No. 21-2875

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DYLAN BRANDT, ET AL.,
Plaintiffs-Appellees,
v.
LESLIE RUTLEDGE,
in her official capacity as the Arkansas Attorney General, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 4:21-cv-450 JM (Hon. James M. Moody, Jr.)

BRIEF OF AMICI CURIAE STATE OF CALIFORNIA AND 20 OTHER STATES SUPPORTING PLAINTIFFS-APPELLEES

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INTERESTS OF AMICI CURIAE

Amici States California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to healthcare.[1] Discrimination and exclusion on the basis of transgender status cause tangible economic, emotional, and health harms such as increased risk of suicide and substance abuse. To prevent these injuries, many of the amici States have adopted laws and policies aimed at combatting discrimination against transgender people who seek to access healthcare—including policies that guarantee non-discriminatory coverage of gender-affirming medical care for transgender minors. These policies rely on evidence-based standards of care and are crafted to ensure that the amici States do not impinge on decisions made between physicians and their patients. The amici States' experience demonstrates that our laws and policies not only improve health outcomes for our transgender residents, they do so at little cost to the public fisc. More generally, amici States have a profound interest in the proper application of the Equal Protection Clause to protect all Americans against

[1] Amici States submit this amicus brief pursuant to the Federal Rule of Appellate Procedure 29(a) and Eighth Circuit Rule of Practice 29(a) in support of Plaintiffs-Appellees.

unconstitutional discrimination in any form and to especially remedy the stigma and discrimination that transgender Americans have experienced for many years.

Amici States have a strong interest in advocating for the well-being of their residents, including teenage residents receiving gender-affirming medical care who often travel to, attend schools in, or work in Arkansas. Without this necessary healthcare access, our residents risk forgoing needed care when visiting Arkansas or must return home to obtain such care. Both alternatives cause detrimental impacts to our residents and our state programs. Families visiting Arkansas deserve to have confidence that teens receiving gender-affirming medical care can continue to do so if, for example, they are hospitalized for an injury or need a prescription refilled. Finally, a reduction in services in one State often causes people to seek services in other States.

ARGUMENT

Arkansas Act 626 is an aberration that harms, not protects, transgender minors.[2] Arkansas' total ban on gender-affirming healthcare for transgender youth not only ignores broad medical consensus from established medical groups and organizations, it also oversteps by interfering in medical decisions that providers reach with their individual patients and their families. The experience of amici

[2] Arkansas Act 626 of 2021, https://www.arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2F&file=626.pdf&ddBienniumSession=2021%2F2021R.

States demonstrates that ensuring equal access to healthcare helps us all without disrupting doctor-patient decisions and without imposing significant costs to amici. The amici States therefore urge this Court to affirm the preliminary injunction.

I. DISCRIMINATION AGAINST TRANSGENDER PEOPLE SIGNIFICANTLY HARMS AMICI STATES AND THEIR RESIDENTS

Transgender people face significant barriers to receiving both routine and transition-related care, including lack of adequate insurance coverage, provider ignorance about the health needs of transgender people, and outright denial of services.[3] Denial of access to medically necessary care has serious consequences for transgender residents and public health generally. Transgender people with gender dysphoria[4] often suffer from severe distress due to the stigma associated with their gender identity.[5] Among transgender people, there are higher rates of

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[3] Sandy E. James et al., Nat'l Ctr. For Transgender Equal., The Report of the 2015 U.S. Transgender Survey 93 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf; *see also* Morning Consult & The Trevor Project, How COVID-19 is Impacting LGBTQ Youth 21 (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/10/Trevor-Poll_COVID19.pdf (finding that 25 percent of trans and nonbinary youth and 25 percent of LGBTQ youth overall reported wanting mental health care and not being able to receive it, compared with only six percent of white cisgender heterosexual youth).

[4] "Gender dysphoria" is the diagnostic term for the intense, debilitating distress and anxiety that can result from incongruence between a person's gender identity and sex assigned at birth. Joint Appendix (JA) 94–95.

[5] *See* James et al., *supra* note 3, at 103.

suicidal thoughts and attempts than in the overall U.S. population.[6] The risks are especially high among transgender minors.[7] If unaddressed, gender dysphoria can impact quality of life, cause fatigue, and trigger decreased social functioning, including reliance on drugs and alcohol.[8] Those suffering from gender dysphoria have an increased risk of HIV and AIDS due to inadequate access to care.[9]

These negative health consequences resulting from untreated gender dysphoria also harm amici States. A recent survey shows that over half of transgender people report economic insecurity due to discrimination based on their

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[6] Ann P. Haas et al., Am. Found. For Suicide Prevention & The Williams Inst., Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-GNC-Suicide-Attempts-Jan-2014.pdf.

