 3(3) (Ala. 2022).

In support of these prohibitions, the Legislature made several legislative findings. *Id.* § 2. The Legislature found in part that “[s]ome in the medical community are aggressively pushing” minors to take transitioning medications, which the Act describes as “unproven, poorly studied . . . interventions” that cause “numerous harmful effects for minors, as well as risks of effects simply unknown due to the new and experimental nature of these interventions.” *Id.* § 2(6), (11). The Legislature went on to find that “[m]inors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications” of these treatments. *Id.* § 2(15). Thus, the Legislature concluded, “the decision to pursue” these treatments “should not be presented to or determined for minors[.]” *Id.* § 2(16).

Alabama legislators passed the Act on April 7, 2022.⁵ Governor Kay Ivey signed the Act into law the following day.⁶ In the week that followed, civil rights groups filed two lawsuits challenging the Act’s constitutionality.⁷ In *Ladinsky v. Ivey*, Case No. 2:22-cv-447 (N.D. Ala. 2022), several plaintiffs challenged the Act in the United States District Court of the Northern District of Alabama. The case

⁵ Jo Yurcaba, *Alabama Passes Bills to Target Trans Minors and LGBTQ Classroom Discussion*, NBCNEWS.COM (Apr. 7, 2022, 4:22 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/alabama-passes-bills-targeting-trans-minors-lgbtq-classroom-discussion-rcna23444>.

⁶ Madeleine Carlisle, *Alabama’s Wave of Anti-LGBTQ Legislation Could Have National Consequences*, TIME.COM (Apr. 15, 2022, 11:40 AM), <https://time.com/6167472/alabama-anti-lgbtq-legislation/>.

⁷ *Alabama Law Banning Transgender Medication Challenged in Two Lawsuits*, CBSNEWS.COM (Apr. 11, 2022, 10:05 PM), <https://www.cbsnews.com/news/alabama-transgender-law-lawsuits/>.

was randomly assigned to United States District Judge Anna M. Manasco. Judge Manasco recused, and the case was randomly reassigned to United States Magistrate Judge Staci G. Cornelius. After the parties declined to proceed before Judge Cornelius in accordance with 28 U.S.C. § 636(c), the case was randomly reassigned to the Honorable Annemarie C. Axon.

With *Ladinsky* pending, a separate set of plaintiffs challenged the Act in the United States District Court of the Middle District of Alabama. That case, styled *Walker v. Marshall*, Case No. 2:22-cv-167 (M.D. Ala. 2022), was randomly assigned to Chief United States District Judge Emily C. Marks. The *Walker* plaintiffs moved to enjoin enforcement of the Act and moved to reassign the case to United States District Judge Myron H. Thompson, alleging that he had previously presided over a similar case. The parties, however, later consented to transferring the case to the Northern District of Alabama for consolidation with *Ladinsky*. At that time, the *Walker* plaintiffs withdrew their motion to reassign.

On April 15, 2022, Chief Judge Marks transferred *Walker* to the Northern District of Alabama in accordance with the “first-filed” rule and 28 U.S.C. § 1404(a). The case was randomly assigned to this Court. Judge Axon then transferred *Ladinsky* to this Court for consolidation with *Walker*. That same day, at 6:24 p.m. CDT, the *Walker* plaintiffs filed a notice of voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i). The *Ladinsky* plaintiffs voluntarily

dismissed their case nine minutes later. Neither the *Walker* plaintiffs nor the *Ladinsky* plaintiffs explained their respective dismissals, but counsel for *Ladinsky* informed the press: “We do plan to refile imminently[.]”⁸

Sure enough, on April 19, four transgender minors (Minor Plaintiffs), their parents (Parent Plaintiffs), a child psychologist and a pediatrician (Healthcare Plaintiffs), and Reverend Paul A. Eknes-Tucker filed this suit in the United States District Court of the Middle District of Alabama and moved to enjoin the Act’s enforcement pending trial. The case was randomly assigned to United States District Judge R. Austin Huffaker, Jr. Due to this Court’s familiarity with *Ladinsky* and *Walker*, Judge Huffaker reassigned the case to this Court to expedite disposition of Plaintiffs’ motion for preliminary injunction. With the Act set to take effect on May 8, the Court entered an abbreviated briefing schedule and set a hearing on Plaintiffs’ motion for May 5–6.

Just days before the hearing, the United States moved to intervene on behalf of Plaintiffs under Federal Rule of Civil Procedure 24.⁹ In the process, the United States filed its own motion to enjoin enforcement of the Act and requested to

⁸ Paul Gattis, *Lawsuits Seeking to Overturn New Alabama Transgender Law Dropped, Could be Refiled*, AL.COM, <https://www.al.com/news/2022/04/lawsuits-seeking-to-overturn-new-alabama-transgender-law-dropped-could-be-refiled.html> (last updated Apr. 16, 2022, 9:22 PM).

⁹ The United States’s amended intervenor complaint does not add any additional claims, name any new defendants, or seek to expand the relief sought by Plaintiffs. *Compare Am. Intervenor Compl.* (Doc. 92) at 4–5, 13–14, *with Compl.* (Doc. 1) at 6–8, 28–35.

participate in the preliminary injunction hearing. Additionally, fifteen states moved for leave to proceed as *amici curiae*¹⁰ and to file a brief in support of Defendants.¹¹ Twenty-two healthcare organizations also moved for leave to proceed as *amici curiae* and to file a brief in support of Plaintiffs.¹² Ultimately, the Court granted these motions in full, took the *amici* briefs under advisement, and gave the United States leave to participate during the preliminary injunction hearing.

During that hearing, the parties submitted hundreds of pages of medical evidence and called several live witnesses. Plaintiffs tendered Dr. Linda Hawkins and Dr. Morissa Ladinsky as experts in the treatment of gender dysphoria in minors. *Tr.* at 16, 92. Dr. Hawkins and Dr. Ladinsky testified that at least twenty-two major

¹⁰ *Amici curiae*, Latin for “friends of the court,” refers to a group of people or institutions who are not parties to a lawsuit, but petition the court (or are requested by the court) to file a brief in the action because they have “a strong interest in the subject matter.” *Amicus Curiae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹ The State *Amici* are the States of Arkansas, Alaska, Arizona, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

¹² The Healthcare *Amici* are the American Academy of Pediatrics; the Alabama Chapter of the American Academy of Pediatrics; the Academic Pediatric Association; the American Academy of Child and Adolescent Psychiatry; the American Academy of Family Physicians; the American Academy of Nursing; the American Association of Physicians for Human Rights, Inc. *d/b/a* Health Professionals Advancing LGBTQ Equality; the American College of Obstetricians and Gynecologists; the American College of Osteopathic Pediatricians; the American College of Physicians; the American Medical Association; the American Pediatric Society; the American Psychiatric Association; the Association of American Medical Colleges; the Association of Medical School Pediatric Department Chairs; the Endocrine Society; the National Association of Pediatric Nurse Practitioners; the Pediatric Endocrine Society; the Society for Adolescent Health and Medicine; the Society for Pediatric Research; the Society of Pediatric Nurses; the Societies for Pediatric Urology; and the World Professional Association for Transgender Health.

medical associations in the United States endorse transitioning medications as well-established, evidence-based methods for treating gender dysphoria in minors. *Id.* at 25, 97–98, 126–27. They opined that there are risks associated with transitioning medications, but that the benefits of treating minors with these medications outweigh these risks in certain cases. *Id.* at 57–58, 121–22, 136, 170. They also explained that minors and their parents undergo a thorough screening process and give informed consent before any treatment regimen begins. *Id.* at 41, 59, 132; *see also Consent Form* (Doc. 78-41) at 1–14. Finally, they testified that, without these medications, minors with gender dysphoria suffer significant deterioration in their familial relationships and educational performance. *Tr.* at 35, 112–13.

Plaintiffs also called Healthcare Plaintiff Dr. Rachel Koe (a licensed pediatrician), Plaintiff Eknes-Tucker, and Parent Plaintiff Megan Poe to testify about their personal knowledge and experiences regarding the treatment of gender dysphoria in minors. *Id.* at 150–51, 170–71, 195. Parent Plaintiff Megan Poe specifically described the positive effects transitioning treatments have had on her fifteen-year-old transgender daughter, Minor Plaintiff Allison Poe. *Id.* at 157–68.

According to Megan, Allison was born a male, but has shown evidence of identifying as a female since she was two-years-old. *Id.* at 153–54. During her early adolescent years, Allison suffered from severe depression and suicidality due to gender dysphoria. *Id.* at 156–57. She began taking transitioning medications at the

end of her sixth-grade year, and her health significantly improved as a result. *Id.* at 163. Megan explained that the medications have had no adverse effects on Allison and that Allison is now happy and “thriving.” *Id.* at 166–67. When asked what would occur if her daughter stopped taking the medications, Megan responded that she feared her daughter would commit suicide. *Id.* at 167.

Intervening on behalf of Plaintiffs, the United States tendered Dr. Armand H. Antommaria as an expert in bioethics and treatment protocols for adolescents suffering from gender dysphoria. *Id.* at 213–26. He reiterated that transitioning medications are well-established, evidence-based methods for treating gender dysphoria in minors. *Id.* at 120–21.

Defendants called two witnesses. *Id.* at 253, 337. First, Defendants tendered Dr. James Cantor—a private psychologist in Toronto, Canada—to testify as an expert on psychology, human sexuality, research methodology, and the state of the research literature on gender dysphoria and its treatment. *Id.* at 253–54. Dr. Cantor opined that, due to the risks of transitioning medications, doctors should use a “watchful waiting” approach to treat gender dysphoria in minors. *Id.* at 281. That approach, according to Dr. Cantor, “refers specifically to withholding any decision about medical interventions until [doctors] have a better idea or feel more confident” that the minor’s gender dysphoria will persist without medical intervention other than counseling. *Id.* Dr. Cantor further testified that several European countries have

restricted treating minors with transitioning medications due to growing concern about the medications' risks. *Id.* at 296–97.

On cross examination, however, Dr. Cantor admitted that: (1) his patients are, on average, thirty years old; (2) he had never provided care to a transgender minor under the age of sixteen; (3) he had never diagnosed a child or adolescent with gender dysphoria; (4) he had never treated a child or adolescent for gender dysphoria; (5) he had no personal experience monitoring patients receiving transitioning medications; and (6) he had no personal knowledge of the assessments or treatment methodologies used at any Alabama gender clinic. *Id.* at 306–09. Accordingly, the Court gave his testimony regarding the treatment of gender dysphoria in minors very little weight. Dr. Cantor also testified that no country in Europe (or elsewhere) has categorically banned treating gender dysphoria in minors with transitioning medications. *Id.* at 326–28. Unlike the Act, Dr. Cantor added, those countries allow such treatments under certain circumstances and for research purposes. *Id.* at 327–28.

Defendants' other witness was Sydney Wright, a twenty-three-year-old woman who took hormone therapies for gender dysphoria for roughly a year beginning when she was nineteen. *Id.* at 338, 351, 357. She testified that she now believes taking the medication was a mistake and that she no longer believes gender dysphoria is a legitimate medical diagnosis. *Id.* at 348–49, 355. She also testified

that she received her treatments in Georgia and never visited a gender clinic in Alabama. *Id.* at 359–61.

II. LEGAL STANDARDS

The purpose of a preliminary injunction “is to preserve the positions of the parties” pending trial. *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). When a federal court preliminarily enjoins a state law passed by duly elected officials, the court effectively overrules a decision “of the people and, thus, in a sense interferes with the processes of democratic government.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). This is an extraordinary and drastic remedy. *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998).

To receive a preliminary injunction, a movant must show that: (1) he or she has a substantial likelihood of success on the merits; (2) he or she will suffer irreparable injury absent injunctive relief; (3) the threatened injury to him or her “outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). The movant bears the burden of persuasion on each element. *State of Fla. v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271, 1279 (11th Cir. 2021).

III. DISCUSSION

Plaintiffs and the United States seek to enjoin Section 4(a)(1)–(3) of the Act pending trial under Federal Rule of Civil Procedure 65. *Pls.’ Mot.* (Doc. 7) at 2; *Intervenor Pl.’s Mot.* (Doc. 62) at 2. Under this rule, a court may issue a preliminary injunction only after giving notice to the adverse party. FED. R. CIV. P. 65(a)(1). Where injunctive relief is appropriate, the movant must give security “to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” *Id.* at 65(c). Here, Defendants have received proper notice. The Court addresses whether Plaintiffs are entitled to preliminary injunctive relief before turning to the issue of security.

A. Substantial Likelihood of Success on the Merits

The Court first considers whether Plaintiffs are substantially likely to succeed on their claims. When a plaintiff brings multiple claims, a reviewing court must consider the plaintiff’s likelihood of success on each claim. *See N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1226 (11th Cir. 2008). Here, Plaintiffs bring five causes of action: four constitutional claims and one preemption claim. The Court begins with Plaintiffs’ constitutional claims.

1. Plaintiffs’ Constitutional Claims

Plaintiffs’ constitutional claims arise under the Civil Rights Act of 1871, 42 U.S.C. § 1983. *Compl.* (Doc. 1) at 28–30, 33–35. That statute guarantees “a

federal forum for claims of unconstitutional treatment at the hands of state officials[.]” *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). To state a claim under § 1983, a plaintiff must allege: (1) the defendant deprived him of a right secured under federal law or the Constitution; and (2) such deprivation occurred under color of state law. *Richardson v. Johnson*, 598 F.3d 734, 737 (11th Cir. 2010) (per curiam).

Parent Plaintiffs claim that the Act violates their constitutional right to direct the medical care of their children under the Due Process Clause of the Fourteenth Amendment. *Compl.* (Doc. 1) at 28–29. Minor Plaintiffs assert that the Act discriminates against them based on their sex in violation of the Fourteenth Amendment. *Id.* at 29–30. Plaintiffs collectively allege that the Act is void for vagueness under the Fifth and Fourteenth Amendments. *Id.* at 34–35. Finally, Plaintiffs collectively claim that the Act unlawfully restricts their speech under the First Amendment. *Id.* at 33–34. The Court addresses Plaintiffs’ claims in that order.

i. Substantive Due Process Claim

Parent Plaintiffs assert that the Act violates their constitutional right to direct the medical care of their children under the Fourteenth Amendment. *Compl.* (Doc. 1) at 28–29.¹³ The Due Process Clause provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. XIV.

¹³ Based on the record evidence, the Court finds that Parent Plaintiffs have standing to bring their Substantive Due Process Claim. Defendants raise no opposition to this conclusion.

The Clause protects against governmental violations of “certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). Fundamental rights are “those guaranteed by the Bill of Rights as well as certain ‘liberty’ and privacy interests implicit in the [D]ue [P]rocess [C]lause and the penumbra of constitutional rights.” *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005).

A parent’s right “to make decisions concerning the care, custody, and control of their children” is one of “the oldest of the fundamental liberty interests” recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). Encompassed within this right is the more specific right to direct a child’s medical care. *See Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (recognizing “the right of parents to generally make decisions concerning the treatment to be given to their children”).¹⁴ Accordingly, parents “retain plenary authority to seek such care for their children, subject to a physician’s independent examination and medical judgment.” *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

Against this backdrop, Parent Plaintiffs are substantially likely to show that they have a fundamental right to treat their children with transitioning medications subject to medically accepted standards and that the Act infringes on that right. The

¹⁴ *See also PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (explaining that “the Due Process Clause provides some level of protection for parents’ decisions regarding their children’s medical care”).

Act prevents Parent Plaintiffs from choosing that course of treatment for their children by criminalizing the use of transitioning medications to treat gender dysphoria in minors, even at the independent recommendation of a licensed pediatrician. Accordingly, Parent Plaintiffs are substantially likely to show that the Act infringes on their fundamental right to treat their children with transitioning medications subject to medically accepted standards.

The State counters that parents have no fundamental right to treat their children with experimental medications. *Defs.’ Br.* (Doc. 74) at 120. To be sure, the parental right to autonomy is not limitless; the State may limit the right and intercede on a child’s behalf when the child’s health or safety is in jeopardy. *Bendiburg*, 909 F.2d at 470. But the fact that a pediatric treatment “involves risks does not automatically transfer the power” to choose that treatment “from the parents to some agency or officer of the state.” *Parham*, 442 U.S. at 603.

Defendants produce no credible evidence to show that transitioning medications are “experimental.” While Defendants offer some evidence that transitioning medications pose certain risks, the uncontradicted record evidence is that at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. Indeed, according to Defendants’ own expert, no country or state in the world categorically bans their use as Alabama

has. Certainly, the science is quickly evolving and will likely continue to do so. But this is true of almost every medical treatment regimen. Risk alone does not make a medication experimental.

Moreover, the record shows that medical providers have used transitioning medications for decades to treat medical conditions other than gender dysphoria, such as central precocious puberty, a condition in which a child enters puberty at a young age. Doctors have also long used hormone therapies for patients whose natural hormone levels are below normal. Based on the current record, Defendants fail to show that transitioning medications are experimental. Thus, Parent Plaintiffs are substantially likely to show that the Act violates their fundamental right to treat their children with transitioning medications subject to medically accepted standards.

Statutes that infringe on fundamental rights are constitutional only when they satisfy the most demanding standard of judicial review, strict scrutiny. *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001). To satisfy strict scrutiny, a statute must be “narrowly tailored” to achieve “a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). The State’s interest in “safeguarding the physical and psychological well-being of a minor is a compelling one.” *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) (cleaned up).

Defendants proffer that the purpose of the Act is “to protect children from experimental medical procedures,” the consequences of which neither they nor their parents often fully appreciate or understand. *Defs.’ Br.* (Doc. 74) at 129; *see also* S.B. 184, ALA. 2022 REG. SESS. § 2(13)–(15) (Ala. 2022). Defendants also allege that the Act halts medical associations from “aggressively pushing” transitioning medications on minors. *Defs.’ Br.* (Doc. 74) at 114; *see also* S.B. 184, ALA. 2022 REG. SESS. § 2(6) (Ala. 2022).

But as explained above, Defendants fail to produce evidence showing that transitioning medications jeopardize the health and safety of minors suffering from gender dysphoria. Nor do Defendants offer evidence to suggest that healthcare associations are aggressively pushing these medications on minors. Instead, the record shows that at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. The record also indicates that parents undergo a thorough screening and consent process before they may choose these medications for their children.

Undoubtedly, transitioning medications carry risks. But again, the fact that pediatric medication “involves risks does not automatically transfer the power” to choose that medication “from the parents to some agency or officer of the state.” *Parham*, 442 U.S. at 603. Parents, pediatricians, and psychologists—not the State or

this Court—are best qualified to determine whether transitioning medications are in a child’s best interest on a case-by-case basis. Defendants’ proffered purposes—which amount to speculative, future concerns about the health and safety of unidentified children—are not genuinely compelling justifications based on the record evidence. For this reason alone, the Act cannot survive strict scrutiny at this stage of litigation.

But even if Defendants’ proffered purposes are genuinely compelling, the Act is not narrowly tailored to achieve those interests. A narrowly tailored statute employs the “least restrictive means” necessary to achieve its purpose. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). A statute is not narrowly tailored when “numerous and less-burdensome alternatives” are available to advance the statute’s purpose. *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1299 (11th Cir. 2017). Put differently, “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000).

Defendants applaud the efforts of several European countries to restrict minors from taking transitioning medications, but unlike Alabama’s Act, these countries allow minors to take transitioning medications in exceptional circumstances on a case-by-case basis. *Defs.’ Br.* (Doc. 74) at 76–82. According to Dr. Cantor, Defendants’ own expert witness, no state or country in the entire world

has enacted a blanket ban of these medications other than Alabama. *Tr.* at 328. The Act, unlike the cited European regulations, does not even permit minors to take transitioning medications for research purposes, even though Defendants adamantly maintain that more research on them is needed. *Id.* at 326–27; *Defs.’ Br.* (Doc. 74) at 116. Because Defendants themselves offer several less restrictive ways to achieve their proffered purposes, the Act is not narrowly tailored at this stage of litigation.