[7] *See, e.g.*, *id*.; Ali Zaker-Shahrak et al., Cal. Dep't of Ins., Economic Impact Assessment: Gender Nondiscrimination in Health Insurance 10 (2012), https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf ("A recent systematic review of largely American samples gives a suicide attempt rate of approximately one in every three individuals with higher rates found among adolescents and young adults.").

[8] *See* Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15(9) Quality of Life Research 1447 (2006), https://www.ncbi.nlm.nih.gov/pubmed/16758113 (observing that transgender men who had received transition-related care reported having a higher health-related quality of life than those who had not).

[9] Ctrs. for Disease Control & Prevention, HIV and Transgender People (April 2021), https://www.cdc.gov/hiv/pdf/group/gender/transgender/cdc-hiv-transgender-factsheet.pdf.

gender identity.[10] Transgender people who experience income insecurity are more likely to be uninsured and to rely on state-run programs such as Medicaid.[11] It is therefore state programs that are likely to bear the burden of addressing the significant attendant consequences of denying transgender people medically necessary care.[12]

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[10] Sharita Gruberg et al., Ctr. for Am. Progress, The State of the LGBTQ Community in 2020 (2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/ (showing more than half [54 percent] of transgender respondents reported that discrimination moderately or significantly affected their financial well-being).

[11] Jaime M. Grant et al., Nat'l Ctr. For Transgender Equal. & Nat'l Gay and Lesbian Task Force, National Transgender Discrimination Survey Report on Health & Health Care 8 (2010), https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf (23 percent of transgender women and 13 percent of transgender men report relying on public health insurance); *see also* Kellan Baker et al., Ctr. for Am. Progress, The Medicaid Program and LGBT Communities: Overview and Policy Recommendations (2016), https://www.americanprogress.org/article/the-medicaid-program-and-lgbt-communities-overview-and-policy-recommendations/ ("The high prevalence of poverty in LGBT communities, especially among transgender people and LGBT people of color, makes Medicaid a critical program for the health and well-being of LGBT communities."); Kerith J. Conron & Kathryn K. O'Neill, Univ. of Cal. Los Angeles, Food Insufficiency Among Transgender Adults During the COVID-19 Pandemic 2 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf (over a quarter of transgender people experience food insufficiency, making it three times as common among transgender people as cisgender (i.e., non-transgender) people).

[12] *See, e.g.*, Wash. Admin. Code § 182-501-0060 (listing state program's benefit packages); Cal. Code Regs. tit. 22 § 51301 *et seq.* (same); N.Y. Comp. Codes R. & regs. tit. 18, § 505.1 *et seq.* (same).

Access to gender-affirming healthcare and other medical interventions that improve mental health are especially important to transgender and nonbinary minors, who already experience additional stresses stemming from discrimination, harassment, and stigma experienced in their daily lives.[13] The Centers for Disease Control and Prevention has found that transgender students are more likely to report feeling unsafe at or going to and from school, being bullied at school, being threatened or injured with a weapon at school, being forced to have sex, and experiencing physical and sexual dating violence.[14] About 23.8 percent of transgender students reported being threatened or injured with a weapon at school, for example, compared with 6.4 percent of cisgender boys and 4.1 percent of cisgender girls.[15] Transgender students who experienced higher levels of

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[13] "People who identify as transgender have higher rates of mental health complications than those in the general population due to stigma and discrimination. In addition to a higher prevalence of mental health issues, transgender people typically experience barriers to healthcare, such as refusal of care, violence, and a lack of provider knowledge. This suggests that these experiences, and not being transgender itself, may predict and contribute towards mental health difficulties." Louise Morales-Brown, *What to Know About Mental Health Among Transgender Individuals*, Medical News Today (May 20, 2021), https://www.medicalnewstoday.com/articles/transgender-mental-health.

[14] *See* Michelle M. Johns et al., U.S. Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students*, 68 Morbidity Mortality Weekly Report 67, 69 (2019), http://dx.doi.org/10.15585/mmwr.mm6803a3.