In sum, Parent Plaintiffs have a fundamental right to direct the medical care of their children. This right includes the more specific right to treat their children with transitioning medications subject to medically accepted standards. The Act infringes on that right and, as such, is subject to strict scrutiny. At this stage of litigation, the Act falls short of that standard because it is not narrowly tailored to achieve a compelling government interest. Accordingly, Parent Plaintiffs are substantially likely to succeed on their Substantive Due Process claim.

ii. Equal Protection Claim

Minor Plaintiffs claim that the Act discriminates against them based on their sex in violation of the Fourteenth Amendment. *Compl.* (Doc. 1) at 29–30.¹⁵ The Equal Protection Clause provides that no State shall “deny to any person within its

¹⁵ Based on the record evidence, the Court finds that Minor Plaintiffs have standing to bring their Equal Protection claim. Defendants raise no opposition to this conclusion. However, Parent Plaintiffs, Healthcare Plaintiffs, and Plaintiff Eknes-Tucker do not explain—nor is it readily apparent—how they have standing to bring an Equal Protection claim and, thus, are not substantially likely to succeed on the merits of their claim.

jurisdiction the equal protection of the laws.” U.S. CONST. AMEND. XIV, § 1. The Clause’s chief purpose “is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)).

As the Supreme Court recently explained, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). Governmental classification based on an individual’s gender nonconformity equates to a sex-based classification for purposes of the Equal Protection Clause. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011). Here, the Act prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity. *See* S.B. 184, ALA. 2022 REG. SESS. § 4(a)(1)–(3) (Ala. 2022). The Act therefore constitutes a sex-based classification for purposes of the Fourteenth Amendment.

The State views things differently. The State argues that the Act creates two categories of people: (1) minors who seek transitioning medications “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex”;

and (2) “all other minors.” *Defs.’ Br.* (Doc. 74) at 93. (quoting S.B. 184, ALA. 2022 REG. SESS. § 4(a) (Ala. 2022)). Because transgender minors fall into both categories, the State reasons, the Act is not a sex-based classification. *Id.* at 94.

The fundamental flaw in this argument is that the first category consists entirely of transgender minors. The Act categorically prohibits transgender minors from taking transitioning medications due to their gender nonconformity. In this way, the Act places a special burden on transgender minors because their gender identity does not match their birth sex. The Act therefore amounts to a sex-based classification for purposes of the Equal Protection Clause. *See Glenn*, 663 F.3d at 1317 (explaining that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”).

Sex-based classifications are constitutional only when they satisfy a heightened standard of review known as intermediate scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). To satisfy this standard, a classification must substantially relate to an important government interest. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The State bears the burden to proffer an exceedingly persuasive justification for the classification. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). An exceedingly persuasive justification is one that is “genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The State again argues that the Act’s purpose is to protect minors from experimental medications and to stop medical providers from “aggressively pushing” these medications on minors. *Defs.’ Br.* (Doc. 74) at 109–120. As explained above, the State puts on no evidence to show that transitioning medications are “experimental.” The record indicates that at least twenty-two major medical associations in the United States endorse these medications as well-established, evidence-based methods for treating gender dysphoria in minors. *Tr.* at 25, 97–98, 126–27. Finally, nothing in the record shows that medical providers are pushing transitioning medications on minors. Accordingly, the State’s proffered justifications are hypothesized, not exceedingly persuasive. Thus, Minor Plaintiffs are substantially likely to succeed on their Equal Protection claim.

iii. Void-for-Vagueness Claim

Plaintiffs collectively claim that the Act is void for vagueness under the Fifth and Fourteenth Amendments because it does not sufficiently define “what actions constitute ‘caus[ing]’ any of the proscribed activities upon a minor.” *Compl.* (Doc. 1) at 34–35. Under the void-for-vagueness doctrine, a penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *United States v. Marte*, 356 F.3d 1336, 1342 (11th Cir. 2004) (quoting *United States v. Fisher*, 289 F.3d 1329, 1333

(11th Cir. 2002)). A federal court reviews a void-for-vagueness claim only when the litigant alleges a constitutional harm. *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1349–50 (11th Cir. 2011).

In this context, constitutional harm comes in two forms: (1) where a criminal defendant violates a vague statute, comes under prosecution, and then moves to dismiss the charges on the grounds that he or she lacked notice that his or her conduct was unlawful; and (2) where a civil plaintiff is “chilled from engaging in constitutional activity” due to a vague statute. *Dana’s R.R. Supply v. Att’y Gen.*, 807 F.3d 1235, 1241 (11th Cir. 2015). Here, Plaintiffs’ void-for-vagueness claim falls into the second category.

Plaintiffs, however, are not substantially likely to succeed on their claim. Under ALA. CODE § 13A-2-5(a), a person is liable for causing a crime “if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient.” The fact that the Act has a scienter requirement greatly weighs against Plaintiffs’ void-for-vagueness claim. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (“The Court has made clear that scienter requirements alleviate vagueness concerns.”); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (“This Court has long recognized that the constitutionality of a

vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.”).

Also weighing against Plaintiffs’ claim is the State’s interpretation of the Act. During the preliminary injunction hearing, Alabama Solicitor General Edmund LaCour explained that a person must administer or prescribe transitioning medications to violate the Act. *Tr.* at 409–11. General LaCour opined that a person cannot violate the Act simply by advising a minor to take transitioning medications or by driving a minor to a gender clinic where transitioning medications are administered. *Id.* at 410.

Additionally, the statutory scienter requirement and the State’s interpretation both align with the modern, plain-language definition of the word cause. According to Merriam-Webster’s Dictionary, “cause” means to “effect by command, authority, or force” or “bring into existence” an action. *Cause*, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). Based on the record evidence, Plaintiffs do not show that they have been chilled from engaging in constitutional activity due to the Act. Plaintiffs are therefore not substantially likely to succeed on their void-for-vagueness claim at this stage of litigation.

iv. Free Speech Claim

Plaintiffs collectively claim that the Act violates their First Amendment right to free speech by prohibiting “any ‘person,’ including physicians, healthcare

professionals, or even parents, from engaging in speech that would ‘cause’ a transgender minor to receive medical treatment for gender dysphoria.” *Compl.* (Doc. 1) at 33–34. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech[.]” U.S. CONST. AMEND. I. At its core, “the First Amendment means that government” generally “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The Amendment, however, offers no protection to words that incite or constitute criminal activity. For example, sexually derogatory remarks may violate Title VII’s general prohibition of sexual discrimination in the workplace. 42 U.S.C. § 2000-e2; *see also* 29 C.F.R. § 1604.11(a) (explaining that, under certain circumstances, “[u]nwelcome sexual advances, *requests* for sexual favors, and other *verbal* or physical conduct of a sexual nature” are actionable as sexual harassment under Title VII (emphasis added)). Likewise, “[s]peech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.” *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). More examples abound, but the point is this: Where the State “does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

As explained *supra* Section III.A.1.iii, the Act does not criminalize speech that could indirectly lead to a minor taking transitioning medications. Rather, the only speech criminalized by Act is that which compels the administration or prescription of transitioning medications to minors. Accordingly, the Act targets conduct (administration and prescription), not speech. Plaintiffs are therefore not substantially likely to succeed on their First Amendment claim.

2. *Plaintiffs' Preemption Claim*

Parent Plaintiffs, Minor Plaintiffs, and Healthcare Plaintiffs bring their preemption claim under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. *Compl.* (Doc. 1) at 31. Section 1557, through its incorporation of the Title IX, prohibits discrimination based on sex and the denial of benefits based on sex in any health program or activity that receives federal funding. 42 U.S.C. § 18116(a); 20 U.S.C. § 1681 *et seq.* Here, Plaintiffs generally rely on the same arguments Minor Plaintiffs made in support of their Equal Protection claim. *Pls.' Br.* (Doc. 8) at 49–52; *Tr.* at 379.

At this stage of litigation, Plaintiffs' preemption claim fails. As explained *supra* Section III.A.1.ii, only Minor Plaintiffs are substantially likely to succeed on their Equal Protection claim. Additionally, Section 1557—by incorporating the enforcement mechanism of Title IX—“is enforceable against institutions and programs that receive federal funds, but does not authorize suits against individuals.”

Hill v. Cundiff, 797 F.3d 948, 977 (11th Cir. 2015). It is presently unclear how Plaintiffs may bring their preemption claim against Defendants who are state officials, not institutions. Due to these concerns, Plaintiffs are not substantially likely to succeed on their preemption claim.

B. Irreparable Harm

The Court next considers whether Parent Plaintiffs and Minor Plaintiffs will suffer irreparable harm absent injunctive relief.¹⁶ Harm “is ‘irreparable’ only if it cannot be undone through monetary remedies.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am.*, 896 F.2d at 1285. An irreparable harm is one that is “actual and imminent, not remote or speculative.” *Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013). The risk of suffering severe medical harm constitutes irreparable harm. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (explaining that a risk of suffering “a severe medical setback” is an irreparable injury); *Blaine v. N. Brevard Cnty. Hosp. Dist.*, 312 F. Supp. 3d 1295, 1306 (M.D. Fla. 2018) (finding irreparable harm where doctor plaintiffs could not provide necessary medical care to their patients).

The Act prevents Parent Plaintiffs from treating their children with transitioning medications subject to medically accepted standards. S.B. 184, ALA.

¹⁶ *See Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (explaining that a court need not consider whether a plaintiff shows irreparable harm if he or she does not show a substantial likelihood of success on his or her claims).

2022 REG. SESS. § 4(a)(1)–(3) (Ala. 2022). The record shows that, without these medications, Minor Plaintiffs will suffer severe medical harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality. *Tr.* at 20, 167. Additionally, the evidence shows that Minor Plaintiffs will suffer significant deterioration in their familial relationships and educational performance. *Id.* at 35, 112–13. The Court therefore concludes that Parent Plaintiffs and Minor Plaintiffs will suffer irreparable harm absent injunctive relief.

C. Balance of Harms & Public Interests

The Court now considers the final two elements together. To satisfy the third and fourth elements of a preliminary injunction, a plaintiff must show that the harm she will likely suffer without an injunction outweighs any harm that her opponent will suffer from the injunction and that the injunction would not disserve (or be adverse to) the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). These factors merge when the State is the opponent. *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (per curiam).

This case largely presents two competing interests. On one hand, “preliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other

strict legal and equitable principles that restrain courts.” *Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am.*, 896 F.2d at 1285. On the other hand, “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944).

Based on the record evidence, the Court finds that the imminent threat of harm to Parent Plaintiffs and Minor Plaintiffs—i.e., severe physical and/or psychological harm—outweighs the harm the State will suffer from an injunction. The Court further finds that an injunction is not adverse to the public interest. To the contrary, enjoining the Act upholds and reaffirms the “enduring American tradition” that parents—not the States or federal courts—play the primary role in nurturing and caring for their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Accordingly, the final two factors favor injunctive relief.

IV. SECURITY

Defendants argue that, if injunctive relief is appropriate, the Court should require each Healthcare Plaintiff to post a \$1 million security. *Defs.’ Br.* (Doc. 74) at 159–60.¹⁷ Calculating the “amount of an injunction bond is within the sound discretion of the district court.” *Carillon Importers, Ltd. v. Frank Pesce Int’l Grp.*,

¹⁷ According to Defendants, this amount represents that “by which [Healthcare] Plaintiffs will be unjustly enriched should they be allowed to administer profitable (and illegal) medical procedures to kids.” *Defs.’ Br.* (Doc. 74) at 160.

112 F.3d 1125, 1127 (11th Cir. 1997) (per curiam). Here, the Court finds that a security bond is not necessary for three reasons. First, as explained *supra* Part III, Healthcare Plaintiffs themselves are not entitled to preliminary injunctive relief. Second, Federal Rule of Civil Procedure 65 does not require the United States to pay security. FED. R. CIV. P. 65(c). Finally, Defendants do not allege that they will suffer any cost or economic harm if they are wrongly enjoined from enforcing the Act. *Defs.’ Br.* (Doc. 74) at 159–60. The Court therefore relieves Plaintiffs from posting security under Rule 65.

V. CONCLUSION

For these reasons, the Court **GRANTS** in part Plaintiffs’ motion for preliminary injunction (Doc. 7) and **ENJOINS** Defendants from enforcing Section 4(a)(1)–(3) of the Act pending trial. The Court **GRANTS** in part the United States’s motion for preliminary injunction (Doc. 62) to the same degree and effect. All other provisions of the Act remain enforceable.

DONE and **ORDERED** May 13, 2022.



LILES C. BURKE
UNITED STATES DISTRICT JUDGE

TAB 308

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 21, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-11707-JJ

Case Style: Paul Eknes-Tucker, et al v. Governor of the State of Alabama, et al

District Court Docket No: 2:22-cv-00184-LCB-SRW

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Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@call.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellees.

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OPIN-1A Issuance of Opinion With Costs

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11707

PAUL A. EKNES-TUCKER,

Rev.,

BRIANNA BOE,

individually and on behalf of her minor son, Michael Boe,

JAMES ZOE,

individually and on behalf of his minor son, Zachary Zoe,

MEGAN POE,

individually and on behalf of her minor daughter, Allison Poe,

KATHY NOE, et al.,

individually and on behalf of her minor son, Christopher Noe,

Plaintiffs-Appellees,

versus

GOVERNOR, OF THE STATE OF ALABAMA,

ATTORNEY GENERAL, STATE OF ALABAMA,

DISTRICT ATTORNEY, FOR MONTGOMERY COUNTY,
DISTRICT ATTORNEY, FOR CULLMAN COUNTY,
DISTRICT ATTORNEY, FOR LEE COUNTY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:22-cv-00184-LCB-SRW

Before LAGOA, BRASHER, Circuit Judges, and BOULEE,* District Judge.

LAGOA, Circuit Judge:

This appeal centers around section 4(a)(1)–(3) of Alabama’s Vulnerable Child Compassion and Protection Act (the “Act”). Section 4(a)(1)–(3) of the Act states that “no person shall engage in or cause” the prescription or administration of puberty blocking medication or cross-sex hormone treatment to a minor “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex.” Thus, section 4(a)(1)–(3)

* Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

makes it a crime in the State of Alabama to take part in providing puberty blockers or cross-sex hormone treatment to a minor for purposes of treating a discordance between the minor’s biological sex and sense of gender identity.

Shortly after the Act was signed into law, a group of transgender minors, their parents, and other concerned individuals challenged the Act’s constitutionality, claiming that it violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. As part of that lawsuit, the district court issued a preliminary injunction enjoining Alabama from enforcing section 4(a)(1)–(3) of the Act pending trial, having determined that the plaintiffs are substantially likely to succeed on both of the aforementioned claims. Specifically, as to the due process claim, the district court held that there is a constitutional right to “treat [one’s] children with transitioning medications subject to medically accepted standards” and that the restrictions of section 4(a)(1)–(3) likely impermissibly infringe upon that constitutional right. As to the equal protection claim, the district court held that section 4(a)(1)–(3) classifies on the basis of sex by classifying on the basis of gender nonconformity and likely amounts to unlawful discrimination under the intermediate scrutiny standard applicable to sex-based classifications.

On review, we hold that the district court abused its discretion in issuing this preliminary injunction because it applied the wrong standard of scrutiny. The plaintiffs have not presented any authority that supports the existence of a constitutional right to

“treat [one’s] children with transitioning medications subject to medically accepted standards.” Nor have they shown that section 4(a)(1)–(3) classifies on the basis of sex or any other protected characteristic. Accordingly, section 4(a)(1)–(3) is subject only to rational basis review. Because the district court erred by reviewing the statute under a heightened standard of scrutiny, its determination that the plaintiffs have established a substantial likelihood of success on the merits cannot stand. We therefore vacate the preliminary injunction.

I. BACKGROUND

The Act was passed by the Alabama Legislature on April 7, 2022, and signed into law by Governor Kay Ivey the following day, thereby set to become effective on May 8, 2022.

A. *The Text of the Act*

The Act contains eleven sections. For the sake of completeness, each section is described below.

Section 1 establishes the title of the Act.

Section 2 sets forth the following findings by the Alabama Legislature:

- (1) The sex of a person is the biological state of being female or male, based on sex organs, chromosomes, and endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed.

22-11707

Opinion of the Court

5

(2) Some individuals, including minors, may experience discordance between their sex and their internal sense of identity, and individuals who experience severe psychological distress as a result of this discordance may be diagnosed with gender dysphoria.

(3) The cause of the individual's impression of discordance between sex and identity is unknown, and the diagnosis is based exclusively on the individual's self-report of feelings and beliefs.

(4) This internal sense of discordance is not permanent or fixed, but to the contrary, numerous studies have shown that a substantial majority of children who experience discordance between their sex and identity will outgrow the discordance once they go through puberty and will eventually have an identity that aligns with their sex.

(5) As a result, taking a wait-and-see approach to children who reveal signs of gender nonconformity results in a large majority of those children resolving to an identity congruent with their sex by late adolescence.

(6) Some in the medical community are aggressively pushing for interventions on minors that medically alter the child's hormonal balance and remove healthy external and internal sex organs when the child expresses a desire to appear as a sex different from his or her own.

(7) This course of treatment for minors commonly begins with encouraging and assisting the

child to socially transition to dressing and presenting as the opposite sex. In the case of prepubertal children, as puberty begins, doctors then administer long-acting GnRH agonist (puberty blockers) that suppress the pubertal development of the child. This use of puberty blockers for gender nonconforming children is experimental and not FDA-approved.

(8) After puberty blockade, the child is later administered “cross-sex” hormonal treatments that induce the development of secondary sex characteristics of the other sex, such as causing the development of breasts and wider hips in male children taking estrogen and greater muscle mass, bone density, body hair, and a deeper voice in female children taking testosterone. Some children are administered these hormones independent of any prior pubertal blockade.

(9) The final phase of treatment is for the individual to undergo cosmetic and other surgical procedures, often to create an appearance similar to that of the opposite sex. These surgical procedures may include a mastectomy to remove a female adolescent’s breasts and “bottom surgery” that removes a minor’s health reproductive organs and creates an artificial form aiming to approximate the appearance of the genitals of the opposite sex.

(10) For minors who are placed on puberty blockers that inhibit their bodies from experiencing the natural process of sexual development, the overwhelming majority will continue down a path toward cross-sex hormones and cosmetic surgery.

(11) This unproven, poorly studied series of interventions results in numerous harmful effects for minors, as well as risks of effects simply unknown due to the new and experimental nature of these interventions.

(12) Among the known harms from puberty blockers is diminished bone density; the full effect of puberty blockers on brain development and cognition are yet unknown, though reason for concern is now present. There is no research on the long-term risks to minors of persistent exposure to puberty blockers. With the administration of cross-sex hormones comes increased risks of cardiovascular disease, thromboembolic stroke, asthma, COPD, and cancer.

(13) Puberty blockers prevent gonadal maturation and thus render patients taking these drugs infertile. Introducing cross-sex hormones to children with immature gonads as a direct result of pubertal blockade is expected to cause irreversible sterility. Sterilization is also permanent for those who undergo surgery to remove reproductive organs, and such persons are likely to suffer through a lifetime of complications from the surgery, infections, and other difficulties requiring yet more medical intervention.

(14) Several studies demonstrate that hormonal and surgical interventions often do not resolve the underlying psychological issues affecting the individual. For example, individuals who undergo cross-sex cosmetic surgical procedures have been found to suffer from elevated mortality rates higher than the general

population. They experience significantly higher rates of substance abuse, depression, and psychiatric hospitalizations.

(15) Minors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications, including permanent sterility, that result from the use of puberty blockers, cross-sex hormones, and surgical procedures.