[15] *Id.*

victimization due to their gender identity were three times more likely to have missed school in a given month than other students.[16] Transgender youth whose restroom and locker room use was restricted were more likely to experience sexual assault compared with those without restrictions.[17] These harms have been further exacerbated by the COVID-19 pandemic and the limited availability of healthcare resources.[18] Indeed, about 34 percent of transgender and nonbinary youth reported that the pandemic has been "much more stressful" compared with 22 percent of white cisgender heterosexual youth.[19]

II. AMICI STATES PROTECT ACCESS TO GENDER-AFFIRMING HEALTHCARE BASED ON WELL-ACCEPTED MEDICAL STANDARDS

Alabama's amicus brief asserts that the Arkansas legislature "does not discriminate against children suffering from gender dysphoria, but seeks to protect

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[16] Movement Advancement Project et al., Separation and Stigma: Transgender Youth and School Facilities 4 (2017), https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf.

[17] Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 Pediatrics 1, 1 (2019), https://publications.aap.org/pediatrics/article/143/6/e20182902/76816/School-Restroom-and-Locker-Room-Restrictions-and.

[18] *See generally* U.S. Dep't of Educ., Office for Civil Rights, Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students iv, 27–30 (2021), https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf (summarizing research findings).

[19] *See* Morning Consult & The Trevor Project, How COVID-19 is Impacting LGBTQ Youth, *supra* note 3, at 20.

them." Alabama Amicus at 29. Amici States' laws protect their transgender minors by increasing their access to healthcare, not by denying it. To prevent the tangible economic, emotional, and health consequences of excluding individuals from needed healthcare, many of the amici States have worked to ensure that their residents, including transgender adolescents, have access to gender-affirming healthcare and to allow doctors to practice medicine in adherence both to well-accepted medical standards and to our anti-discrimination laws. These laws also protect state residents without harm to the public fisc.

A. Amici States Have Longstanding Anti-Discrimination Laws Guaranteeing Access to Gender-Affirming Medical Care

Several amici States explicitly prohibit insurers from excluding transition-related care from their insurance policies. These protections increase access to healthcare for our residents by barring discriminatory health insurance coverage that contravenes both best medical practice and legal standards prohibiting discrimination on the basis of gender identity.[20] Of particular concern are barriers

[20] As in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–42 (2020), it is unnecessary for this Court to even define "sex" or "gender" in order to conclude that the Arkansas statute discriminates on the basis of sex, gender, and transgender status. *Accord United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (state laws that discriminate on the basis of "sex" and "gender" are subject to heightened scrutiny); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny where the challenged policy "cannot be stated without referencing sex.").

to healthcare erected against transgender patients for care that is otherwise accessible to others.

In California, for instance, longstanding laws and regulations ensure that transgender patients are not denied or limited coverage for care that is ordinarily available. California's Medicaid program ("Medi-Cal") has prohibited transition-related exclusions from its coverage since 2001.[21] In 2012, the California Insurance Commissioner adopted regulations prohibiting private insurers from denying coverage for "services related to gender transition . . . including but not limited to hormone therapy" if the same services are available when unrelated to gender transition and also from requiring a premium based on the insured's identity as a transgender person.[22] These rules apply regardless of the beneficiary's age.

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[21] *See* Cal. Dep't of Health Care Servs., All-Plan Letter 16-013, Ensuring Access to Medi-Cal Services for Transgender Beneficiaries (Oct. 6, 2016), http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf (reminding Medi-Cal managed care health plans that they must provide covered services to all Medi-Cal beneficiaries, including transgender beneficiaries, and including surgery, pursuant to Cal. Health & Safety Code §1365.5); *see also J.D. v. Lackner*, 80 Cal. App. 3d 90, 95 (1978) (recognizing that "sex reassignment surgery" may be medically necessary and ordering Medi-Cal to grant the treatment); *id.* ("We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic.").

[22] Cal. Code Regs. tit. 10 § 2561.2, subd. (a), http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CDI-Gender-Nondiscrimination-Regulations.pdf.

Other amici States are equally committed to ensuring transgender people are treated with dignity and respect when accessing healthcare, and that they are not denied the care they need. For example, on November 30, 2015, the Minnesota Departments of Commerce and Health confirmed that health plans subject to their jurisdiction may not exclude coverage for treatment for gender dysphoria when medically necessary.[23] Many of amici States' laws, regulations, and healthcare bulletins likewise prohibit insurers from discrimination in the provision of healthcare.[24] Taken together, these protections reflect our core commitment to

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[23] Minn. Dep't of Commerce, Admin. Bulletin 2015-5, Gender Identity Nondiscrimination Requirements (2015), https://mn.gov/commerce-stat/pdfs/bulletin-insurance-2015-5.pdf.

[24] *See, e.g.*, **Connecticut**: Conn. Gen. Stat. § 46a-71(a) ("All services of every state agency shall be performed without discrimination based upon . . . gender identity or expression"); Conn. Ins. Dep't, Bulletin IC-34, Gender Identity Nondiscrimination Requirements (Dec. 19, 2013), https://portal.ct.gov/-/media/CID/BulletinIC37GenderIdentityNondiscriminationRequirementspdf.pdf (prohibiting private insurers from discriminating against people based on gender identity); **Hawai'i**: Haw. Rev. Stat. § 431:10A-118.3(a) (prohibiting gender identity discrimination in accident and health or sickness insurance contracts); Haw. Rev. Stat. § 432:1-607.3 (prohibiting gender identity discrimination in hospital and medical service policies); Haw. Rev. Stat. § 432D-26.3 (prohibiting gender identity discrimination in health maintenance organization policies); **Illinois**: Ill. Adm. Code, tit. 50, § 2603.35 (prohibiting group and individual health insurance plans from discriminating on the basis of gender identity); **Massachusetts**: Mass. Div. of Ins., Office of Consumer Affairs & Bus. Regulation, Bulletin 2014-03, Guidance Regarding Prohibited Discrimination on the basis of Gender Identity 1 (June 20, 2014), https://www.mass.gov/doc/bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the-basis-of-gender-identity/download (prohibiting private insurers from denying coverage for

protecting the equality of all people, regardless of their gender identity, and ensuring people with gender dysphoria are not denied access to much needed care.

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medically necessary treatment based on an individual's gender identity); **New Jersey**: N.J. Stat. Ann. § 26:2J-4.40 (prohibiting health maintenance organization contracts from discriminating on the basis of gender identity or expression); N.J. Stat. Ann. § 10:5-12(f) (prohibiting gender identity or expression discrimination in places of public accommodation, including in the provision of health insurance); N.J. Stat. Ann. § 52:14-17.29x ("State Health Benefits Commission contracts not to discriminate based on gender identity or expression"); **New York**: N.Y. Comp. Codes R. & Regs. tit. 18 § 505.2(l)(3)-(4) (covering medically necessary gender reassignment surgery under Medicaid); N.Y. Dep't of Fin. Servs., Ins. Circular Letter No. 7 (2014), https://www.dfs.ny.gov/insurance/circltr/2014/cl2014_07.htm (prohibiting private insurers from excluding coverage for the diagnosis and treatment of gender dysphoria); **Vermont**: Vt. Dep't of Fin. Reg., Div. of Ins., Ins. Bulletin No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity including Medically Necessary Gender Dysphoria Surgery and Related Health Care 1 (2013), https://dfr.vermont.gov/sites/finreg/files/regbul/dfr-bulletin-insurance-174-gender-dysphoria-surgery.pdf ("Insurance companies, health insurance companies, nonprofit hospital services corporations, nonprofit medical services corporations, non-ERISA employer group plans and managed care organizations shall not exclude coverage for medically necessary treatment including gender reassignment surgery for gender dysphoria and related health conditions."); Vt. Dep't of Health Access, Medical Policy re: Gender Affirmation Surgery for the Treatment of Gender Dysphoria 2 (2019), http://vels.staging.vermont.gov/sites/dvha/files/documents/providers/Forms/1gender-affirmation-surgery-w-icd-10-coded-110119.pdf (covering gender reassignment surgery if certain criteria are met under Medicaid); **Washington**: Wash. Admin. Code § 182-531-1675 (listing surgical and hormone therapy as available under Apple Health's "gender dysphoria treatment program"); Letter from Mike Kreidler, Office of the Ins. Comm'r of Wash. State to Health Ins. Carriers in Wash. State (June 25, 2014), https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-discrimination-letter.pdf.