(16) For these reasons, the decision to pursue a course of hormonal and surgical interventions to address a discordance between the individual's sex and sense of identity should not be presented to or determined for minors who are incapable of comprehending the negative implications and life-course difficulties attending to these interventions.

Section 3 provides definitions for the terms “minor,” “person,” and “sex.” Section 3(1) incorporates the definition of “minor” established in section 43-8-1 of the Alabama Code, first enacted in 1975, which is “[a] person who is under 19 years of age.” Ala. Code § 43-8-1(18). Section 3(2) defines the term “person” to include “[a]ny individual”; “[a]ny agent, employee, official, or contractor of any legal entity”; and “[a]ny agent, employee, official, or contractor of a school district or the state or any of its political subdivisions or agencies.” Section 3(3) defines the term “sex” to mean “[t]he

22-11707

Opinion of the Court

9

biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles.”

Section 4, in broad terms, makes it a felony to perform certain medical practices on minors for certain purposes, and reads as follows:

(a) Except as provided in subsection (b), no person shall engage in or cause any of the following practices to be performed upon a minor if the practice is performed for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex as defined in this act:

- (1) Prescribing or administering puberty blocking medication to stop or delay normal puberty.
- (2) Prescribing or administering supraphysiologic^[1] doses of testosterone or other androgens to females.
- (3) Prescribing or administering supraphysiologic doses of estrogen to males.
- (4) Performing surgeries that sterilize, including castration, vasectomy, hysterectomy, oophorectomy, orchiectomy, and penectomy.

¹ Supraphysiologic means of or pertaining to an amount “greater than normally present in the body.” See *Supraphysiologic*, Merriam-Webster, <https://www.merriam-webster.com/medical/supraphysiological>.

(5) Performing surgeries that artificially construct tissue with the appearance of genitalia that differs from the individual's sex, including metoidioplasty, phalloplasty, and vaginoplasty.

(6) Removing any healthy or non-diseased body part or tissue, except for a male circumcision.

(b) Subsection (a) does not apply to a procedure undertaken to treat a minor born with a medically verifiable disorder of sex development, including either of the following:

(1) An individual born with external biological sex characteristics that are irresolvably ambiguous, including an individual born with 46 XX chromosomes with virilization, 46 XY chromosomes with under virilization, or having both ovarian and testicular tissue.

(2) An individual whom a physician has otherwise diagnosed with a disorder of sexual development, in which the physician has determined through genetic or biochemical testing that the person does not have normal sex chromosome structure, sex steroid hormone production, or sex steroid hormone action for a male or female.

(c) A violation of this section is a Class C felony.

Section 5, in broad terms, prohibits certain school employees from withholding certain information about minor students from their parents and from encouraging or

coercing minor students to do the same. The section reads as follows:

No nurse, counselor, teacher, principal, or other administrative official at a public or private school attended by a minor shall do either of the following:

- (1) Encourage or coerce a minor to withhold from the minor's parent or legal guardian the fact that the minor's perception of his or her gender or sex is inconsistent with the minor's sex.
- (2) Withhold from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex.

Section 6 clarifies that, except as provided for in section 4, nothing in the Act shall be construed as "limiting or preventing" certain mental health professionals from "rendering the services for which they are qualified by training or experience involving the application of recognized principles, methods, and procedures of the science and professional of psychology and counseling."

Section 7 similarly clarifies that "[n]othing in this section shall be construed to establish a new or separate standard of care for hospitals or physicians and their patients or otherwise modify, amend, or supersede" certain other laws of the State of Alabama.

Section 8 is a severability clause. It provides that, "[i]f any part, section, or subsection of [the Act] or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect parts, sections, subsections, or applications of this act

that can be given effect without the invalid part, section, subsection, or application.”

Section 9 clarifies that the Act “does not affect a right or duty afforded to a licensed pharmacist by state law.”

Section 10 clarifies that, “[a]lthough this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds,” it is “excluded from further requirements and application under Amendment 621, as amended by Amendment 890 . . . because [it] defines a new crime or amends the definition of an existing crime.”

Section 11, the final section, establishes that the Act “shall become effective 30 days following its passage and approval by the Governor, or its otherwise becoming law.”

B. Procedural History

On April 19, 2022, a group of plaintiffs initiated this challenge to the Act seeking declaratory and injunctive relief. The group consisted of transgender minors (the “Minor Plaintiffs”), the parents of those transgender minors (the “Parent Plaintiffs”), healthcare providers who regularly treat transgender youth (the “Provider Plaintiffs”), and Reverend Paul A. Eknes-Tucker, the Senior Pastor at Pilgrim Church in Birmingham, Alabama, who

frequently counsels parents of transgender children (collectively, “Plaintiffs”).²

The original complaint generally alleged that: (1) the Act violates the Due Process Clause of the Fourteenth Amendment by depriving the Parent Plaintiffs of their right to direct the upbringing of their children (Count I); (2) the Act violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against the Minor Plaintiffs on the bases of sex and transgender status (Count II); (3) the Act is preempted by section 1557 of the Affordable Care Act (Count III); (4) the Act violates the Free Speech Clause of the First Amendment (Count IV); and (5) the Act is void for vagueness under the Due Process Clause of the Fourteenth Amendment (Count V). That complaint named the Attorney General of Alabama and several state officials (collectively, “Alabama”) as defendants.³

Two days later, Plaintiffs filed a motion for preliminary injunction, seeking a ruling preventing the enforcement of the Act in advance of its May 8, 2022, effective date.⁴ In light of that request,

² Reverend Eknes-Tucker is not included as a plaintiff in the operative pleading, the Second Amended Complaint, nor does he take part in this appeal.

³ The original complaint also included Governor Ivey as a defendant, but the parties subsequently moved to dismiss her from the action on May 3, 2022, pursuant to a joint understanding that she and her office would be bound by any forthcoming injunctive relief. The district court granted that request.

⁴ The motion is styled as a “motion for a temporary restraining order and/or preliminary injunction.” However, because Alabama received notice of the

the district court expedited the briefing schedule and scheduled a hearing for the first week of May.

On April 29, 2022, the United States filed a motion to intervene, as well as its own motion for preliminary injunction similarly seeking to prevent enforcement of the Act. Shortly thereafter, fifteen states moved for leave to file an amicus brief in support of Alabama. That was followed by a group of at least twenty-two professional medical and mental health organizations jointly moving for leave to file an amicus brief in support of Plaintiffs. The district court ultimately granted the motion to intervene and the motions to file amicus briefs, giving the United States permission to participate in the preliminary injunction hearing and taking the amicus briefs under advisement.

The three-day hearing on Plaintiffs' motion for preliminary injunction began on May 4, 2022. On that first day, the district court discussed the motion for intervention and heard opening arguments from the parties. At that time, Plaintiffs represented that they were no longer challenging the portions of section 4 that ban surgical intervention, i.e., subsections (a)(4)–(6), and were instead focusing on the portions of section 4 that ban puberty blockers and cross-sex hormone treatment, i.e. subsections (a)(1)–(3). The following day, the parties commenced their presentation of the evidence.

request for injunctive relief, the motion subsequently was addressed only as a motion for preliminary injunction.

Plaintiffs first tendered Dr. Linda Hawkins and Dr. Morissa Ladinsky as experts in the treatment of gender dysphoria in minors. Dr. Hawkins is the director of the Gender and Sexuality Development Clinic at the Children’s Hospital of Philadelphia. She has specialized in treating LGBT youth for roughly twenty-two years and worked with over 4,000 transgender youth. During her testimony, Dr. Hawkins defined “gender identity” as “the internal authentic hardwired sense of one’s self as male or female.” She further testified that a blanket prohibition on puberty blockers and hormone treatment would be “devastating” for transgender youth, comparing it to “removing somebody’s cancer treatment and just expecting them to be okay.”

Dr. Ladinsky is an associate professor of pediatrics at the Heersink School of Medicine at the University of Alabama at Birmingham (“UAB”) and a board-certified pediatrician at the affiliated hospital. Dr. Ladinsky opened a gender clinic at UAB in the fall of 2015 and, at the time of her testimony, had worked with an estimated 400 to 450 minors suffering from gender dysphoria. Dr. Ladinsky discussed the guidelines on the treatment of gender dysphoria in youth that the UAB gender clinic follows and noted that those guidelines are endorsed by the American Academy of Pediatrics. She also noted that consent forms must be signed by all legal parents and guardians before a minor’s hormonal therapy can begin. According to Dr. Ladinsky, puberty blockers pose some risks but, overall, are safe and reversible. She described the risks posed by puberty blockers and cross-sex hormones, related to fertility and sexual function, as “small side effect risks.” Dr. Ladinsky also

testified that the youngest minor for which she prescribed puberty blockers was an eleven-year-old female and that about 85 percent of her patients who have taken puberty blockers have gone on to take cross-sex hormones. In her opinion, it is “uncommon” for a minor patient taking puberty blockers to stop experiencing gender dysphoria and begin identifying with their biological sex.

Plaintiffs then called Megan Poe (one of the Parent Plaintiffs), Dr. Rachel Koe (one of the Provider Plaintiffs), and Reverend Eknes-Tucker to testify about their personal knowledge and experience regarding gender dysphoria.

Poe is the mother of a biological male who identifies as a female. When asked how her child presents as a female, Poe testified that her child “is very over the top girly,” “loves makeup and hair,” and “[is] always worried about her clothes.” The child began showing signs of a female gender identity at the age of two, according to Poe, by wanting girl toys and girl clothes. The child started puberty blockers in sixth grade and then started hormone therapy at the age of fourteen. Poe reported that her child now is “so happy” and “thriving” and has not experienced any side effects from the treatment. She insisted that her child is “definitely not [experiencing] a phase” and is “never going to grow out of this.” Poe also said she was afraid that her child would commit suicide if the treatments were no longer available.

Dr. Koe is a pediatrician in southeast Alabama. Dr. Koe reported that she treats transgender adolescents but has never treated a patient with gender dysphoria who later desisted or expressed

regret about receiving these types of treatments. She also testified that, if the Act takes effect, it will leave her “stuck in a place where [she doesn’t] know how to proceed” nor how to provide care for patients with gender dysphoria.

Reverend Eknes-Tucker is the Senior Pastor at Pilgrim Church in Birmingham, Alabama, and has been a pastor for 45 years. Reverend Eknes-Tucker testified that there have been transgender individuals in every congregation that he has served and that he has given advice to parents of transgender children on numerous occasions. He clarified that he has not given medical advice but that he has helped connect parents of transgender children with doctors who provide gender-affirming care.

In addition to this live testimony, Plaintiffs produced as evidence various organizational medical guidelines, sworn declarations, research articles, and other documents.

Next, the United States, as an intervenor on behalf of Plaintiffs, tendered Dr. Armand H. Antommara as an expert in bioethics and treatment protocols for adolescents suffering from gender dysphoria. Dr. Antommara is the chair of pediatric ethics and an attending physician at Cincinnati Children’s Hospital Medical Center. During his testimony, Dr. Antommara addressed the dearth of randomized controlled trials for the treatment of minors with puberty blockers and cross-sex hormone therapy and expressed his concern that such trials “would be unethical,” given the lack of confidence that the control group and the experimental group would receive equally efficacious treatment. He also expressed concern that any

such trials “would have substantial methodological limitations,” given the need to recruit enough participants and conduct a blind study. When asked for his opinion regarding the ability of parents and adolescents to adequately understand and give informed consent to the provision of puberty blockers and hormone therapy, Dr. Antommara answered that those treatments are “comparable to other decisions that parents and their children make in pediatric healthcare on a frequent basis.” He further testified that there are no equally effective alternative medical treatments for adolescents with gender dysphoria and that there is not an ethical basis for distinguishing between minors experiencing precocious puberty⁵ and minors experiencing gender dysphoria with respect to the provision of puberty blockers and hormone treatment.

Along with Dr. Antommara’s testimony, the United States presented, among other things, various organizations’ medical policy statements and guidelines, some research and news articles, and Dr. Antommara’s declaration and curriculum vitae. For example, the United States presented the Standards of Care of the World Professional Association for Transgender Health (“WPATH”), which endorse the use of puberty blockers and cross-sex hormone treatment for minors when certain criteria are met. The United States also offered statements by the Alabama Psychological Association and the American Academy of Pediatrics supporting the use of puberty blockers and cross-sex hormone treatment for minors and opposing the Act. The full record reveals that at least twenty-

⁵ Precocious puberty is the premature initiation of puberty.

22-11707

Opinion of the Court

19

two professional medical and mental health organizations support the use of such medications.

On cross-examination, Dr. Antommara acknowledged that “[t]here are risks involved in the treatment course for the treatment of gender dysphoria.” He went on to note that, for puberty blockers and cross-sex hormones generally, there is a risk of impaired fertility, and that, for estrogen therapy, there is a risk of change in sexual function. When asked whether he agrees that more research is needed to study the efficacy and the costs and benefits of gender-affirming care, Dr. Antommara responded that “more research is needed in all areas of health care.”

Alabama, for its part, first tendered Dr. James Cantor. Dr. Cantor is a clinical psychologist and neuroscientist who was called as an expert on psychology, human sexuality, research methodology, and the state of research on gender dysphoria. In response to Dr. Antommara’s testimony, Dr. Cantor confirmed that none of the existing studies on puberty blockers and hormone therapies are randomized and opined that there are alternative methodologies that would be more reliable than observational trials, which he described as the lowest quality of evidence. Dr. Cantor also testified that the existing research does not support the conclusion that the use of puberty blockers and hormone therapy is “the only safe and effective treatment for gender dysphoria.” In his opinion, gender dysphoria can be treated with a “watchful waiting approach” whereby decisions about medical interventions are withheld, but therapy is continued, until more information becomes available.

According to Dr. Cantor, clinical guidelines suggest that comorbidities, including mental health issues, should be resolved prior to pursuing puberty blockers and cross-sex hormone treatment. He also noted that some cases of gender dysphoria have turned out to be prepubescent children misinterpreting their same-sex attraction and that blocking puberty in such cases prevents those children from understanding their sexuality.

On cross-examination, Dr. Cantor acknowledged that he is not a medical doctor and that he has not provided care to transgender adolescents under the age of sixteen.

Alabama then called Sydney Wright to testify about her personal experience with gender dysphoria. Wright is a biological female who is married to another woman. At the time of her testimony, Wright was twenty-three years old. She testified that she began identifying as transgender and receiving related treatment when she was seventeen years old, which culminated in testosterone therapy for approximately one year when she was nineteen years old. According to Wright, the testosterone treatment put her at a greater risk of heart attack or stroke and caused her to develop tachycardia. She explained that, after a significant discussion with her grandfather, she stopped identifying as transgender and receiving testosterone therapy. She now believes that her doctors mishandled her treatment and that she simply needed counseling during her teenage years. She also reported that her digestive system is “still messed up” and that she may have fertility issues as a result of the testosterone therapy that she received over three-and-a-half

years earlier. When asked what she would tell a young person struggling with gender dysphoria, Wright stated that she would advise them to take “a lot of time,” “love [themselves],” and understand that they can act and dress like the opposite sex without “hav[ing] to transition.”

In addition to these two witnesses, Alabama produced, among other things, research papers, foreign countries’ medical guidelines, and the declarations of various healthcare professionals and individuals with experience related to gender dysphoria. For example, in terms of healthcare professionals, Alabama produced a declaration in which Dr. Quentin L. Van Meter⁶ states that comparing the use of puberty blockers for precocious puberty with the use of puberty blockers for gender dysphoria is like “comparing apples to oranges,” given the evidence that “normal bone density can’t be fully reestablished” in the latter case and the lack of long-term data on bone, gonad, and brain health. Alabama also produced a declaration in which Dr. Patrick Hunter⁷ attests that “there is currently no established standard of care for transgender-identified youth” and that “[t]he medical risks of ‘gender-affirming’ interventions are substantial.” In terms of individuals with personal experience related to gender dysphoria, Alabama produced the

⁶ Dr. Van Meter is a board-certified pediatrician and pediatric endocrinologist who currently works in private practice.

⁷ Dr. Hunter is a board-certified pediatrician with a master’s degree in bioethics who currently holds academic positions at the University of Central Florida and Florida State University.

declaration of Corinna Cohn, a biological male who underwent sex reassignment surgery at the age of nineteen—which included the removal of testicles, penectomy, and vaginoplasty—and who, looking back, claims to have been “unprepared to understand the consequences” of seeking such medical interventions as a teenager. Alabama also produced a declaration in which Carol Freitas, a biological female who previously experienced gender dysphoria, claims that “[transitioning] was the biggest mistake [that she] ever made” and that she instead should have been treated for depression and post-traumatic stress disorder related to her “internalized homophobia and childhood abuse.” Lastly, in terms of medical opinions from foreign countries, Alabama produced documents showing that public healthcare entities of Sweden, Finland, France, Australia, New Zealand, and the United Kingdom have raised concerns about the risks associated with puberty blockers and cross-sex hormone treatment and supported greater caution and/or more restrictive criteria in connection with such interventions.

On May 13, 2022, the district court granted in part and denied in part the motions for preliminary injunction, enjoining Alabama from enforcing section 4(a)(1)–(3) but allowing the rest of the Act to remain in effect. The ruling was based on, among other things, a determination that Plaintiffs had shown a substantial likelihood of success on the merits as to their substantive due process claim and equal protection claim (Counts I and II), but not as to their other claims. With respect to the substantive due process claim (Count I), the district court recognized a fundamental right of parents to “treat their children with transitioning medications

subject to medically accepted standards,” held that the Act infringes upon that fundamental right and concluded that Alabama had not sufficiently demonstrated that the Act is narrowly tailored to achieve a compelling state interest. With respect to the equal protection claim (Count II), the district court held that the Act “amounts to a sex-based classification” and concluded that Alabama had not proffered a sufficiently persuasive justification for that classification.

Alabama filed a timely notice of appeal on May 16, 2022.⁸

II. STANDARD OF REVIEW

“We review the grant of a preliminary injunction for abuse of discretion, reviewing any underlying legal conclusions *de novo* and any findings of fact for clear error.” *Gonzalez v. Governor of Georgia*, 978 F.3d 1266, 1270 (11th Cir. 2020). “A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous.” *Id.* (quoting *United States v. Estrada*, 969 F.3d 1245, 1261 (11th Cir. 2020)).

III. ANALYSIS

A district court may grant injunctive relief only if the moving party demonstrates that: “(1) it has a substantial likelihood of

⁸ The operative pleading—the second amended complaint—was filed on September 19, 2022. In terms of counts, the second amended complaint contains only the substantive due process claim and the equal protection claim.

success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). “In considering these four prerequisites, [courts] must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion” as to these four prerequisites. *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); accord *Siegel*, 234 F.3d at 1176.⁹

As previewed, the district court determined that these four prerequisites are met with respect to section 4(a)(1)–(3) and thus enjoined Alabama from enforcing that part of the Act. The district court dedicated the bulk of its analysis in the preliminary injunction order to the first prerequisite and ultimately found that Plaintiffs had established a substantial likelihood of success as to their substantive due process claim and equal protection claim. Because the parties’ arguments on appeal similarly focus on the likelihood-of-success prerequisite, we do the same. We begin with the substantive due process claim and then turn to the equal protection claim.

A. Substantive Due Process

⁹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The Supreme Court has held that this language guarantees both procedural and substantive rights. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022). Those substantive rights include a “great majority” of the rights guaranteed by the first eight Amendments vis-à-vis the federal government, as well as “a select list of fundamental rights that are not mentioned anywhere in the Constitution.” *Id.*; see also *McDonald v. City of Chicago*, 561 U.S. 742, 760–66 (2010) (reviewing the history of the Supreme Court’s incorporation of “almost all of the provisions of the Bill of Rights” against the States).

To determine whether a right at issue is one of the substantive rights guaranteed by the Due Process Clause, courts must look to whether the right is “deeply rooted in [our] history and tradition” and “essential to our Nation’s ‘scheme of ordered liberty.’” *Dobbs*, 142 S. Ct. at 2246 (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)). The outcome of this analysis determines the amount of leeway that states have to enact laws that infringe upon the right at issue. “Laws that burden the exercise of a fundamental right require strict scrutiny and are sustained only if narrowly tailored to further a compelling government interest.” *Lofton v. Sec’y of Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 815 (11th Cir. 2004). Conversely, laws that do not burden the exercise of a fundamental right (and do not discriminate against a suspect class under the Equal Protection Clause) are subject to rational

basis review and need only “be rationally related to a legitimate governmental interest.” *Jones v. Governor of Florida*, 950 F.3d 795, 809 (11th Cir. 2020). Although not “toothless,” rational basis review is “highly deferential to government action.” *Id.* (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)).

In other words, every time a court recognizes an asserted right as a fundamental right protected by the Constitution, the court, “to a great extent, place[s] the matter outside the arena of public debate and legislative action.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). For that reason, the Supreme Court has instructed courts addressing substantive due process claims to “engage[] in a careful analysis of the history of the right at issue” and be “‘reluctant’ to recognize rights that are not mentioned in the Constitution.” *Dobbs*, 142 S. Ct. at 2246–47 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

In this case, the district court determined that the “right to treat [one’s] children with transitioning medications subject to medically accepted standards” is one of the substantive rights guaranteed by the Due Process Clause and that, therefore, section 4(a)(1)–(3) is subject to strict scrutiny. But the use of these medications in general—let alone for children—almost certainly is not “deeply rooted” in our nation’s history and tradition. Although there are records of transgender or otherwise gender nonconforming individuals from various points in history,¹⁰ the earliest-

¹⁰ See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 822 n.1 (11th Cir. 2022) (Wilson, J. dissenting) (noting that Justinian’s Code, from the

recorded uses of puberty blocking medication and cross-sex hormone treatment for purposes of treating the discordance between an individual’s biological sex and sense of gender identity did not occur until well into the twentieth century.^{11, 12} Indeed, the district

early sixth century AD, contains discussion of “hermaphrodites”); Mary Beth Norton, *Founding Mothers & Fathers: Gendered Power and the Forming of American Society* 183–202 (1996) (discussing the case of Thomasine Hall, also known as Thomas Hall, an intersex individual who alternated between identifying as a man and as a woman and who was ordered by a Virginia court in 1629 to wear dual-gendered apparel); Genny Beemyn, *U.S. History, in Trans Bodies, Trans Selves: A Resource for the Transgender Community* 501, 501–53 (Laura Erickson-Schroth ed. 2014) (discussing multiple prominent transgender individuals born between 1882 and 1926, including Lili Elbe, formerly known as Einar Wegener; Laurence Michael Dillon, formerly known as Laura Maud Dillon; and Christine Jorgensen, formerly known as George William).

¹¹ Puberty blockers first began being used in the 1980s. See Victoria Pelham, *Puberty Blockers: What You Should Know*, Cedars-Sinai Blog (Jan. 16, 2023), <https://www.cedars-sinai.org/blog/puberty-blockers-for-precocious-puberty.html>; Simona Giordano & Søren Holm, *Is Puberty Delaying Treatment ‘Experimental Treatment’?*, 21(2) Int’l. J. Transgend. Health 113 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7430465/>.

¹² Estrogen and testosterone were not discovered and characterized until the 1920s and 1930s. See Jamshed R. Tata, *One Hundred Years of Hormones*, 6 EMBO Rep. 490, 491 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1369102/pdf/67400444.pdf>. Laurence Michael Dillon, formerly known as Laura Maud Dillon, began receiving testosterone treatment for purposes of treating the discordance between biological sex and sense of gender identity in 1939 and is thought by some to be the first biological female to receive such treatment. See Pagan Kennedy, *The First Man-Made Man: The Story of Two Sex Changes, One Love Affair, and a Twentieth-Century Medical Revolution* (2007). According to the WPATH Standards of Care offered by both Plaintiffs and the United States, health professionals began using hormone therapy as a

court’s order does not feature any discussion of the history of the use of puberty blockers or cross-sex hormone treatment or otherwise explain how that history informs the meaning of the Fourteenth Amendment at the time it was ratified—July 9, 1868.¹³ See *Morrissey v. United States*, 871 F.3d 1260, 1269–70 (11th Cir. 2017) (rejecting the notion that the Constitution protects a right to procreate via in vitro fertilization procedures based on the fact that such procedures are “decidedly modern phenomena” that did not come about until 1978).

Rather than perform any historical inquiry specifically tied to the particular alleged right at issue, the order on appeal instead surmises that the “right to treat [one’s] children with transitioning medications subject to medically accepted standards” falls under the broader, recognized fundamental right to “make decisions concerning the care, custody, and control of [one’s] children.” *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Lofton*, 358 F.3d at 812. *But see Morrissey*, 871 F.3d at 1269 (emphasizing that a substantive due process analysis must focus on the specific right asserted, rather than simply rely on a related general right). However, there is no binding authority that indicates that the general right to “make decisions concerning the care, custody, and control of

treatment for gender dysphoria “[i]n the second half of the 20th century.” Doc. 78-17 at 14.

¹³ See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 6–7 (2015) (“[T]he original meaning (‘communicative content’) of the constitutional text is fixed at the time each provision is framed and ratified.”).

[one’s] children” includes the right to give one’s children puberty blockers and cross-sex hormone treatment.

The fundamental right to “make decisions concerning the care, custody, and control of [one’s] children,” as it is recognized today, traces back in large part to *Meyer v. Nebraska*, 262 U.S. 390 (1923). There, the Supreme Court held that a Nebraska law restricting the teaching of foreign languages violated the Due Process Clause. *Id.* at 400–03. In doing so, the Court recognized that the “liberty” guaranteed by the Due Process Clause includes the right “to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.” *Id.* at 399 (emphasis added).

The Supreme Court elaborated on the fundamental liberty of parents two years later in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). That case addressed Oregon’s Compulsory Education Act of 1922, which mandated that parents send their school-aged children to public school (as opposed to private school). *Id.* at 530–31. Citing its decision in *Meyer*, the Court concluded that the Oregon law violated the Due Process Clause on the basis that it “unreasonably interferes with the liberty of parents and guardians to *direct the upbringing and education of children under their control.*” *Id.* at 534–35 (emphasis added).

Meyer and *Pierce* ushered in a line of Supreme Court decisions that recognized, and further defined the contours of, parents’

liberty interest to control the upbringing of their children.¹⁴ The majority of those cases, however, pertain to issues of education, religion, or custody. The Supreme Court’s most extensive discussion of parents’ control over the medical treatment received by their children came in *Parham v. J. R.*, 442 U.S. 584 (1979).

In *Parham*, a group of minors brought a Due Process challenge to Georgia’s procedures for committing children to mental hospitals. *Id.* at 587–88. At the time, Georgia law provided for the voluntary admission of children upon application by a parent or

¹⁴ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166–69 (1944) (recognizing that “the custody, care and nurture of [children] reside[s] first in the parents,” but nevertheless upholding Massachusetts child labor laws that restricted the ability of children to sell religious literature in accordance with their parents’ wishes based on the state’s “authority over children’s activities” and “the crippling effects of child employment, more especially in public places” (footnote omitted)); *Stanley v. Illinois*, 405 U.S. 645, 646–59 (1972) (holding that Illinois could not automatically designate the children of unwed parents as wards of the state upon the death of the mother because fathers of children born out of wedlock have a “cognizable and substantial” “interest in retaining custody of [their] children” under the Constitution); *Wisconsin v. Yoder*, 406 U.S. 205, 213–234 (1972) (holding that Wisconsin could not compel school attendance beyond the eighth grade because doing so would “grave[ly] interfere[] with important Amish religious tenets” and “the traditional interest of parents with respect to the religious upbringing of their children”); *Troxel*, 530 U.S. at 60–75 (striking down Washington’s nonparental visitation statute, which would have permitted any person to petition for visitation rights at any time and courts to grant such rights whenever in the best interest of the child, on the basis that it contravened “the fundamental right of parents to make decisions concerning the care, custody, and control of their children” and “the traditional presumption that a fit parent will act in the best interest of his or her child”).

guardian. *Id.* at 590–91. Thus, the question at issue was whether the minors had a *procedural* due process right to greater procedural safeguards, e.g., a judicial hearing, before their parents could commit them. *Id.* at 610. The Supreme Court concluded that “some kind of inquiry should be made by a ‘neutral factfinder’ to determine whether the statutory requirements for admission are satisfied,” but that the inquiry could be “informal,” e.g., conducted by a staff physician, and did not require an adversarial proceeding with a judicial or administrative officer. *Id.* at 606–10. “[R]equiring a formalized, factfinding hearing,” according to the Supreme Court, would “[p]it[] the parents and the child” against each other and represent a “significant intrusion into the parent-child relationship.” *Id.* at 610; *see also id.* (“It is one thing to require a neutral physician to make a careful review of the parents’ decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents’ motivation is consistent with the child’s interests.”). In so ruling, the Supreme Court recognized, as a general matter, that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment,” *id.* at 603, and that parents retain “plenary authority” as well as “a substantial, if not the dominant, role” in deciding to pursue lawfully available treatment, like institutionalization, for their children, *id.* at 604; *see also id.* at 609 (concerning “treatment that is provided by the state”). *Parham* was concerned about the procedures a state must afford a child prior to institutionalization when the parent believes such treatment—which

is not only lawful but provided by the state itself—is necessary. Notably, *Parham* does not at all suggest that parents have a fundamental right to direct a particular medical treatment for their child that is prohibited by state law. *Parham* therefore offers no support for the Parent Plaintiffs’ substantive due process claim.

This Court has issued its own series of decisions outlining the contours of parents’ liberty interest to control the upbringing of their children,¹⁵ with the most relevant decision being *Bendiburg v. Dempsey*, 909 F.2d 463 (11th Cir. 1990). In that case, the State of Georgia had obtained temporary custody of a fifteen-year-old boy who was injured in an automobile accident. As the boy’s custodian

¹⁵ See, e.g., *Arnold v. Bd. of Educ. of Escambia Cnty.*, 880 F.2d 305, 312–14 (11th Cir. 1989) (holding that the parent plaintiffs sufficiently alleged a cause of action under 42 U.S.C. § 1983 for violation of the fundamental right to direct the upbringing of one’s children against two school officials who allegedly coerced a minor female into undergoing an abortion), *overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993); *Lofton*, 358 F.3d at 811–15 (declining to extend the parental right of control protected by the Due Process Clause to foster parents); *Robertson v. Hecksel*, 420 F.3d 1254, 1255–60 (11th Cir. 2005) (declining “to further expand the substantive protections of the Due Process Clause” by recognizing that a mother whose son was killed by police during a traffic stop “suffered a deprivation of [a] constitutionally-protected liberty interest in a continued relationship with [him]”); *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1281–86 (11th Cir. 2008) (holding that Florida’s Pledge of Allegiance statute, which requires students to recite the Pledge in the absence of a written request to the contrary by a parent, is constitutional despite restricting the students’ freedom of speech because it advances the fundamental rights of parents to direct the upbringing of their children).

and over the father’s wishes,¹⁶ Georgia consented to the use of a Hickman catheter on the boy, which allegedly caused a massive pulmonary embolus and ultimately the boy’s death. *Id.* at 466–67. This Court allowed the father’s *procedural* due process claims against certain defendants to proceed to trial, noting that “neither the state nor private actors, concerned for the medical needs of a child, can willfully disregard the rights of parents to generally make decisions concerning the treatment to be given to their children” and that “[t]he Due Process Clause prevents government from abusing its power, or employing its power as an instrument of oppression.” *Id.* at 470. But, as relevant here, this Court affirmed the determination that the father had no *substantive* due process claim and recognized that “[t]he state has an interest in protecting the health, safety, and welfare of children residing within its borders.”¹⁷ *Id.* at 468, 470.

In sum, none of the binding decisions regarding substantive due process establishes that there is a fundamental right to “treat [one’s] children with transitioning medications subject to medically

¹⁶ The child’s mother had been killed in the same automobile accident. *Bendiburg*, 909 F.2d at 466.

¹⁷ It bears emphasizing that *Bendiburg* dealt with a situation wherein a State interfered with a single parent’s ability to *refuse* certain lawful medical treatment for his child. *Id.* at 466–67. To the extent that *Bendiburg* supports the proposition that parents have a substantive due process right relating to the medical treatment that their children receive, its reasoning is not equally applicable to situations involving parents’ ability to *affirmatively obtain* certain medical treatment for their children that the State prohibits.

accepted standards.” Instead, some of these cases recognize, at a high level of generality, that there is a fundamental right to make decisions concerning the “upbringing” and “care, custody, and control” of one’s children. See *Pierce*, 268 U.S. at 534–35; *Troxel*, 530 U.S. at 66. And those decisions applying the fundamental parental right in the context of medical decision-making do not establish that parents have a derivative fundamental right to obtain a particular medical treatment for their children as long as a critical mass of medical professionals approve. Moreover, all of the cases dealing with the fundamental parental right reflect the common thread that states properly may limit the authority of parents where “it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972); see also *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944); *Parham*, 442 U.S. at 604; *Bendiburg*, 909 F.2d at 470. Against this backdrop, and without any historical analysis specifically tied to the medications at issue, Plaintiffs have not shown it to be likely that the Due Process Clause of the Constitution guarantees a fundamental “right to treat [one’s] children with transitioning medications subject to medically accepted standards.”¹⁸ See *L.W. v. Skrmetti*, 73 F.4th 408, 416–17 (6th Cir. July 8, 2023) (recognizing that parents “have a substantive due process

¹⁸ This is consistent with the fact that there has been no showing of any historical recognition of a fundamental right of adults to obtain the medications at issue for themselves. As Alabama points out, it would make little sense for adults to have a *parental* right to obtain these medications for their children but not a *personal* right to obtain the same medications for themselves.

right ‘to make decisions concerning the care, custody, and control of their children’” but noting that “[n]o Supreme Court case extends it to a general right to receive new medical or experimental drug treatments” (quoting *Troxel*, 530 U.S. at 66)).

Because the Due Process Clause does not guarantee the described right, state regulation of the use of puberty blockers and cross-sex hormone treatment for minors would be subject only to rational basis review and thus afforded “a ‘strong presumption of validity.’” *Dobbs*, 142 S. Ct. at 2284 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). “Under this deferential standard,” the question that we ask “is simply whether the challenged legislation is rationally related to a legitimate state interest.” *Lofton*, 358 F.3d at 818. Such a relationship may merely “be based on rational speculation” and need not be supported “by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993); accord *Jones*, 950 F.3d at 809 (“When we review a statute for rationality, generally we ask whether there is *any* rational basis for the law, even if the government’s proffered explanation is irrational, and even if it fails to offer any explanation at all.”).

We are highly doubtful that section 4(a)(1)–(3) would not survive the lenient standard that is rational basis review. It is well established that states have a compelling interest in “safeguarding the physical and psychological well-being of . . . minor[s].” *Otto v. City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020) (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)). In the same vein, states have a compelling interest in protecting children from drugs,

particularly those for which there is uncertainty regarding benefits, recent surges in use, and irreversible effects.¹⁹ Although rational speculation is itself sufficient to survive rational basis review, here Alabama relies on both record evidence and rational speculation to establish that section 4(a)(1)–(3) is rationally related to that compelling state interest. First, the record evidence is undisputed that the medications at issue present *some* risks. As the district court recognized, these medications can cause “loss of fertility and sexual function.” The district court also acknowledged testimony that “several European countries have restricted treating minors with transitioning medications due to growing concern about the medications’ risks.” Second, there 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. Section 4(a)(1)–(3) addresses these risks by prohibiting the prescription and administration of puberty blockers and cross-sex hormone treatment to a patient under the age of nineteen for purposes of treating discordance between biological sex and sense of gender identity so that children will have more time to develop their identities and to consider all of the

¹⁹ As Alabama suggests, the opioid epidemic has shown firsthand the need to be skeptical and exercise caution when there is a sudden uptick in prescriptions of powerful, off-label medications, even when some medical and pharmaceutical organizations defend their safety. *See also Skrametti*, 73 F.4th at 418 (“[I]t is difficult to maintain that the medical community is of one mind about the use of hormone therapy for gender dysphoria when the FDA is not prepared to put its credibility and careful testing protocols behind the use.”).

potential consequences before moving forward with such treatments. That connection would be sufficient under rational basis review.

In sum, Plaintiffs’ assertion that the Constitution protects the right to treat one’s children with puberty blockers and cross-sex hormone therapy is precisely the sort of claim that asks courts to “break new ground in [the] field [of Substantive Due Process]” and therefore ought to elicit the “utmost care” from the judiciary. *See Collins*, 503 U.S. at 125. The district court held that there is a specific right under the Constitution “to treat [one’s] children with transitioning medications subject to medically accepted standards,” but did so without performing any analysis of whether that specific right is deeply rooted in our nation’s history and tradition. Instead, the district court grounded its ruling in an unprecedented interpretation of parents’ fundamental right to make decisions concerning the “upbringing” and “care, custody, and control” of one’s children. *See Pierce*, 268 U.S. at 534–35; *Troxel*, 530 U.S. at 66. That was error. Neither the record nor any binding authority establishes that the “right to treat [one’s] children with transitioning medications subject to medically accepted standards” is a fundamental right protected by the Constitution. And, assuming it is not, then section 4(a)(1)–(3) is subject only to rational basis review—a lenient standard that the law seems to undoubtedly clear. Because the district court erroneously reviewed section 4(a)(1)–(3) with heightened scrutiny, its determination regarding the Parent Plaintiffs’ likelihood of success does not justify the preliminary injunction.

B. Equal Protection

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and “simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike,” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

“In considering whether state legislation violates the Equal Protection Clause . . . we apply different levels of scrutiny to different types of classifications.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All statutory classifications must, at a minimum, satisfy rational basis review. *Id.* Classifications based on race or national origin, however, are reviewed under the “most exacting” level of scrutiny: strict scrutiny. *Id.* Between rational basis review and strict scrutiny lies “a level of intermediate scrutiny,” which applies to classifications based on sex or illegitimacy. *Id.*

Thus, a government policy that distinguishes on the basis of sex is permissible under the Equal Protection Clause “only if it satisfies intermediate scrutiny.” *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022). Under that standard, the party seeking to uphold the policy carries the burden of “showing that the [sex-based] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”

Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

“For a government objective to be important, it cannot ‘rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.’” *Adams*, 57 F.4th at 801 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). And for a policy’s means to be substantially related to a government objective, there must be “enough of a fit” between the means and the asserted justification. *Id.* (quoting *Danskine v. Mia. Dade Fire Dep’t*, 253 F.3d 1288, 1299 (11th Cir. 2001)). However, “the Equal Protection Clause does not demand a perfect fit between means and ends when it comes to sex.” *Id.*; see also *Nguyen v. INS*, 533 U.S. 53, 70 (2001) (“None of our gender-based classification equal protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance.”).

In this case, the district court first held that section 4(a)(1)–(3) of the Act classifies on the basis of gender nonconformity and therefore classifies on the basis of sex. In determining that section 4(a)(1)–(3) classifies on the basis of gender nonconformity, the district court reasoned that section 4(a)(1)–(3) “prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity.” And, in holding that a classification on the basis of gender nonconformity necessarily constitutes a classification on the basis of sex, the district court cited the reasoning of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

After determining that section 4(a)(1)–(3) of the Act amounts to a sex-based classification subject to intermediate scrutiny, the district court then found that Alabama had not offered any exceedingly persuasive justification for the classification and thus concluded that the Minor Plaintiffs are substantially likely to succeed on their equal protection claim.