In addition to these general protections, some amici States have issued explicit guidance prohibiting insurers from denying minors treatment for gender dysphoria solely based on age, in recognition of the importance of gender-affirming interventions for this vulnerable population.[25] The Massachusetts Division of Insurance advises insurers that "[f]or minors seeking access to gender-affirming medical or surgical procedures, [insurance carriers] must undertake case-by-case review of individual circumstances and authorize coverage for these treatments when such treatments are determined to be medically necessary."[26]

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[25] **New York**: N.Y. Comp. Codes R. & Regs. tit. 18 § 505.2(l)(2)(i)-(ii) (medically necessary hormone replacement therapy is available for minors); *id.* § 505.2(l)(3)(ii) (medically necessary gender-affirming surgery is available for minors); **Oregon:** Or. Health Auth., Prioritized List: Guideline for Gender Dysphoria 1 (2019), https://www.oregon.gov/oha/HPA/DSI-HERC/FactSheets/Gender-dysphoria.pdf (approving coverage for puberty suppression hormones for gender-questioning youth based on "extensive testimony/debate from experts at various public meetings as well as reviewing relevant evidence and literature regarding the effectiveness of cross-sex hormone therapy"); **Washington**: Wash. Admin. Code § 182-531-1675(b)(ii) (coverage for puberty suppression therapy); *id.* § 182-531-1675(f) (payment for gender-affirming care for those under 20 years of age if it is "medically necessary, safe, effective, and not experimental").

[26] Gary D. Anderson, Mass. Comm'r of Ins., Bulletin 2021-11, Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services 3 (2021), https://www.mass.gov/doc/bulletin-2021-11-prohibited-discrimination-on-the-basis-of-gender-identity-or-gender-dysphoria-including-medically-necessary-gender-affirming-care-and-related-services-issued-september-9-2021/download.

California's Insurance Commissioner recently clarified that health insurance companies could not deny coverage based on a strict age limit for transgender male patients seeking chest reconstruction surgery without considering the patient's specific clinical situation.[27] This guidance expressly acknowledges the need for coverage for transgender minors, noting that "[s]ocial stigma, misconceptions about gender dysphoria and its treatment, and outdated medical criteria create barriers to necessary medical care that can lead to tragic results for individuals with gender dysphoria, especially for . . . transgender youth."[28]

B. Amici States' Policies Are Based on Well-Accepted Medical Standards and Leave Undisturbed Decisions Made Between Doctors and Their Patients

Amici's policies strike an important balance between adhering to well-accepted medical standards without unduly interfering in the doctor-patient

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[27] Press Release, Cal. Dep't of Ins., Commissioner Lara Takes Proactive Step to Ensure Transgender Youth Have Access to Gender-Affirming Medical Care for Gender Dysphoria (Dec. 30, 2020), https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release140-2020.cfm; Letter from Ricardo Lara, Cal. Ins. Comm'r, Cal. Dep't of Ins., to Kathie Mohig, Exec. Dir., Trans Family Support Services, at 4–5 (Dec. 30, 2020), https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Gender-dysphoria-male-chest-surgery-CDI-GC-opinion-letter-12-30-20.pdf (instructing that insurers must provide a process for considering the "specific clinical situation" of the minor as well as individual "goals for gender identity expression" when determining the medical necessity of reconstructive surgery).

[28] Press Release, Cal. Dep't of Ins., *supra* note 27.

relationship. For example, the Minnesota Department of Commerce, which has an external review process for insurance appeals, has ruled that insurers must use medical standards set forth by the World Professional Association for Transgender Health (WPATH), an international professional association that provides evidence-based standards of care for transgender people, and may not substitute their own, more-restrictive standards for providing coverage for gender-affirming healthcare.[29] California's opinion letter about coverage for chest surgery for transgender minors expressly cites to the WPATH standards as well.[30] Massachusetts similarly recommends insurance carriers "consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender health field, including but not limited to those issued by the [WPATH]."[31] Many other amici States have relied on prevailing professional

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[29] Letter from Lisa K. Maguire, Esq., State Appeals, to Blue Cross Blue Shield Member (Aug. 11, 2014), https://www.outfront.org/sites/default/files/Dept%20of%20Commerce%20external%20review.pdf (determining that denial of coverage for gender-affirming surgery should be overturned as inconsistent with WPATH standards); *see also* Minn. Dep't of Commerce, Admin. Bulletin 2015-5, *supra* note 23, at 2 ("Determination of medical necessity and prior authorization protocols for gender dysphoria-related treatment must be based on the most recent, published medical standards set forth by nationally recognized medical experts in the transgender health field.").

[30] Press Release, Cal. Dep't of Ins., *supra* note 27; Letter from Lara to Mohig, *supra* note 27, at 3–4.