On appeal, Alabama maintains that section 4(a)(1)–(3) classifies on the bases of age and procedure, not sex or gender nonconformity, and is therefore not subject to any heightened scrutiny above rational basis review. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (“[A]ge is not a suspect classification under the Equal Protection Clause.”); *Clark*, 486 U.S. at 461 (listing suspect classifications and making no reference to classifications based on procedures). Alabama further argues that section 4(a)(1)–(3) would survive at any level of scrutiny because it “serves the compelling [state] interest of protecting children from unproven, life-altering medical interventions” and because “no other approach would offer children in Alabama adequate protection.”

In response, the Minor Plaintiffs argue that section 4(a)(1)–(3) classifies on the basis of sex both directly, by using sex-based terms, and indirectly, by classifying on the basis of gender nonconformity, and that the district court therefore properly applied intermediate scrutiny. The Minor Plaintiffs also argue that, even if the more lenient rational basis standard applies, section 4(a)(1)–(3) does not pass muster. For its part, the United States makes the argument that section 4(a)(1)–(3) “triggers heightened scrutiny” because it

”discriminates against transgender persons, who constitute at least a quasi-suspect class” by themselves, distinct from sex.

Having carefully considered all of these positions, we agree with Alabama that section 4(a)(1)–(3) is best understood as a law that targets specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic under the Equal Protection Clause. Section 4(a)(1)–(3) is therefore subject only to rational basis review—a standard that it almost undoubtedly satisfies for the reasons discussed. *See supra* Section III.A; *see also Skrmetti*, 73 F.4th at 419 (finding it “highly unlikely” that the plaintiffs could show that Tennessee’s substantially similar law “lacks a rational basis”). Because the district court erroneously departed from that standard, its assessment regarding the Minor Plaintiffs’ likelihood of success as to their equal protection claim cannot support the preliminary injunction. We reason as follows.

To begin, we reject the view that section 4(a)(1)–(3) amounts to a sex-based classification subject to intermediate scrutiny. As mentioned, one of the Minor Plaintiffs’ arguments is that section 4(a)(1)–(3) directly classifies on the basis of sex because it “uses explicitly sex-based terms to criminalize certain treatments based on a minor’s ‘sex.’” Of course, section 4(a)(1)–(3) discusses sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females. We

nonetheless believe the statute does not discriminate based on sex for two reasons.

First, the statute does not establish an unequal regime for males and females. In the Supreme Court’s leading precedent on gender-based intermediate scrutiny under the Equal Protection Clause, the Court held that heightened scrutiny applies to “official action that closes a door or denies opportunity to women (or to men).” *Virginia*, 518 U.S. at 532. Alabama’s law does not distinguish between men and women in such a way. *Cf. Adams*, 57 F.4th at 800–11. Instead, section 4(a)(1)–(3) establishes a rule that applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors. *See Skrmetti*, 73 F.4th at 419 (explaining that this sort of restriction on puberty blockers and cross-sex hormone treatment “does not prefer one sex to the detriment of the other”).

Second, the statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based. The Act regulates medical interventions to treat an incongruence between one’s biological sex and one’s perception of one’s sex. The cross-sex hormone treatments for gender dysphoria are different for males and for females because of biological differences between males and females—females are given testosterone and males are given estrogen. With regards to puberty blockers, those

medications inhibit and suppress the production of testosterone in males and estrogen in females. For that reason, it is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes in specific terms *without* referencing sex in some way. Thus, we do not find the direct sex-classification argument to be persuasive.

The Minor Plaintiffs’ other sex-based argument is that section 4(a)(1)–(3) indirectly classifies on the basis of sex by classifying on the basis of gender nonconformity. This is the position that the district court adopted, citing *Bostock* and *Brumby*. Neither of those cases, however, dealt with the Equal Protection Clause as applied to laws regulating medical treatments.

Bostock dealt with Title VII of the Civil Rights Act of 1964, § 701 *et seq.*, as amended, 42 U.S.C. § 2000e *et seq.*, in the context of employment discrimination. *See* 140 S. Ct. at 1737–41, 1754 (holding that “[a]n employer who fires an individual merely for being gay or transgender defies [Title VII]”). After noting that “only the words on the page constitute the law adopted by Congress and approved by the President,” *id.* at 1738, the Court in *Bostock* relied exclusively on the specific text of Title VII. The Court “proceed[ed] on the assumption that ‘sex’ . . . refer[s] only to biological distinctions between male and female.” *Id.* at 1739. But the Court reasoned that the combined ordinary meaning of the words “because of,” *id.*, “otherwise . . . discriminate against,” *id.* at 1740, and “individual,” *id.*, led to the conclusion that Title VII makes “[a]n

individual's homosexuality or transgender status . . . not relevant to employment decisions,” *id.* at 1741.

The Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*. It provides simply that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV. Because *Bostock* therefore concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case. See *Skrmetti*, 73 F.4th at 420 (finding that the reasoning of *Bostock* “applies only to Title VII”); see also *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022 WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from denial of rehearing en banc) (expressing skepticism that *Bostock*’s reasoning applies to the Equal Protection Clause of the Fourteenth Amendment because the Fourteenth Amendment “predates Title VII by nearly a century” and contains language that is “not similar in any way” to Title VII’s); see *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring) (noting the different language in Title VI and the Equal Protection Clause and explaining “[t]hat such differently worded provisions should mean the same thing is implausible on its face.”)

Brumby, on the other hand, did deal with the Equal Protection Clause; but, like *Bostock*, *Brumby* concerned gender stereotyping in the context of employment discrimination. See 663 F.3d at 1313–20 (holding that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he

or she fires a transgender or transsexual employee because of his or her gender non-conformity”). So, while *Brumby* did involve the same law at issue here—the Equal Protection Clause—it discussed that law as applied to a particular factual scenario, i.e., one where an employer fired an employee for failing to adhere to certain expectations and stereotypes associated with the employee’s sex. That is not the scenario presented here. Section 4(a)(1)–(3) targets certain medical interventions for minors meant to treat the condition of gender dysphoria; it does not further any particular gender stereotype. Insofar as section 4(a)(1)–(3) involves sex, it simply reflects biological differences between males and females, not stereotypes associated with either sex.

To be sure, section 4(a)(1)–(3) restricts a specific course of medical treatment that, by the nature of things, only gender non-conforming individuals may receive. But just last year, the Supreme Court explained that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’” *Dobbs*, 142 S. Ct. at 2245–46 (alteration in original) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)); see also *id.* at 2246 (recognizing that “the ‘goal of preventing abortion’ does not constitute ‘invidiously discriminatory animus’ against women” (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273–74 (1993))). By the same token, the regulation of a course of treatment that only gender nonconforming individuals can undergo would not trigger heightened scrutiny unless the regulation

were a pretext for invidious discrimination against such individuals. And the district court did not find that Alabama’s law was based on invidious discrimination.

We similarly reject the United States’ view that section 4(a)(1)–(3) is subject to heightened scrutiny because it classifies on the basis of transgender status, separate from sex. As we recently explained, “we have grave ‘doubt’ that transgender persons constitute a quasi-suspect class,” distinct from sex, under the Equal Protection Clause. *Adams*, 57 F.4th at 803 n.5. Even if they did, for the reasons discussed with respect to gender nonconformity, section 4(a)(1)–(3)’s relationship to transgender status would not trigger heightened scrutiny. Chiefly, the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo would not trigger heightened scrutiny unless the regulation is a pretext for invidious discrimination against such individuals, and, here, the district court made no findings of such a pretext. For these reasons, we conclude that section 4(a)(1)–(3)’s relationship to transgender status does not warrant heightened scrutiny.

Apart from sex, gender nonconformity, and transgender status, the Minor Plaintiffs and the United States do not claim any other suspect classification. All the parties agree that section 4(a)(1)–(3) draws distinctions on the basis of age. However, “age is not a suspect classification under the Equal Protection Clause.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). As a result, “[s]tates may discriminate on the basis of age without offending the

Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.” *Id.* And “[t]he rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.” *Id.*

Here, it seems abundantly clear that section 4(a)(1)–(3) classifies on the basis of age in a way that is rationally related to a legitimate state interest. As discussed, Alabama has a legitimate interest in “safeguarding the physical and psychological well-being of . . . minor[s],” and notably that interest itself distinguishes minors from adults. *Otto*, 981 F.3d at 868 (quoting *Ferber*, 458 U.S. at 756–57); *see supra* Section III.A. Section 4(a)(1)–(3) furthers that interest by restricting the prescription and administration of puberty blockers and cross-sex hormone treatment to minors for purposes of treating discordance between biological sex and sense of gender identity based on the rational understanding that many minors may not be finished forming their identities and may not fully appreciate the associated risks. Moreover, Alabama’s decision to draw the line at the age of nineteen sufficiently approximates the divide between individuals who warrant government protection and individuals who are better able to make decisions for themselves; it is neither too over- nor under-inclusive. For these reasons, it is exceedingly likely that section 4(a)(1)–(3) satisfies rational basis review as a classification on the basis of age.

Section 4(a)(1)–(3) is therefore subject only to rational basis review—a standard that it is exceedingly likely to satisfy for the

reasons discussed. *See supra* Section III.A. The district court erred as a matter of law by applying heightened scrutiny, and that error tainted its assessment of Plaintiffs’ likelihood of success. Because that is true with respect to both the due process claim and the equal protection claim, we vacate the preliminary injunction.

* * * *

This case revolves around an issue that is surely of the utmost importance to all of the parties involved: the safety and well-being of the children of Alabama. But it is complicated by the fact that there is a strong disagreement between the parties over what is best for those children. Absent a constitutional mandate to the contrary, these types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action.

Faced with this difficult and delicate set of circumstances, the district court granted the “extraordinary and drastic remedy” that is a preliminary injunction and enjoined Alabama from enforcing part of the law in dispute. *See Callaway*, 489 F.2d at 573. In doing so, the district court determined that section 4(a)(1)–(3) of the Act is subject to heightened scrutiny on due process and equal protection grounds and therefore the parties challenging the law had a substantial likelihood of success on the merits as to those claims. That was erroneous. With respect to the Parent Plaintiffs’ substantive due process claim, the district court divined, without adequate historical support, that the Due Process Clause of the Fourteenth Amendment protects the right to “treat [one’s] children with transitioning medications subject to medically accepted

22-11707

Opinion of the Court

49

standards.” And with respect to the Minor Plaintiffs’ equal protection claim, the district court determined that the law classifies on the basis of sex, when in reality the law simply reflects real, biological differences between males and females and equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes. Because the district court reviewed the law under the wrong standard of scrutiny in connection with both claims, the issuance of the preliminary injunction constituted an abuse of discretion. *See Curling v. Raffensperger*, 50 F.4th 1114, 1121 (11th Cir. 2022) (“[A] court abuses its discretion in granting a preliminary injunction if, in determining whether success is likely, it incorrectly or unreasonably applies the law.”).

IV. CONCLUSION

For these reasons, we vacate the district court’s preliminary injunction on the enforcement of section 4(a)(1)–(3) of the Act.

VACATED.

22-11707

BRASHER, J., Concurring

1

BRASHER, Circuit Judge, concurring:

I concur in the Court’s opinion. I write separately to focus on the plaintiffs’ equal protection claim.

The resolution of an equal protection claim often turns on the level of scrutiny that we apply—rational basis, intermediate, or strict. The plaintiffs argue that the statute classifies based on sex, which warrants intermediate scrutiny. The Court rejects that argument, and, after much deliberation and research, I agree. Alabama’s statute does not treat one sex differently than the other. It does not use sex as a proxy for some more germane classification. And it is not based on a sex stereotype. Instead, I think the law is best read to classify—not based on sex—but as between minors who want puberty blockers and hormones to treat “a discordance between [their] sex and sense of gender identity,” Ala. Code § 26-26-2(2), and those minors who want these drugs to treat a different condition.

But even if the statute did discriminate based on sex, I think it is likely to satisfy intermediate scrutiny. If Alabama’s statute involves a sex-based classification that triggers heightened scrutiny, it does so because it is otherwise impossible to regulate these drugs differently when they are prescribed as a treatment for gender dysphoria than when they are prescribed for other purposes. As long as the state has a substantial justification for regulating differently the use of puberty blockers and hormones for different purposes, then I think this law satisfies intermediate scrutiny.

I.

I'll start with the level of scrutiny that applies to this law. We should be cautious when we are asked to extend heightened scrutiny to novel facts like these. As Justice Stevens explained in one of the Court's leading cases on sex discrimination, the text of the Equal Protection Clause does not subject state laws to different levels of judicial scrutiny. *See Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring). The Clause “requires every State to govern impartially,” and it “does not direct the courts to apply one standard of review in some cases and a different standard in other cases.” *Id.*; *see also United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) (calling tiers of scrutiny “made-up tests”); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 638 (2016) (Thomas, J., dissenting) (calling tiers of scrutiny “increasingly meaningless . . . formalism”). Moreover, some of the Supreme Court's most recent (and significant) equal protection precedents don't apply the tiers of scrutiny. *E.g., Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015).

Nonetheless, the Supreme Court has established the tiers of scrutiny, and lower courts must apply that doctrine the best we can. In doing so, I think we must appreciate that the tiers of scrutiny are “no more scientific than their names suggest.” *Virginia*, 518 U.S. at 567 (Scalia, J., dissenting). They should be “guidelines informing our approach to the case at hand, not tests to be mechanically applied.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 457 (2015) (Breyer, J., concurring). To that end, when we are asked to apply heightened

22-11707

BRASHER, J., Concurring

3

scrutiny on novel facts, we need to ensure that the purposes of the doctrine warrant that approach.

In my view, many judges have mechanically applied intermediate scrutiny to laws like Alabama’s without considering the reasons we subject sex classifications to heightened scrutiny. Consider the Eighth Circuit’s decision in *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). There, the court concluded that Arkansas’s comparable law discriminates based on sex because, referring to cross-sex hormones, it said that “medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex.” *Id.* at 669. But the court ignored the law’s ban on puberty blockers, which applies the same way to both sexes. And, more fundamentally, the court did not explain how applying heightened scrutiny to a law that regulates sex-specific medical interventions is consistent with the reasons the Supreme Court created that standard.

Turning back to this case, Alabama’s law is replete with sex-related language. But, even though the statute uses sex-related language, I think it is wrong to say that the statute *classifies* based on sex. The law regulates drugs that “treat a discordance between [an] individual’s sex and sense of gender identity.” Ala. Code § 26-26-2(2). The law defines “sex” as “[t]he biological state of being male or female, based on the individual’s sex organs, chromosomes, and endogenous hormone profiles.” *Id.* § 26-26-2(3). Then the law prohibits various treatments “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her

gender or sex, if that appearance or perception is inconsistent with the minor’s sex as defined in this act.” *Id.* § 26-26-4(a).

I see the word “sex” in this law. But I don’t see a sex *classification*—at least, not as the idea of a sex classification appears in our equal-protection caselaw. Instead, it seems to me that this sex-related language classifies between, on the one hand, those minors who want these drugs to treat “a discordance between [their] sex and sense of gender identity” and, on the other hand, those minors who want these drugs to treat a different condition. The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). So the right question under the Equal Protection Clause is whether these two groups—those who want to use these drugs to treat a discordance between their sex and gender identity and those who want to use these drugs to treat other conditions—are similarly situated.

That question isn’t one that seems suited to heightened scrutiny. The Equal Protection Clause prohibits “giv[ing] a mandatory preference to members of either sex over members of the other.” *Reed v. Reed*, 404 U.S. 71, 76 (1971). We apply heightened scrutiny to sex classifications because of an intuition that, “[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.” *City of Cleburne*, 473 U.S. at 441. When we apply heightened scrutiny to a statute that classifies based on sex, the point is to ascertain

22-11707

BRASHER, J., Concurring

5

whether the classification is based on “traditional, often inaccurate, assumptions about the proper roles of men and women.” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982). We are also seeking to ensure that sex is not being used as an “inaccurate proxy for other, more germane bases of classification.” *Craig*, 429 U.S. at 198.

None of these rationales apply to the line drawn in Alabama’s statute. It doesn’t distribute benefits or burdens between men and women or arguably use sex as a proxy for other interests. It bans a course of treatment—puberty blockers and hormones—for a particular condition that affects both boys and girls. Another way to think about it: an injunction against the enforcement of Alabama’s law under equal-protection principles will not equalize burdens or benefits between girls and boys. It will not require the government to treat boys and girls the same. It will merely force Alabama to *either* ban puberty blockers and hormones for all purposes *or* allow them for all purposes.

For its part, the district court applied heightened scrutiny on the theory that Alabama’s statute discriminates based on a sex stereotype because it targets medical interventions for transgender people, i.e., those who feel a “a discordance between [their] sex and sense of gender identity.” The district court cited *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011), for this proposition, but I think it misread that precedent.¹ In *Glenn*, we concluded that a public

¹ I don’t fault the district court for reaching the conclusion that it did. The district court did an admirable job with a difficult case on an expedited

employer engaged in sex discrimination by firing a transgender employee who was born a man because the employee began wearing stereotypical women’s clothing. *Id.* at 1314. The employer allowed biological women to wear stereotypical women’s clothing, but not biological men. We held that the employer had engaged in sex discrimination under the Equal Protection Clause—not because it fired a transgender employee—but because it fired an employee “on the basis of gender-based behavioral norms.” *Id.* at 1316–17. By ruling against that practice under the circumstances of that case, we required the employer to treat men and women equally, no matter their clothing choices.

Unlike the employer’s decision in *Glenn*, Alabama’s statute does not fit the mold of a sex-based stereotype. The statute isn’t based on a socially constructed generalization about the way men or women should behave. It does not reinforce an “assumption[] about the proper roles of men and women” in our society. *Hogan*, 458 U.S. at 725–26. And it doesn’t reflect society’s “notions of the relative capabilities of men and women.” *City of Cleburne*, 473 U.S. at 441. To be sure, the statute’s classification reflects the government’s recognition that, without medical intervention, a healthy child will mature in accord with his or her biological sex. But the recognition of biological reality is “not a stereotype.” *Nguyen v. INS*, 533 U.S. 53, 68 (2001).

timeframe. One of the benefits of the appellate process is that we have more time and resources to assess a legal question, which sometimes yields a different result.

22-11707

BRASHER, J., Concurring

7

The district court—viewing this case through the lens of sex stereotyping—did not make any findings on whether the state was justified in treating people differently because they want these drugs to treat a discordance between their sex and gender identity instead of some other condition. But the state has identified many reasons for drawing that line. For example, the record reflects that other countries are regulating the drugs differently for these purposes, and the FDA has not approved them for this purpose although it has for others. I cannot say that those reasons fail the lenient standard of rational basis review. *See Jones v. Gov. of Fla.*, 975 F.3d 1016, 1034–35 (11th Cir. 2020).

II.

Although I believe rational basis scrutiny likely applies, I also think that, even if Alabama’s statute triggered intermediate scrutiny, it would likely survive that heightened scrutiny.

Intermediate scrutiny under the Equal Protection Clause does not require us to ask whether a law is good or bad policy, but whether a government has a good reason for using a sex-based classification in a law. The relevant question is whether “*the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’*” *Hogan*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)) (emphasis added). As I discuss above, the purpose of this heightened scrutiny is to ensure that laws based on sex classifications aren’t using those classifications because of “outmoded notions of the relative

capabilities of men and women.” *City of Cleburne*, 473 U.S. at 441. Instead, the use of sex must reflect that it is a “meaningful consideration[]” on which the law is based. *Id.* And so, under intermediate scrutiny, the government’s burden is to establish “an ‘exceedingly persuasive justification’ for the classification.” *Hogan*, 458 U.S. at 724 (quoting *Kirchberg v. Feenstra* 450 U.S. 455, 461 (1981)) (emphasis added).

Assuming the classification in this law is subject to intermediate scrutiny, I believe the state probably has an “exceedingly persuasive justification” for regulating these drugs differently when they are used to treat a discordance between an individual’s sex and sense of gender identity than when they are used for other purposes. *See Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017) (quoting *Virginia*, 518 U.S. at 531). The record reflects that the use of puberty blockers and hormones for this purpose specifically carries potentially uncertain risks. The record also reflects that there is uncertainty about how to tell which patients need these interventions for this purpose and which don’t. Although further fact finding in this litigation will test the plausibility of those concerns, Alabama doesn’t have to conclusively prove these things to have an important governmental interest. Intermediate scrutiny permits “the legislature [to] make a predictive judgment” based on competing evidence. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011) (discussing relative burdens of intermediate and strict scrutiny).

Likewise, I think the state’s interest is sufficiently related to the sex classification in the law to the extent there is one. Assuming

22-11707

BRASHER, J., Concurring

9

this statute involves a sex-based classification, it does so because there is no other way to regulate treatments for “a discordance between [an] individual’s sex and sense of gender identity” without drawing such a distinction. Alabama would have to use sex-based language to regulate those treatments even if it wanted to subsidize them instead of banning them. So, if intermediate scrutiny applied here, the “sufficiently related” question collapses into the state interest question: it is whether Alabama has an important governmental interest in regulating the use of puberty blockers and hormones for “a discordance between [an] individual’s sex and sense of gender identity” but not for other uses. Because the record reflects that the state has that kind of interest, the statute’s classification likely satisfies intermediate scrutiny.

The plaintiffs argue, in part, that Alabama is not justified in *banning* these treatments because there are less restrictive alternatives to a ban. But I don’t think that is how intermediate scrutiny works under the Equal Protection Clause. Consider how the Supreme Court applied intermediate scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976). There, a state law prohibited sales of alcohol to men between the ages of eighteen and twenty but not women in that age range. *Id.* at 191–92. The Court accepted that the goal of this law—“the enhancement of traffic safety”—is an important interest. *Id.* at 199–200. But it held that the government did not have sufficient evidence that a “gender-based distinction closely serves to achieve that objective.” *Id.* at 200. The Court in *Craig* never asked whether the state’s decision to *ban* under-21-year-old men from drinking alcohol was justified as compared to some less restrictive,

but equally sex-based, alternative—such as making men take additional driving classes or the like. Instead, the Court assessed only whether the *sex-based classification* fit closely enough to the purposes of the law. Likewise, here, I think we can resolve the plaintiffs’ equal protection claim by assessing whether the state has an interest in classifying based on sex without also asking whether, even if the state were allowed to classify based on sex, the state could achieve its objective with some lesser restriction.

In short, assuming this law is subject to intermediate scrutiny, I think it likely passes. On this record, it seems clear that the state has an interest in regulating these drugs differently when they are prescribed to treat a discordance between sex and gender than when they are prescribed to treat other conditions. And the state cannot do that without drawing the lines it has drawn in this statute.

III.

Whether rational basis or intermediate scrutiny applies, I believe this appeal comes out the same way: the state will likely prevail on the merits. Future findings of fact in the district court may establish otherwise. But at this stage, the plaintiffs have not carried their burden entitling them to a preliminary injunction. I concur.

TAB 313

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

Brianna Boe, *et al.*,)
)
Plaintiffs,)
)
United States of America,)
)
Intervenor Plaintiff,)
)
v.) Civil Action No. 2:22-cv-184-LCB
)
Hon. Steve Marshall, in his official)
capacity as Attorney General,)
of the State of Alabama, *et al.*,)
)
Defendants.)

**DEFENDANTS' TIME-SENSITIVE MOTION TO STAY
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Introduction	1
Argument.....	2
I. Defendants Are Likely To Succeed.....	2
II. Defendants—And The Public—Will Be Irreparably Injured Absent A Stay.....	5
III. The Equities Favor A Stay.....	7
Conclusion	9

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018)	5
<i>Doe I v. Thornbury</i> , 75 F.4th 655 (6th Cir. 2023).....	4
<i>Doe I v. Thornbury</i> , No. 23-cv-230 (W.D. Ky. July 14, 2023).....	4
<i>Eknes-Tucker v. Governor of Alabama</i> , ___ F.4th ___, No. 22-11707, 2023 WL 5344981 (11th Cir. Aug. 21, 2023).....	2, 5, 6, 8
<i>Hand v. Scott</i> , 888 F.3d 1206 (11th Cir. 2018).....	5
<i>Koe v. Carlson</i> , No. 1:23-cv-2904-SEG (N.D. Ga. Sept. 5, 2023)	4
<i>L.W. v. Skrmetti</i> , 73 F.4th 408 (6th Cir. 2023).....	4, 7, 8, 9
<i>Martin v. Singletary</i> , 965 F.2d 944 (11th Cir. 1992).....	3
<i>NetChoice, LLC v. Att’y Gen., Fla.</i> , 34 F.4th 1196 (11th Cir. 2022).....	5
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	5
<i>Swain v. Junior</i> , 958 F.3d 1081 (11th Cir. 2020).....	5
<i>Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.</i> , 210 F.3d 1309 (11th Cir. 2000).....	2

Statutes

Ala. Code § 26-26-4(a)9

Rules

11th Cir. R. 36-33
Fed. R. App. P. 8(a)(1).....3
Fed. R. App. P. 8(a)(1)(A)1
Fed. R. Civ. P. 62(d)1, 3

Other Authorities

GLBTQ Legal Advocates & Defenders, *Update on the federal challenge to Alabama’s law banning medical care for transgender minors and access to care* (Aug. 28, 2023), <https://www.glad.org/update-on-federal-challenge-to-al-transgender-medical-care-ban/>.7

INTRODUCTION

Under Federal Rule of Appellate Procedure 8(a)(1)(A) and Federal Rule of Civil Procedure 62(d), the Defendants move for a stay of the Court's preliminary injunction. *See* Docs. 107 and 112-1. All the stay factors weigh in Defendants' favor. First, given the Eleventh Circuit's recent opinion that will vacate the injunction, it is now clear that Defendants are likely to succeed on the merits. That opinion is binding circuit law even before the mandate issues. Second, Defendants will suffer irreparable harm absent a stay, as otherwise they cannot enforce Alabama's presumptively valid law. Third, the public interest lies in enforcement of a duly enacted law that protects children from risky, sterilizing drugs. Fourth, the Minor Plaintiffs will not be harmed by a stay: the law *protects* them from risky interventions, and it permits their physicians to taper the administration of puberty blockers or cross-sex hormones they had prescribed for the purpose of gender transitioning.

A stay is needed to allow Defendants to enforce Alabama's duly enacted law while the appellate process continues to proceed. Via press release, Plaintiffs' counsel have indicated that they intend to seek rehearing of the Eleventh Circuit's decision, which—as counsel suggest—will delay issuance of the Eleventh Circuit's mandate. While Plaintiffs are of course free to seek rehearing, they are not entitled to the benefits of an injunction when the equities weigh against them. Rehearing should be sought on its own merits, not as a delay tactic to prolong relief the Eleventh Circuit

has now ruled Plaintiffs should not have received. Because Alabama’s law is presumptively valid under binding precedent, Defendants respectfully request a stay of the preliminary injunction so they may enforce the law pending final judgment and any further appellate review. And because of the serious implications for Alabama’s children and the potential need to seek a stay from the Eleventh Circuit, **Defendants respectfully request a ruling on this motion by September 22.**

ARGUMENT

Four considerations govern “whether a stay is warranted”: “(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (cleaned up). All four support a stay here.

I. Defendants Are Likely To Succeed.

Defendants are likely to succeed in obtaining vacatur of the preliminary injunction. Indeed, the Eleventh Circuit has already published a binding precedent vacating that injunction. *See Eknes-Tucker v. Governor of Alabama*, ___ F.4th ___, ___, No. 22-11707, 2023 WL 5344981, at *18 (11th Cir. Aug. 21, 2023) (“[W]e

vacate the district court’s preliminary injunction on the enforcement of section 4(a)(1)-(3) of the Act.”).

Though “the mandate” in that appeal “has not yet issued,” the Eleventh Circuit’s opinion “is nonetheless the law in this circuit.” *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992). The mandate is simply “the official means of communicating [the Eleventh Circuit’s] judgment to the district court and of returning jurisdiction in a case to the district court.” *Id.* But that procedure “in no way affects the duty of ... the courts in this circuit to apply now the precedent established by [the opinion] as binding authority.” *Id.*; see 11th Cir. R. 36-3, Internal Operating Procedure 2 (“Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.”). And this Court retains jurisdiction to stay the preliminary injunction. See Fed. R. Civ. P. 62(d); Fed. R. App. P. 8(a)(1) (requiring motions for stay to be made “first in the district court”).

Binding circuit precedent thus establishes that Defendants are substantially likely to succeed on the merits. Indeed, they have already prevailed on the merits of the preliminary injunction. That is true even if Plaintiffs’ attempt to seek rehearing or further review by the en banc Eleventh Circuit or the Supreme Court comes to fruition—which, it must be said, is a slim possibility in itself, and an even slimmer one that either court would reach a result at odds with the unanimous panel opinion.

Under current law, Defendants succeed and the injunction should be stayed. *See Order, Koe v. Carlson*, No. 1:23-cv-2904-SEG, Doc. 119 (N.D. Ga. Sept. 5, 2023) (staying preliminary injunction of Georgia’s similar law because “[i]t is undisputed that th[e] Court’s preliminary injunction order rests on legal grounds that have been squarely rejected by the panel in *Eknes-Tucker*, and that th[e] Court’s injunction cannot stand on the bases articulated in the order”).

A similar analysis recently played out in the Western District of Kentucky. Plaintiffs there challenged Kentucky’s law prohibiting the administration of sex-modification procedures to minors, and the district court preliminary enjoined enforcement of the law. But after the Sixth Circuit stayed a preliminary injunction enjoining enforcement of Tennessee’s similar law, *see L.W. v. Skrmetti*, 73 F.4th 408, 412 (6th Cir. 2023), the Kentucky court re-weighed the equitable factors, found that Kentucky was likely to succeed on the merits, and stayed its injunction. *See Order, Doe I v. Thornbury*, No. 23-cv-230, Doc. 79 (W.D. Ky. July 14, 2023). The Sixth Circuit declined to lift the stay pending appeal. *Doe I v. Thornbury*, 75 F.4th 655, 657 (6th Cir. 2023).

The only difference here is that the Eleventh Circuit has *already* ruled that Defendants are substantially likely to succeed on the merits and has ordered the injunction to be vacated. The likelihood-of-success factor thus weighs heavily in favor of a stay. *See NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1209 (11th Cir.

2022) (“Likelihood of success on the merits is generally the most important factor.” (internal quotation marks omitted)).

II. Defendants—And The Public—Will Be Irreparably Injured Absent A Stay.

After likelihood of success, irreparable injury to the movant is the other “most critical” factor. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As government officials, Defendants’ “interest and harm merge with the public interest.” *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020); see PI Op., Doc. 112-1 at 30. Both Defendants and the public are irreparably injured by an injunction against enforcement of a presumptively valid law that protects children.

First, “the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); see *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that State “would be harmed if it could not apply its own laws”); PI Op., Doc. 112-1 at 30 (“preliminary injunctions of legislative enactments” “interfere with the democratic process” (cleaned up)).

Second, “[i]t is well established that states have a compelling interest in safeguarding the physical and psychological well-being of minors.” *Eknes-Tucker*, 2023 WL 5344981, at *13 (cleaned up). “In the same vein, states have a compelling interest in protecting children from drugs, particularly those for which there is uncertainty regarding benefits, recent surges in use, and irreversible effects.” *Id.* Here, “the record evidence is undisputed that the medications at issue present *some* risks”; “[a]s

[this Court] recognized, these medications can cause ‘loss of fertility and sexual function.’” *Id.* (quoting PI Op., Doc. 112-1 at 3). Alabama’s law addresses both “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.” *Id.* Enjoining enforcement of the law would irreparably harm children who “may not be finished forming their identities and may not fully appreciate the associated risks” of these sterilizing interventions. *Id.* at *17. Absent a stay, these children may face a lifetime of physical and mental harm—permanently immature sex organs, bone density loss, delayed development, and much, much more. *See* PI Response, Doc. 74 at 57-76, 109-20; *see also* PI Op., Doc. 112-1 at 19 (“Undoubtedly, transitioning medications carry risks.”).

In considering the public interest at the preliminary injunction stage, this Court emphasized the merits of the Plaintiffs’ substantive due process parental rights claim. *See* PI Op., Doc. 112-1 at 31. But the Eleventh Circuit held that “the ‘right to treat one’s children with transitioning medications subject to medically accepted standards’” is *not* “a fundamental right protected by the Constitution.” *Eknes-Tucker*, 2023 WL 5344981, at *14. Thus, the public interest favors enforcement of a validly enacted law that protects children and is consistent with the Constitution.

As the Sixth Circuit recently explained in granting a stay of a similar preliminary injunction, “[i]f the injunction remains in place,” the State “will suffer

irreparable harm from its inability to enforce the will of its legislature, to further the public-health considerations undergirding the law, and to avoid irreversible health risks to its children.” *L.W.*, 73 F.4th at 421. Here too, a stay is necessary.

III. The Equities Favor A Stay.

Finally, Plaintiffs’ stated interests do not overcome the merits and public interest considerations favoring a stay. A week after the Eleventh Circuit issued its opinion vacating the preliminary injunction, Plaintiffs’ counsel put out a press release stating that “[t]he most important thing to know is that the preliminary injunction blocking enforcement of Alabama’s law is still in effect and will remain in effect at least for the next two to three months, and possibly longer.”¹ In that press release, Plaintiffs’ counsel stated that they plan to move for reconsideration, and that “[w]hile this process unfolds, the preliminary injunction remains in effect, which means the Alabama [law] cannot be enforced.”² In that time, according to the Plaintiffs’ counsel, “[m]edical providers in Alabama” “will continue to provide” sterilizing sex-modification interventions.³

Plaintiffs are entitled to seek further appellate review, but they are not entitled to the benefits of the injunction while they do so. Under binding circuit law,

¹ GLBTQ Legal Advocates & Defenders, *Update on the federal challenge to Alabama’s law banning medical care for transgender minors and access to care* (Aug. 28, 2023), <https://www.glad.org/update-on-federal-challenge-to-al-transgender-medical-care-ban/>.

² *Id.*

³ *Id.*

Alabama’s law is due to be enforced—now. And because of that binding law, the proper default rule during any further proceedings is that the law should be enforced. Defendants are happy for the appellate process to play out and for Plaintiffs to have the full opportunity to seek rehearing if they wish. Defendants ask only to be able to enforce Alabama’s presumptively valid law in the meantime.

To the extent that Plaintiffs assert a harm from being denied risky medical interventions, “elected representatives made these precise cost-benefit decisions.” *L.W.*, 73 F.4th at 421. Whether “the procedures create health risks that cannot be undone” or “the absence of such procedures creates risks that cannot be undone” is not a choice “for judges to make.” *Id.* “[T]hese types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action.” *Eknes-Tucker*, 2023 WL 5344981, at *18. And in any event, as Defendants previously explained, “[n]ot only is it impossible to tell who would benefit from the interventions if they worked the way Plaintiffs say, but the evidence does not even show that the treatments offer long-term benefits even when they are administered under the most conservative conditions.” PI Response, Doc. 74 at 116; *see id.* at 114-20; *see also Eknes-Tucker*, 2023 WL 5344981, at *21 (Brasher, J., concurring). And Alabama’s medical professionals can manage Plaintiffs’ mental health in other ways, including through existing or innovative psychotherapy. *See* PI Response, Doc. 74 at 43; Declaration of Dianna Kenny, Doc. 69-7 at 37-44.

Last, it should be noted that “prescribing medications to safely *end* a gender-transition procedure does not fall within the Act’s prohibition,” PI Response, Doc. 74 at 156, thus “lessen[ing] [any] harm to those minors who wish to continue receiving treatment,” *L.W.*, 73 F.4th at 421. As Defendants explained at the preliminary injunction hearing, “tapering somebody off of these artificial hormones” “would not be using the hormones for [a] prohibited purpose”—*i.e.*, “engag[ing] in or caus[ing] the [listed] practices for the purpose of attempting to in effect cause a gender transition.” PI Trans. 412. So cutting off medication cold turkey is not “something that anyone needs to worry about.” *Id.* Instead, the law prohibits what the Alabama legislature determined was impermissibly risky: giving puberty blockers or cross-sex hormones to a child “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s [biological sex].” Ala. Code § 26-26-4(a).

CONCLUSION

For these reasons, the Court should stay the preliminary injunction.

Date: September 6, 2023

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s/ Edmund G. LaCour Jr.
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Counsel for Defendants

TAB 314

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11707

PAUL A. EKNES-TUCKER,
Rev.,
BRIANNA BOE,
individually and on behalf of her minor son, Michael Boe,
JAMES ZOE,
individually and on behalf of his minor son, Zachary Zoe,
MEGAN POE,
individually and on behalf of her minor daughter, Allison Poe,
KATHY NOE, et al.,
individually and on behalf of her minor son, Christopher Noe,
Plaintiffs-Appellees,

versus

GOVERNOR, OF THE STATE OF ALABAMA,
ATTORNEY GENERAL, STATE OF ALABAMA,
DISTRICT ATTORNEY, FOR MONTGOMERY COUNTY,
DISTRICT ATTORNEY, FOR CULLMAN COUNTY,

2

Order of the Court

22-11707

DISTRICT ATTORNEY, FOR LEE COUNTY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:22-cv-00184-LCB-SRW

ORDER:

A judge of this Court withholds issuance of the mandate in
this appeal.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

TAB 316

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

BRIANNA BOE, *et al.*,)
)
Plaintiffs,)
)
and)
)
UNITED STATES OF AMERICA,)
) NO. 2:22-CV-00184-LCB-CWB
Plaintiff-Intervenor,) HON. LILES C. BURKE
)
v.)
)
STEVE MARSHALL, in his official)
capacity as Attorney General of the)
State of Alabama, *et al.*,)
)
Defendants.)
)

PRIVATE PLAINTIFFS' RESPONSE TO DEFENDANTS' TIME-SENSITIVE MOTION TO STAY PRELIMINARY INJUNCTION

Plaintiffs Brianna Boe, individually and on behalf of her minor son, Michael Boe; Megan Poe, individually and on behalf of her minor daughter, Allison Poe; Kathy Noe, individually and on behalf of her minor son, Christopher Noe; Rachel Koe, M.D.; Rebecca Roe, individually and on behalf of her minor daughter, Melissa Roe; Heather Austin, Ph.D.; and Robert Moe, individually and on behalf of his minor

daughter, April Moe (collectively, “the Private Plaintiffs”) respond to Defendants’ Time-Sensitive Motion to Stay the Preliminary Injunction (Doc. 313) (the “Motion”).

On September 11, 2023, Plaintiffs filed their Petition for Rehearing En Banc, explaining in detail why the decision of the Eleventh Circuit panel vacating this Court’s preliminary injunction conflicts with multiple prior decisions of the Supreme Court and the Eleventh Circuit.¹ In their Motion, Defendants acknowledge that, under the Federal Rules of Appellate Procedure, Plaintiffs’ filing of that petition automatically stays issuance of the Eleventh Circuit’s mandate until such time as the Court of Appeals completes its consideration of the petition. And if the rules themselves were not clear enough, the Eleventh Circuit has now issued an order *specifically withholding issuance of the mandate in Defendants’ appeal*. See Doc. 314; *Eknes-Tucker v. Governor of the State of Alabama*, No. 22-1107, Doc. 132 (11th Cir. Sept. 15, 2023). Despite this well-established procedure and the Eleventh Circuit’s order, Defendants urge this Court to depart from the ordinary rules and process applicable to each of the more than 50,000 appeals that are filed each year

¹ Defendants filed their Motion to Stay on September 6, 2023, in anticipation of Private Plaintiffs filing their Petition for Rehearing En Banc. See Doc. 313.

in the federal court system² and immediately provide them the full relief they seek in their appeal before that appeal is concluded.