[31] Anderson, Bulletin 2021-11, *supra* note 26, at 2.

standards of care set forth by nationally recognized medical experts in crafting laws and guidance on coverage of gender-affirming medical care to treat gender dysphoria.[32]

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[32] *See, e.g.*, **Colorado**: Colo. Code Regs. § 4-2-62 (prohibiting "[d]en[ial], exclu[sion], or otherwise limit[ing] coverage for medically necessary services, in accordance with generally accepted professional standards of care, based upon a person's . . . gender identity"); Press Release, Colo. Dep't of Regulatory Agencies, Division of Insurance Announces a New Resource for LGBTQ Coloradans (Jun. 1, 2020), https://doi.colorado.gov/press-release/division-of-insurance-announces-a-new-resource-for-lgbtq-coloradans; **Connecticut**: Conn. Comm'n On Human Rights And Opportunities, Declaratory Ruling on Petition Regarding Health Insurers' Categorization of Certain Gender-Confirming Procedures as Cosmetic 9 (2020), https://www.chlpi.org/wp-content/uploads/2013/12/Dec-Rule_04152020.pdf (Connecticut law requires insurers "to pay 'covered expenses' for treatment provided to individuals with gender dysphoria where the treatment is deemed necessary under generally accepted medical standards"); **District of Columbia**: Chester A. McPherson, D.C. Dep't of Ins., Bulletin 13-IB-01-30/15, Prohibition of Discrimination in Health Insurance Based on Gender Identity and Expression 3–4 (2014), https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf (stating that determining medical necessity should require referring to "recognized professional standard of medical care for transgender individuals requiring treatment for gender dysphoria" and citing to WPATH standards); **Maine**: Press Release, EqualityMaine, Maine Transgender Network, GLAD and Maine Women's Lobby Announce Health Coverage for Transgender Individuals Under MaineCare, LGBTQ Legal Advocates & Defs. (Oct. 3, 2019), https://www.glad.org/post/equalitymaine-maine-transgender-network-glad-and-maine-womens-lobby-announce-health-coverage-for-transgender-individuals-under-mainecare/ (stating that criteria for determining medically necessary care "will be based on consensus professional medical standards" and citing to WPATH standards); **Minnesota**: Minn. Dep't of Commerce, Admin. Bulletin 2015-5, *supra* note 23, at 2 (medical necessity "must be based on the most recent, published medical standards set forth by nationally recognized medical experts in the transgender health field"); **New York**: N.Y. Dep't of Fin. Servs., Ins. Circular

Amici States' policies also are explicit in avoiding interference with the doctor-patient relationship and disrupting decisions made based on well-accepted medical standards. The District of Columbia has instructed that determinations of "medical necessity" for insurance coverage purposes "must also be guided by providers in communication with individual patients."[33] As of January 1, 2022, Washington forbids insurers from "deny[ing] or limit[ing] coverage for gender affirming treatment" when it is medically necessary and "prescribed in accordance

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Letter No. 7, *supra* note 24 (citing to the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders' (DSM) recognition of gender dysphoria as a mental health condition); **Oregon**: Or. Health Auth., Prioritized List: Guidelines for Gender Dysphoria, *supra* note 25, at 1 (approving coverage for puberty suppression hormones for gender-questioning youth based on extensive testimony "from experts at various public meetings as well as reviewing relevant evidence and literature regarding the effectiveness of cross-sex hormone therapy" and citing to WPATH standards); **Rhode Island**: R.I. Health Ins. Comm'r, Health Ins. Bulletin 2015-3, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression 1 (2015), http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf (concluding that "a growing body of scientific and clinical evidence regarding the potential harm to consumers arising from the denial or exclusion of services on the basis of gender identity or expression" prompted a reexamination of these exclusions); **Washington**: Wash. Rev. Code § 48.43.0128(3) (for health plans issued on or after January 1, 2022, Washington forbids insurers from "deny[ing] or limit[ing] coverage for gender-affirming treatment" when it is medically necessary and "prescribed in accordance with accepted standards of care" and from "apply[ing] categorical cosmetic or blanket exclusions to gender-affirming treatment").

[33] McPherson, Bulletin 13-IB-01-30/15, *supra* note 32, at 4.

with accepted standards of care."[34] And in California, the State encourages health insurance companies to evaluate coverage criteria for gender-affirming care in order "to avoid needlessly delaying and interfering with medical care recommended by a patient's doctor."[35]

C. Ensuring Access to Gender-Affirming Medical Care Has Improved Health Outcomes for Transgender People, Including Minors

Amici seek to protect the decisions made between teenagers, their families, and their doctors based on widely-accepted medical practices. Amici States' policies not only ensure that residents have access to these best practices, they have also improved health outcomes for transgender people—including transgender minors—at minimal cost to States.