Defendants offer no reason why the particular facts and circumstances of this case require an exception from rules that have governed appellate review in the federal system for many decades. By contrast, Plaintiffs would suffer severe and irreparable harm if the ordinary processes of appellate review are circumvented in the manner Defendants suggest. As this Court found in granting the preliminary injunction, the Minor Plaintiffs will suffer severe harm if they are deprived of established treatments for gender dysphoria. Those same considerations weigh strongly against the Court granting the extraordinary relief Defendants seek, which would deprive Plaintiffs of procedures and protections that have been developed to ensure that all litigants are guaranteed fair treatment and that the appellate review process proceeds in an orderly manner. The Court should deny Defendants' motion and permit the appellate process to proceed as normal.

ARGUMENT

The Federal Rules of Appellate Procedure establish a clear and precise timeline for when appellate decisions become effective and when jurisdiction over the matter on appeal returns to the District Court. The filing of a notice of appeal

² See United States Courts, Appellate Courts and Cases – Journalist's Guide, *available at* <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide>.

divests the District Court of jurisdiction over the matter on appeal; jurisdiction is returned to the District Court upon issuance of the mandate of the Court of Appeals. *See, e.g., United States v. Sears*, 411 F.3d 1240, 1241–42 (11th Cir. 2005).

When an appeals court panel decision is issued, the Federal Rules provide that the mandate will issue “7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.” Fed. R. App. P. 41(b). The reason for this automatic delay in issuing the mandate is clear: “[u]nless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment.” 11th Cir. R. 35-10. The Federal Rules establish a well-defined process to ensure orderly resolution of appeals and to prevent further proceedings in the district courts concerning the matter on appeal before appellate consideration is concluded. The automatic delay ensures that the District Court does not act in reliance on the panel opinion while a request for rehearing en banc is pending and further appellate review remains possible.³

³ Notably, a different rule applies when rehearing en banc is denied or is not requested and a party files a petition for writ of certiorari in the Supreme Court. In that circumstance, there is no automatic delay in issuance of the mandate. A party desiring a stay of the mandate must file a motion requesting such a stay in the Court of Appeals. *See* Fed. R. App. P. 41(d).

Pursuant to the Federal Rules, Plaintiffs filed a timely petition for rehearing en banc on September 11, 2023. Contrary to Defendants' baseless claims, Plaintiffs did not do so as "a delay tactic to prolong relief." (Mot. at 1.) Rather, Plaintiffs' petition carefully explains why the panel opinion conflicts with multiple decisions of the Supreme Court and the Eleventh Circuit concerning the rights of parents to direct their children's medical care under the Due Process Clause and the application of the Equal Protection Clause to laws that classify based on sex and transgender status. These are not frivolous claims asserted for the purpose of delay. Plaintiffs have explained why the panel's decision departs from longstanding precedent, including many of the precedents that this Court relied on in granting the preliminary injunction, and why the appeal concerns constitutional issues of the highest importance. Moreover, after the filing of that petition, the Eleventh Circuit ordered that issuance of the mandate be withheld. *See* Doc. 313.

Plaintiffs' counsel's issuance of a press statement following the Eleventh Circuit decision also does not show that their petition for rehearing en banc was filed for purposes of delay, as Defendants' Motion suggests. That statement was issued in response to understandable concerns from many Alabama families about whether the decision would cause them to immediately lose access to medical treatment for their transgender adolescent children. Plaintiffs' counsel simply communicated their best understanding of a realistic timeframe for when the Treatment Ban might go

into effect given their anticipated litigation plans. And any contention that the petition was filed for an improper purpose of delay is undermined by the fact that Plaintiffs filed their petition well ahead of their deadline for doing so, which would have been 45 days after issuance of the panel opinion due to the participation of the United States as a party to the appeal. *See* 11th Cir. R. 35-2.

Notwithstanding the well-established and clear procedures following a panel decision, Defendants seek to bypass the Federal Rules and obtain the full relief that their appeal seeks immediately, before the appeal is concluded. Their Motion offers no legitimate reason for the Court to depart from the rules in this manner. Indeed, it is not even clear that this Court has jurisdiction to grant the relief that Defendants seek because it is precisely the same relief sought in their appeal, a matter over which the Eleventh Circuit is still exercising its jurisdiction. *See, e.g., Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 819 (5th Cir. 1989) (holding that “the district court may not alter the injunction once an appeal has been filed except to maintain the status quo of the parties pending the appeal”). Defendants’ principal argument is that, notwithstanding the clear timeline established by the Federal Rules of Appellate Procedure, the panel opinion is precedential upon issuance, even before the mandate issues. For this reason, they assert Plaintiffs’ likelihood of success on the merits and the other factors that led the Court to issue the preliminary injunction must now be

re-balanced and the Court must reconsider its earlier decision even before the Eleventh Circuit has remanded the case to this Court.

The principal authority on which Defendants rely, *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992), does not assist them. In that case, which concerned a habeas corpus petition, the Eleventh Circuit relied on its decision in an earlier appeal from a separate habeas petition that had previously been filed by the petitioner. The court held that although the mandate in the previous appeal had not issued, the court's earlier decision was nonetheless precedential for purposes of the later appeal. *See id.*

Unlike *Martin*, this case does not involve the application of an appellate decision as precedent in a separate, subsequent case. Instead, Defendants ask this Court to provide the precise relief that is sought in their appeal *in the same case*, and to do so before appellate review is concluded. Setting aside the question of whether this Court has jurisdiction to enter such an order, it is clear that doing so would both thwart the intent of the Federal Rules and undermine considerations of judicial economy.

Under Defendants' proposal, any litigant who succeeds in obtaining a decision from an appellate panel vacating a preliminary injunction would be entitled to ignore the Federal Rules and their provisions concerning petitions for rehearing en banc and simply return to the District Court immediately to demand relief. Presumably,

this also means that if rehearing en banc were granted and the panel decision were automatically vacated, *see* 11th Cir. R. 35-10, the District Court would ping pong to restoring the injunction while en banc reconsideration proceeds. The Federal Rules provide the clear process outlined above precisely to avoid such dueling back-and-forth motions in the district courts while the matter at issue remains on appeal. The Court should reject Defendants' plea to replace the Federal Rules with this new norm and the attendant proliferation of needless motion practice on the district courts' dockets.

The other cases on which Defendants rely also do not support their position. In *Koe v. Carlson*, No. 1:23-cv-2904-SEG, Doc. 119 (N.D. Ga. Sept. 5, 2023), the court granted a stay pending appeal, as specifically authorized by Federal Rule of Appellate Procedure 8, before any meaningful appellate review of its preliminary injunction had commenced. And in *Doe v. Thornbury*, No. 23-cv-230, Doc. 79 (W.D. Ky. July 14, 2023), the court likewise granted a stay at the outset of the appeal in response to an order from the Sixth Circuit requiring a stay pending appeal in a similar case. In this case, no stay pending appeal was sought or obtained at the outset of Defendants' appeal. Defendants should not be permitted to obtain one now so as to sidestep the timeline for issuance of the mandate provided in the Federal Rules.

Beyond these concerns regarding jurisdiction, judicial administration, and adherence to the Federal Rules, Defendants' Motion also fails on the merits because

Defendants have not made the showing necessary to establish that they would suffer irreparable harm because of any delay that may result from the Eleventh Circuit's consideration of the petition for rehearing en banc. Any such claim of harm is undermined by Defendants' failure to seek a stay of the Court's preliminary injunction at the outset of their appeal. *Cf. Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981), *overruled on another point by Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 n.8 (11th Cir. 1997) (affirming district court's denial of stay of state court proceedings under Anti-Injunction Act in light of party's "delay in seeking a stay until the state court had adjudicated all issues except the amount of damage").

The preliminary injunction has been in effect for over a year. All of the claimed harms that Defendants assert they will suffer are precisely the same harms that they claimed to be suffering at the time the injunction was entered. Defendants did not move for a stay pending appeal in either this Court or the Eleventh Circuit. Defendants have failed to demonstrate that they will suffer any new harm that was not present when the appeal commenced because of the additional delay needed for en banc reconsideration.

In any event, as this Court has previously concluded, any harm that Defendants will suffer from being unable to enforce the Treatment Ban is outweighed by the severe and irreparable harm that Plaintiffs will suffer if they are

no longer able to access established medical treatments from which they have already benefitted. As the Court found, “[t]he record shows that, without transitioning medications, Minor Plaintiffs will suffer severe medical harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality,” as well as “significant deterioration in their familial relationships and educational performance.” *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1150 (M.D. Ala. 2022). Given the gravity of harm that Plaintiffs are facing, the Court should reject Defendants’ invitation to circumvent the Federal Rules and should ensure that Plaintiffs retain the benefit of procedural protections that have been established for appellate review to proceed in a manner that promotes fairness, stability, and certainty for all parties.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants’ Motion.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this document using the Court's CM/ECF system on September 22, 2023, which will serve all counsel of record.

s/ Melody H. Eagan

TAB 317

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

Brianna Boe, *et al.*,)
)
Plaintiffs,)
)
United States of America,)
)
Intervenor Plaintiff,)
)
v.) Civil Action No. 2:22-cv-184-LCB
)
Hon. Steve Marshall, in his official)
capacity as Attorney General,)
of the State of Alabama, *et al.*,)
)
Defendants.)

**DEFENDANTS' REPLY IN SUPPORT OF TIME-SENSITIVE MOTION
TO STAY PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Introduction	1
Argument.....	2
I. The Court Has Jurisdiction To Issue A Stay	2
II. All Factors Support A Stay	5
Conclusion	9

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018).....	7
<i>Contra Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.</i> , 210 F.3d 1309 (11th Cir. 2000)	8
<i>Dillard v. City of Foley</i> , 926 F. Supp. 1053 (M.D. Ala. 1995).....	2
<i>Eknes-Tucker v. Governor of Alabama</i> , ___ F.4th ___, No. 22-11707, 2023 WL 5344981 (11th Cir. Aug. 21, 2023).....	8
<i>Fernandez v. Mattress Xperts Broward, Inc.</i> , No. 21-80573-cv, 2021 WL 3931243 (S.D. Fla. Sept. 2, 2021).....	3
<i>First Fin. Bank v. CS Assets, LLC</i> , No. 08-0731, 2010 WL 3119077 (S.D. Ala. Aug. 6, 2010)	3
<i>Georgia Advoc. Off. v. Jackson</i> , 33 F.4th 1325 (11th Cir. 2022)	3
<i>Hand v. Scott</i> , 888 F.3d 1206 (11th Cir. 2018)	7
<i>In re Miranne</i> , 852 F.2d 805 (5th Cir. 1988)	3
<i>Koe v. Noggle</i> , No. 1:23-cv-2904-SEG (N.D. Ga. Aug. 20, 2023).....	6
<i>Martin v. Singletary</i> , 965 F.2d 944 (11th Cir. 1992)	3, 6
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	8

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834 F.2d 673 (7th Cir. 1987)4

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958 F.3d 1081 (11th Cir. 2020)8

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No. 1:09-CV-01734-WCO, 2011 WL 13269445
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11th Cir. R. 36-3, Internal Operating Procedure 26

Fed. R. App. P. 82

Fed. R. Civ. P. 622

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INTRODUCTION

Plaintiffs do not dispute the most important factor favoring a stay: Defendants are likely to succeed on the merits because the Eleventh Circuit already ruled in their favor in a binding, precedential opinion. Most of the Plaintiffs' response is devoted to an irrelevant tangent about appellate court mandates, suggesting that the Court lacks jurisdiction to enter a stay. That suggestion is meritless. The Federal Rules *require* that a party seeking to stay an injunction during an appeal ask the district court first. Plaintiffs cite nothing suggesting that district courts lack jurisdiction to consider such motions. District courts cannot *vacate* injunctions that are on appeal. But they can *stay* them. That is what the Defendants request.

The formal issuance of the mandate has nothing to do with whether a stay of an injunction is warranted in light of the panel's precedential ruling. At any time since this Court's injunction was issued, the Court could have issued a stay. That power did not evaporate when the Eleventh Circuit vacated this Court's injunction in a binding opinion. And the Court *should* exercise the power to stay now because the Defendants are likely to succeed and satisfy the other stay factors.

Plaintiffs contest neither likelihood of success nor the public interest. Though they briefly imply that the State Defendants do not consider themselves harmed from being prevented from enforcing Alabama's laws, that harm is why Defendants immediately appealed this Court's preliminary injunction. Doc. 108. The Plaintiffs'

only real argument is about purported harms to the Minor Plaintiffs, but the legislative determination the Eleventh Circuit held required deference was that these sex-modification procedures themselves harm, not help, children. All factors support a stay.

ARGUMENT

I. The Court Has Jurisdiction To Issue A Stay.

Most of Plaintiffs' response is directed toward a suggestion that the Court lacks jurisdiction to issue a stay. That is wrong. "A party can move to have the [order] stayed upon appeal." *U.S. Commodity Futures Trading Comm'n v. Escobio*, 946 F.3d 1242, 1251 (11th Cir. 2020) (citing Fed. R. Civ. P. 62 and Fed. R. App. P. 8). Under Federal Rule of Appellate Procedure 8(a)(1), a party seeking a stay during an appeal "must ordinarily move first in the district court." (Emphasis added); see Plaintiffs' Response 8 (later conceding that "stay[s] pending appeal" are "specifically authorized by Federal Rule of Appellate Procedure 8"). And under Federal Rule of Civil Procedure 62(d), "[w]hile an appeal is pending from an interlocutory order ... that grants ... an injunction, the court may suspend, modify, restore, or grant an injunction."

These provisions each confirm that "it is within the court's discretion to issue a stay of an order granting an injunction" while that order is on appeal. *Dillard v. City of Foley*, 926 F. Supp. 1053, 1075 (M.D. Ala. 1995); see, e.g., *Tucker v. Fulton*

Cnty., No. 1:09-CV-01734-WCO, 2011 WL 13269445, at *1 (N.D. Ga. May 24, 2011) (“[E]ven though plaintiff has already filed his notice of appeal, the court retains jurisdiction to consider the propriety of a stay.” (citing *In re Miranne*, 852 F.2d 805, 806 (5th Cir. 1988) (“[W]e are persuaded that the district court retained jurisdiction to grant appellant’s request for a stay despite the fact that the notice of appeal was filed prior to the request for a stay,” primarily due to the “general principle that an application for a stay of the judgment or order of a district court ordinarily should be made in the first instance in the district court”))); *First Fin. Bank v. CS Assets, LLC*, No. 08-0731, 2010 WL 3119077, at *2 (S.D. Ala. Aug. 6, 2010) (same). The Plaintiffs’ “arguments would make the[se] rule[s] a nullity and are unsound.” 11 Wright & Miller, *Federal Practice & Procedure* § 2904 (3d ed.).

The appellate mandate is irrelevant to this Court’s jurisdiction to enter a stay. “The stay of the mandate ... merely delays the return of jurisdiction to the district court to carry out [the Court of Appeals’] judgment in that case.” *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992); e.g., *Georgia Advoc. Off. v. Jackson*, 33 F.4th 1325, 1326 (11th Cir. 2022); *Fernandez v. Mattress Xperts Broward, Inc.*, No. 21-80573-cv, 2021 WL 3931243, at *2 (S.D. Fla. Sept. 2, 2021) (“[T]he mandate in any case functions to end the jurisdiction of the appellate court and to return full jurisdiction of the case to the trial court.”).

But—and this is the critical point—this Court never lost jurisdiction to issue a stay. Practically *every* stay order pending appeal from a district court comes before a mandate issues. As Wright and Miller explain, the “[p]ower of [a] district court to grant a stay of judgment pending appeal continues to reside in the district court until such time as the court of appeals issues its mandate.” 11 *Federal Practice & Procedure, supra*, § 2908 n.7. That is true even *if* the Court of Appeals issues a “grant of a rehearing en banc.” *Id.* (describing the holding of *Rakovich v. Wade*, 834 F.2d 673 (7th Cir. 1987), and collecting other cases).

For these reasons, the Plaintiffs’ lengthy discussion of mandate issuance rules is as irrelevant as the fact that one Eleventh Circuit judge directed “withholding issuance of the mandate.” Plaintiffs’ Response 2 (emphases omitted). The mandate rules have nothing to do with whether a stay is appropriate. They have no bearing on any of the four stay factors. They have no connection with this Court’s jurisdictional or equitable powers to decide this motion.¹

The Plaintiffs insist that issuing a stay is “an exception from rules that have governed appellate review in the federal system for many decades.” *Id.* at 3. But

¹ If the Eleventh Circuit or the Supreme Court were to change the result on appeal—a possibility that even the Plaintiffs do not argue is likely—this Court would equally retain jurisdiction to adjust any stay as necessary. That possibility is no reason to deny the Eleventh Circuit’s binding precedent of its force now. This is not “ping pong” (Plaintiffs’ Response 8); it is following binding law. As Plaintiffs acknowledge, mandates are not typically withheld pending Supreme Court review (*id.* at 4 n.3), but even that rule—which permits a case to proceed fully in the district court—has not resulted in some crisis of “fairness, stability, and certainty” (*id.* at 10).

again, stays pending appeal are practically always issued while the mandate is outstanding. This case would be no exception. And though Plaintiffs speak of “bypass[ing]” “the clear timeline established by the Federal Rules of Appellate Procedure” (*id.* at 6), how could a district court stay be proper “at the outset of the appeal” (*id.* at 8 (citing similar Georgia litigation)) but *not* after the moving party prevails? In both cases, the Court of Appeals possesses the mandate. Plaintiffs have no explanation for this divergence. It is thus *Plaintiffs* who demand an extraordinary result: depriving the State Defendants of the benefit of their own victory while every other jurisdiction within the Eleventh Circuit must operate under the binding precedent obtained by Defendants on appeal. The Plaintiffs point to no precedent supporting this bizarre result.² The Court has jurisdiction to stay its own preliminary injunction.

II. All Factors Support A Stay.

All stay factors support Defendants.

1. The Defendants are likely to succeed on the merits of their appeal because they already have. Plaintiffs do not contest that Defendants are indeed likely to succeed on the merits. At most, they seem to contest whether the opinion establishing that likelihood is already “precedential.” Response 6. Given that they do not

² Plaintiffs’ position would also lead to gamesmanship of the type they disclaim (Response 5) by encouraging losing parties to delay the mandate.

meaningfully contest *likelihood* of success, their argument about precedential force is irrelevant.

It's also flat-out wrong. As Plaintiffs characterize Defendants' "principal argument," "the panel opinion is precedential upon issuance, even before the mandate issues." Response 6. That is indeed Eleventh Circuit law: "The stay [of the mandate] in no way affects the duty of ... the courts in this circuit to apply now the precedent established by [the opinion] as binding authority." *Martin*, 965 F.2d at 945 n.1. It "is the law in this circuit." *Id.*; see 11th Cir. R. 36-3, Internal Operating Procedure 2 ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

Plaintiffs suggest that this rule applies only to "a separate" case. Response 7. That is not what *Martin* or the Eleventh Circuit rules say. They say that a precedential opinion *immediately* becomes "law in this circuit" and "binding authority." Unsurprisingly then, Plaintiffs find no support in the caselaw for their suggestion. And that suggestion would lead to absurd results: near-identical district court cases would reach different outcomes. That is no hypothetical harm. On August 20, 2023, the Northern District of Georgia entered a preliminary injunction enjoining enforcement of Georgia's similar law. *Koe v. Noggle*, No. 1:23-cv-2904-SEG (N.D. Ga. Aug. 20, 2023), ECF 106. The Eleventh Circuit decided this case the next day, and, as a result, the Georgia Court stayed its injunction on September 5. *Id.*, ECF 119. Plaintiffs seem

to agree that stay was proper in light of the Eleventh Circuit's (precedential) decision, but argue that this Court should not follow suit. Why? Because the Eleventh Circuit's decision was in *this* case rather than Georgia's, thus (somehow) indicating that this Court is not bound by the decision the way other courts are. Response 8. Plaintiffs offer no justification for such absurdity, and there is none. The Eleventh Circuit's decision is binding precedent for *all* courts in the Circuit, including this one.