Since 2012, at least 24 States and the District of Columbia have prohibited health insurance discrimination against transgender people.[36] These laws are motivated by the goal of promoting good medical practices and increasing equity in access to healthcare.

California, for example, covers gender-affirming healthcare for the well-being of its transgender residents. But it does so with little effect on the public fisc.

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[34] Wash. Rev. Code § 48.43.0128(3).

[35] Press Release, Cal. Dep't of Ins., *supra* note 27.

[36] Healthcare Law and Policies, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Dec. 23, 2021).

An economic impact analysis of California's 2012 regulation found that removing transgender exclusions had an "immaterial" effect on premium costs, leading the California Department of Insurance to conclude that "the benefits of eliminating discrimination far exceed the insignificant costs."[37] Those benefits include improved health outcomes among transgender people, such as reduced suicide risk, lower rates of substance use, and increased adherence to HIV treatment.[38] Indeed, "the strongest predictor associated with the risk of suicide was gender based discrimination," which included "problems getting health or medical services due to their gender identity or presentation."[39] The economic impact analysis further acknowledged that suicide risk is especially high among transgender minors.[40] California's analysis concluded that "[t]hese studies provide overwhelming evidence that removing discriminatory barriers to treatment results in significantly lower suicide rates" and the 2012 regulation "will not only save insurers from the

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[37] Kellan E. Baker, *The Future of Transgender Coverage*, 376(19) New Eng. J. of Med. 1801, 1803 (2017), https://pubmed.ncbi.nlm.nih.gov/28402247/*; see generally* Zaker-Shahrak, *supra* note 7.

[38] *Id*.

[39] Zaker-Shahrak, *supra* note 7, at 10 (citing Clements-Nolle, et al. study).

[40] *Id*. (citing Haas study).

costs associated with suicide, but prevent significant numbers of transgender insureds from losing their lives."[41]

Similarly, in 2013, the Commonwealth of Massachusetts Group Insurance Commission found that the benefits of gender-affirming medical treatment outweigh the costs, noting that "these additional expenses hold good value for reducing the risk of negative endpoints—HIV, depression, suicidality, and drug abuse."[42] While this study did not include adolescents, it acknowledged findings that "young adults experience alleviation of gender dysphoria and improvement in psychological functioning following gender reassignment."[43]

Studies have overwhelmingly shown that mental health for transgender minors drastically improves when they have access to early treatment. A 2021 survey of nearly 12,000 transgender and nonbinary youth found that, for youth under the age of 18, use of gender-affirming hormone therapy was associated with 39 percent lower odds of recent depression and 38 percent lower odds of attempting suicide in the past year compared to youth who wanted, but did not

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[41] *Id*. at 10–11.

[42] William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31(4) J. Gen. Intern. Med. 394, 394 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/.

[43] *Id*. at 400.

receive, such therapy.[44] In short, removing discriminatory barriers to healthcare improves health outcomes for transgender residents, especially minors, and does so at little cost to States.

III. ARKANSAS' LAW INSTITUTES AN UNCONSTITUTIONAL BAN THAT DISCRIMINATES BASED ON SEX AND IGNORES MEDICAL CONSENSUS AS WELL AS DECISIONS MADE BETWEEN DOCTORS AND THEIR PATIENTS

Arkansas' law is an aberration that violates the Equal Protection Clause. It is the only state law that constitutes a total ban on medical treatment "related to gender transition."[45] This ban oversteps into medical decisions made between doctors and patients, in the face of overwhelming medical consensus that the banned care is medically necessary for some individuals with gender dysphoria. The ban likewise singles out adolescents for discrimination based on their transgender status.[46] Under heightened as well as rational basis standards of

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[44] Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, XXX J. of Adolescent Health 1, 1 (2021), https://www.jahonline.org/article/S1054-139X(21)00568-1/fulltext; *see also* Jack L. Turban et al, *Access To Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults* 17(1) PLOS One 1, 8 (2022), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0261039 ("After adjusting for demographic and potential confounding variables, access to [gender-affirming hormones] during adolescence (ages 14–17) was associated with lower odds of past-month severe psychological distress […], past-year suicidal ideation […], past month binge drinking […], and lifetime illicit drug use […] when compared to access to [gender-affirming hormones] during adulthood.").