2. Plaintiffs' suggestion that Defendants will not "suffer irreparable harm because of any delay" (*id.* at 9) is likewise foreclosed by precedent. "[T]he inability to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that the State "would be harmed if it could not apply its own laws"). Plaintiffs have no response. Instead, citing only an abrogated 40-year-old case about parallel state proceedings, they suggest that the Defendants must not be harmed because they did not "seek a stay of the Court's preliminary injunction at the outset of their appeal." Response 9. But Defendants have repeatedly asserted the very sovereignty harm that the Plaintiffs now pretend does not exist (*see, e.g.*, Doc. 74 at 157), and that harm is why Defendants immediately appealed this Court's preliminary injunction. *See* Doc. 108. Now that Defendants have prevailed on that appeal, all factors favor the State, and a stay motion is warranted.

3. Defendants have explained why the public interest too supports a stay: “to further the public-health considerations undergirding the law, and to avoid irreversible health risks to [Alabama] children.” Doc. 313 at 9-11. Plaintiffs have no answer. Their response does not even contain the word “public.” *Contra Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000) (one stay factor is “where the public interest lies”). The public interest supports a stay. *See also Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (noting that, as government officials, Defendants’ interest and harm merge with the public interest”).

4. Plaintiffs invoke purported harms to the Minor Plaintiffs from a stay, but those theoretical harms cannot overcome the other stay factors. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (likelihood of success and irreparable injury to the movant “are the most critical” factors). In any event, Defendants explained why Plaintiffs’ harm argument fails: “elected representatives” determined that “the procedures create health risks that cannot be undone,” and the Eleventh Circuit said that determination is “the sort that our system of government reserves to legislative, not judicial, action.” Doc. 313 at 12 (quoting *Eknes-Tucker v. Governor of Alabama*, ___ F.4th ___, ___, No. 22-11707, 2023 WL 5344981, at *18 (11th Cir. Aug. 21, 2023)). This Court recognized that sex-modification procedures in minors can cause “loss of fertility and sexual function.” PI Op., Doc. 112-1 at 3. If the Court grants a stay, any

Minor Plaintiffs using sex-modification procedures—and nearly all the Plaintiffs who are still minors do *not* appear to be using such procedures (Doc. 159 at 15-16, 19-24)—can be safely tapered off them by their physicians. Doc. 313 at 13. And children in Alabama—including those not before the Court, but who are nevertheless still impacted by the continuing injunction—can continue to access safe, proven therapies for gender dysphoria. *Id.* at 12. Thus, Plaintiffs cannot make a showing that even one Minor Plaintiff would be harmed rather than helped by a stay.

CONCLUSION

Defendants do not begrudge the Plaintiffs their continued efforts on appeal. But under binding circuit law, Alabama's law can be enforced while those efforts run their course. The Court should stay the preliminary injunction.

Date: September 28, 2023

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CERTIFICATE OF SERVICE

I certify that I electronically filed this document using the Court's CM/ECF system on September 28, 2023, which will serve all counsel of record.

s/ Edmund G. LaCour Jr.
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TAB 368

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

BRIANNA BOE, et al.,)
)
 Plaintiffs,)
)
 v.) **Case No. 2:22-cv-184-LCB**
)
 STEVE MARSHALL, et al.,)
)
 Defendants.)

ORDER

This case challenges the constitutionality of Section 4(a)(1)–(3) of the Alabama Vulnerable Child Compassion and Protection Act, a statute that criminalizes gender-affirming medical treatments for transgender youth in the State of Alabama. But it was not the first case to do so: two earlier cases, *Walker v. Marshall*, 5:22-cv-480-LCB (N.D. Ala.) and *Ladinsky v. Ivey*, 5:22-cv-447-LCB (N.D. Ala.), mounted precisely the same challenge on behalf of other plaintiffs. Those cases, however, were voluntarily dismissed—indeed, suspiciously so, for they were dismissed only minutes apart and on the same day they were consolidated before this Court. Counsel told the media they planned to refile immediately, and four days later, they filed this case.

Alert to the possibility of judge shopping, the Court ordered that these procedural irregularities be brought to the attention of the chief judges of the

Northern, Southern, and Middle Districts of Alabama, who later convened a three-judge panel to investigate whether counsel in either *Walker* or *Ladinsky* had impermissibly sought to circumvent the random case assignment procedures for the Northern and Middle Districts of Alabama. The panel opened their investigation in a miscellaneous case known as *In re Vague*, 2:22-mc-3977-WKW and, after a thorough inquiry lasting nearly a year and a half, issued its findings in a sealed Final Report of Inquiry with instructions that the Clerk of Court serve it on this Court to “proceed as appropriate.” *In re Vague*, 2:22-mc-3977-WKW (Doc. 70 at 52).¹

At the time the panel published its findings, several motions were already pending in this case on the merits; after its publication, a flurry of others followed. The Court addressed “all pending motions” at a hearing on November 2, 2023. This order memorializes the rulings made on the record and not yet entered on the docket.

DISCUSSION

I. Defendants’ Motion to Compel Designation of One Additional HHS Custodian: Admiral Rachel Levine (Doc. 302).

Defendants have moved under Federal Rule of Civil Procedure 37(a)(1) for an order compelling the United States to designate Admiral Rachel Levine as a document custodian for the Department of Health and Human Services. (Doc. 302). Earlier this year, the Court compelled the United States to produce thirteen

¹ To streamline the ancillary disciplinary proceedings that would follow from their findings, the panel reassigned *Vague* to this Court. *In re Vague*, 2:22-mc-3977-WKW (Doc. 99).

categories of communications and documents that Defendants had requested from HHS after concluding that Defendants' requests were relevant and proportional to the needs of the case. (Doc. 261). Apropos these requests, Defendants and HHS agreed on search terms and nine people to be named custodians, but they disagreed on whether a tenth—Admiral Levine—should be named as well. When neither party could agree to the other's proposed compromises, this motion followed.

For the reasons stated on the record, the Court finds that Admiral Levine's emails are relevant and Defendants' request to designate her as an HHS document custodian is proportional to the needs of the case. Given that Admiral Levine is a public official, the Court rests this finding in part on the parties' representation that the production would neither interfere with her official duties nor burden her personally.

Defendants' Motion to Compel Designation of One Additional HHS Custodian: Admiral Levine (Doc. 302) is therefore **GRANTED**.

II. Defendants' Oral Motion to Continue Trial (Doc. 351)

Although no paper motion was pending on the matter, Defendants moved at the hearing to continue the trial date by at least two months. In support of their motion, Defendants noted that the United States has not produced its discovery on time, and the delays mounting from its tardy production have threatened to

compromise the rigor of Defendants' experts' reports, which come due before the experts could review the full slate of discovery from the United States.

Defendants' motion is **GRANTED** and trial is reset for **August 12, 2024**. Unless the parties seek further modification, all other deadlines remain in place. Counsel at the hearing suggested that they might not need to ask the Court to modify the deadlines, since the United States wouldn't object to new ones. If this was meant to suggest that the scheduling order could be modified by the parties' agreement, they are reminded that this is not so. While parties are free to ask the Court to modify the scheduling order at any time, they cannot change it by agreement alone; they must seek the Court's consent. *See* FED. R. CIV. P. 16(b)(4). If the parties should like the Court to modify any further deadlines, they are encouraged to meet, confer, and move jointly for a new scheduling order.

III. Defendants' Time-Sensitive Motion to Stay Preliminary Injunction (Doc. 313)

On May 13, 2022, the Court enjoined Defendants from enforcing section 4(a)(1)–(3) of the Alabama Vulnerable Child Compassion and Protection Act pending a trial on the merits. (Doc. 107). The Court of Appeals for the Eleventh Circuit has since issued an opinion vacating the Court's preliminary injunction, but it has not issued a mandate to the Court. *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023). With this opinion in hand, Defendants have moved to stay the Court's injunction and begin enforcing the State's act. (Doc. 313).

As noted at the hearing, the Court is not obliged to rush the judicial process for the State's benefit. The Eleventh Circuit has not, for whatever reason, issued its mandate, and unless and until it does, the preliminary injunction will remain in effect.

For the reasons stated on the record at the hearing, Defendants' Time-Sensitive Motion to Stay Preliminary Injunction (Doc. 313) is **DENIED**.

IV. Defendants' Motion for Hearing (Doc. 322)

Defendants asked for a hearing to address three issues: (1) Defendants' motion to designate Admiral Levine as an HHS document custodian, (2) the parties' discovery timeline, and (3) Defendants' motion to stay the Court's preliminary injunction—the three issues decided above. (Doc. 322).

Because these issues have already been resolved, Defendants' Motion for Hearing (Doc. 322) is **DENIED AS MOOT**.

V. Motion to Take Judicial Notice (Doc. 346).

James Esseks, Carl Charles, and LaTisha Faulks have moved the Court to take judicial notice of the panel's filings in the *Vague* proceedings, including the sealed hearing transcripts that the panel considered as evidence in preparing its Final Report of Inquiry. After learning that the Court has had access to the *Vague* docket, including all its sealed filings, since that case was filed, respondents conceded that their motion is moot.

Respondents' Motion to Take Judicial Notice (Doc. 346) is therefore
DENIED AS MOOT.

VI. Defendants' Motions for Leave to File Under Seal (Doc. 335) and Amended Motion for Leave to File Unredacted Response Under Seal (Doc. 341)

Defendants have also moved for leave to file under seal a response to several motions that respondents in *Vague* had filed under seal in this case. (Doc. 335). A few days after Defendants first urged this motion, the Court noted that most of the *Vague* respondents' motions had been filed impermissibly under seal without the Court's permission, and it directed the clerk to unseal them. Defendants have since amended their motion with a redacted version of their response, but they re-urge their request to file their full briefing under seal. (Doc. 341).

Defendants' Motion and Amended Motion for Leave to File Unredacted Response Under Seal (Doc. 335; Doc. 341) are **GRANTED**. The Clerk of Court is **DIRECTED** to file the unredacted version of Defendants' Response under seal.

VII. Motion for Extension of Time (Doc. 353)

Esseks, Charles, and Faulks have also moved to extend the deadline to submit a memorandum on the merits of the panel's Final Report of Inquiry. At the hearing, respondents sought leave to brief the legal issues and standards implicated by the panel's findings, which the Court granted. Respondents now ask that they be permitted to file this response seven days after they receive a copy of the transcript

for the proceedings that took place before Special Master Bernard Harwood on May 20, 2022.

Respondents' Motion for Extension of Time (Doc. 353) is **GRANTED**.

CONCLUSION

The Court **ORDERS** as follows:

- Defendants' Motion to Compel Designation of One Additional HHS Custodian: Admiral Levine (Doc. 302) is **GRANTED**;
- Defendants' Oral Motion to Continue Trial (Doc. 351) is **GRANTED**, and trial is reset for **August 12, 2024**;
- Defendants' Time-Sensitive Motion to Stay Preliminary Injunction (Doc. 313) is **DENIED**;
- Defendants' Motion for Hearing (Doc. 322) is **DENIED AS MOOT**;
- Respondents' Motion to Take Judicial Notice (Doc. 346) is **DENIED AS MOOT**;
- Defendants' Motion and Amended Motion for Leave to File Unredacted Response Under Seal (Doc. 335; Doc. 341) are **GRANTED**, and the Clerk of Court is **DIRECTED** to file the unredacted version of Defendants' Response under seal; and
- Respondents' Motion for Extension of Time (Doc. 353) is **GRANTED**.

DONE and **ORDERED** this November 17, 2023.



LILES C. BURKE
UNITED STATES DISTRICT JUDGE

TAB A

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIANNA BOE, et al., *
*
Plaintiffs, * 2:22-cv-00184-LCB
* November 2, 2023
vs. * Montgomery, Alabama
* 10:00 a.m.
STEVE MARSHALL, et al., *
*
Defendants. *

SEALED

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LILES C. BURKE
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified
pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies
and Procedures Vol. VI, Chapter III, D.2. Transcript
produced by computerized stenotype.

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COURT REPORTER: Christina K. Decker, RMR, CRR

1 burden if we took that option.

2 THE COURT: I understand.

3 You know, if the shoe were on the other foot -- and it's
4 not -- but if it were, you know, I don't want to put the State
5 in the position of, you know, the person with the discovery
6 that's sought gets to determine the terms under which it will
7 be provided.

8 I don't think the request is unreasonable.

9 MS. MURPHY: Thank you, Your Honor.

10 THE COURT: Absolutely. Absolutely.

11 But, again, let me just say, you know, I do not want to
12 burden Admiral Lavine with this. And I think if the two of you
13 talk, we can find a way to accomplish their discovery without
14 it being any burden at all to her, much less a substantial
15 burden. I think we can do this through subordinates, and she
16 won't have to spend any time on it at all.

17 MS. MURPHY: Thank you, Your Honor.

18 THE COURT: All right. Do we have any additional
19 motions that we need to take up today?

20 MR. BOWDRE: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. BOWDRE: I think there are two other things that
23 we would like to talk with you about.

24 One is the HHS's notice that it's going to be two months
25 late in producing discovery.

1 And then the other is our motion to stay the Court's
2 preliminary injunction.

3 I will start with the schedule.

4 So, as you know, when the parties proposed and this Court
5 entered the scheduling order in June --

6 THE COURT: Let me just help you on the preliminary
7 injunction order.

8 That's the Eleventh Circuit's business. They've issued --
9 they've issued their ruling. For whatever reason, they have
10 not issued a mandate. That's up to them.

11 And, so, you know, if the Eleventh Circuit decides that
12 they want to issue a mandate on this case, and make that order
13 final and permanent, that will act. But I have no intention of
14 doing anything at this time with that order. That's fully in
15 the Eleventh Circuit hands, and that's up to them.

16 MR. BOWDRE: Yes, Your Honor.

17 And just to clarify, though. We are not asking you to
18 vacate the preliminary injunction, but to stay it, which we
19 think the Court has jurisdiction to do.

20 I understand if the Court doesn't want to do that, we
21 would just ask that the Court deny the order quickly so we can
22 pursue an appeal, if necessary.

23 THE COURT: Understood.

24 MR. BOWDRE: Back to HHS.

25 The schedule that this Court entered was a tight schedule,

1 but it depended on each phase being completed before the next
2 phase could take place.

3 So HHS was to produce all of its discovery to us by
4 October 20th. So then we had just a little over a month to
5 review that discovery with our experts, and then for those
6 experts to write their supplemental reports, which are due
7 December 1.

8 And then that gave the plaintiffs just over a month to
9 review those before their rebuttal reports were due. And then
10 there are a few weeks for final depositions before discovery
11 closed.

12 When HHS said that it's not going to be able to complete
13 discovery until December 15 -- two months later, and two weeks
14 after our supplemental reports are due -- that really throws a
15 wrench into things.

16 And I would also just point out that the discovery that is
17 delayed is from the National Institutes of Health, which is the
18 subdivision within HHS that is funding and overseeing the
19 ongoing studies into the safety and efficacy of these
20 transitioning treatments for children. So we think that
21 discovery is actually very important for our experts to be able
22 to review and opine on in the supplemental report.

23 So, obviously, we want to get to trial --

24 THE COURT: What's the solution?

25 MR. BOWDRE: I think reluctantly, and very

1 frustratingly for defendants, I think the solution is to kick
2 everything back by two months -- so adjust the schedule.

3 Because we think -- you know, we want to get to trial. We
4 want to vindicate the State's law. But we also need the
5 discovery to do that.

6 THE COURT: So move the trial?

7 MR. BOWDRE: Yes, Your Honor.

8 THE COURT: I had come to generally the same
9 conclusion myself.

10 MR. BOWDRE: One other --

11 THE COURT: Let me say something else about your
12 motion for me to vacate my preliminary injunction.

13 I mean, I'm not really sure why you filed that. You know,
14 that's the Eleventh Circuit's business.

15 Why do you think they haven't issued a mandate?

16 MR. BOWDRE: Well, Your Honor, I think there's a
17 difference between a stay and vacating the injunction. I just
18 want to be very clear that the mandate goes to whether this
19 Court has jurisdiction to vacate the injunction. And the
20 answer to that is clear, that it doesn't.

21 The mandate has nothing to do with whether this Court can
22 stay the injunction. And courts do that all the time.

23 THE COURT: I understand that.

24 MR. BOWDRE: Okay.

25 THE COURT: But you're asking me to get in front of

1 them. You are asking me to get out in front of them.

2 This is their business. They have issued an order, but
3 they have not issued a mandate. And I don't know what that
4 means.

5 Does it mean they're going to hear it *en banc*? Does it
6 mean the order might change? Does it mean it might not change?

7 But you are asking me to second guess them really, aren't
8 you?

9 MR. BOWDRE: No, Your Honor, I don't think so. I
10 think we are asking you to recognize that, as of right now, all
11 of the Eleventh Circuit is bound by the precedential decision
12 that the Court issued.

13 And so that is why, for instance, the Georgia district
14 court stayed its injunction that it had issued in light of the
15 Court's ruling. And so we just thought it would be very odd
16 that if that is proper for the Georgia district court to stay
17 its injunction in light of that ruling, the same effect should
18 take place here.

19 THE COURT: So let's get in the "what about" business.

20 So, then, I vacate my order based on this opinion, and a
21 new opinion comes out *en banc* that says something entirely
22 different.

23 MR. BOWDRE: If that's the case, Your Honor, then we
24 follow the new opinion.

25 The point is we follow the precedent as it exists today.

1 And the precedent as it exists today shows that we are likely
2 to succeed on the merits.

3 THE COURT: All right.

4 MR. BOWDRE: And, again --

5 THE COURT: I think we have covered it.

6 MR. BOWDRE: Yes, Your Honor.

7 THE COURT: All right. Anybody think that we don't
8 need to set this trial out a little bit further?

9 MS. EAGAN: Judge, Melody Eagan. From our
10 perspective, that is acceptable to us.

11 THE COURT: Okay. All right.

12 MS. MURPHY: Your Honor, Amie Murphy on behalf of the
13 United States.

14 I just want to correct the record very quickly, if I may.

15 THE COURT: Yes.

16 MS. MURPHY: Your Honor, defendants approached us last
17 week with the request to agree to change the scheduling order.
18 We gave it some thought in our office. We spoke with HHS.

19 Although HHS believes that they can complete the
20 production by mid November, we informed the defendants that we
21 were not opposed to an extension of the discovery schedule.

22 So I'm not sure why they made a motion here today. But we
23 said that we would agree to it.

24 THE COURT: Got it. Got it. Thank you.

25 Well, while I've got everybody, let's see what the

1 calendar says.

2 How do the first two weeks of July look for everybody?

3 MR. BOWDRE: I believe that would be fine with the
4 State defendants, Your Honor.

5 THE COURT: My wife is going to be very put out about
6 this.

7 MS. EAGAN: Your Honor, from our perspective -- from
8 our calendars, it's fine. But as a wife, who might have family
9 vacations planned --

10 THE COURT: Absolutely.

11 MS. EAGAN: But from our perspective, that works for
12 our calendars.

13 THE COURT: So the unexpected continues to happen in
14 this case, it seems, at every turn on a myriad of issues. And
15 I don't think it's impossible that another one -- another turn
16 could happen.

17 Do we want to make look at August the 1st, and keep
18 everybody's calendar intact and not risk having another
19 continuance?

20 MR. BOWDRE: Your Honor, either one would be fine with
21 us, Your Honor.

22 THE COURT: Got it.

23 MS. EAGAN: Your Honor, from our perspective, that is
24 fine.

25 THE COURT: Got it.

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CERTIFICATE

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

Christina K Decker

11-05-2023

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date

TAB B

CERTIFICATE OF SERVICE

I certify that on November 21, 2023, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for State Defendants