[45] *See generally* Healthcare Law and Policies, *supra* note 36.

[46] *See generally* JA 911–55 (Turban Decl.).

review, this law is unconstitutional. Rather than protecting youth, the Arkansas law targets a vulnerable population and fails to achieve its stated purpose. Arkansas has failed to demonstrate that its law is substantially related to advancing the health and wellbeing of transgender youth, as required under intermediate scrutiny. Arkansas has similarly failed to satisfy the rational basis standard because its law actually undermines its stated interest in the health and wellbeing of minors.

Alabama's brief argues that Arkansas's law is justified because its alleged purpose is to protect children from purported negative health outcomes that result from gender-affirming care, stating that a state's power "is likely at its zenith when it acts to protect children." Alabama Amicus at 25 (citing *Bellotti v. Baird*, 443 U.S. 622, 634 (1979)). But even *Bellotti* acknowledges that "[t]he child is not the mere creature of the state." *Bellotti*, 443 U.S. at 637; *contra* Alabama Amicus at 28–29 ("[I]t was the responsibility of the Arkansas legislature to determine the best way to help children suffering from gender dysphoria . . . ."). States, of course, have authority to regulate the medical profession. [47] Yet, it is an aberration for a

[47] In support of the Arkansas law, several of Defendants' amici share anecdotal experiences of providers administering gender-affirming care to their or their children's alleged detriment. *See, e.g.*, Amicus Briefs of Yaacov Sheinfeld et al. and Keira Bell et al. As Plaintiffs-Appellees explain, the rushed provision of care without evaluation would be inconsistent with prevailing protocols. Plaintiffs-Appellees' Br. at 44. Instead of banning a medical practice based on well-established medical consensus because of the actions of providers who act beyond protocol—which would be an overreach—amici States rely on their regulators and

State to totally ban a medical practice for specific treatment contexts (e.g., banning transgender minors from accessing gender-affirming medical care) where the treatments are known to be effective and where the same treatments have otherwise been broadly permitted (e.g., cisgender minors remain able to access treatments such as breast reduction for a teenage cisgender girl to alleviate back pain or for a teen cisgender boy to get treatment for gynecomastia).[48]

Evidence in the record—and Amici States' own experience—overwhelmingly show that transgender youth who are affirmed in their identities and have access to gender-affirming healthcare experience improved health

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licensing boards to address inappropriate conduct by their providers in order to prevent harm to their residents. Indeed, Alabama references the opioid crisis, which resulted in States adopting legislation to curb the amount of opioids that physicians could prescribe in order to address a well-documented public health crisis, but not completely ban their distribution. *See* Alabama Amicus at 24 (citing Nat'l Conf. of State Legislatures, Prescribing Policies: States Confront Opioid Overdose Epidemic (June 30, 2019), https://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx ("State lawmakers are crafting innovative policies . . . to address this public health crisis while also ensuring appropriate access to pain management.")).

[48] *See, e.g.*, *Breast Reduction Surgery*, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/breast-reduction-surgery/about/pac-20385246 (last visited Jan. 11, 2022) (discussing breast reduction surgery for teenagers); *Enlarged Breasts in Men (Gynecomastia)*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/gynecomastia/symptoms-causes/syc-20351793 (last visited Jan. 11, 2022) (discussing gynecomastia in men and boys).

outcomes.[49] Indeed, research demonstrates that transgender youth who are supported and affirmed in their gender and have access to medical care report better mental health outcomes.[50] Alabama amici's arguments to the contrary largely mischaracterize the scientific literature and the record below.[51]

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[49] *See, e.g.*, JA 915–17 (Turban Decl. ¶ 13 (discussing eight studies of gender-affirming pubertal suppression linked to favorable mental health outcomes)); JA 917–19 (Turban Decl. ¶ 14 (discussing six studies of gender-affirming hormone replacement therapy linked to favorable mental health outcomes)); *see also* Padula et al., *supra* note 42, at 400; Zaker-Shahrak, *supra* note 7, at 10–11.

[50] *See* Dominic J. Gibson et al., *Evaluation of Anxiety and Depression in a Community Sample of Transgender Youth*, 4(4) J. Am. Med. Ass'n Open 1, 1–2 (2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2778206 (finding "no significant group differences in self-reported depressive symptoms, self-reported anxiety symptoms, or parent reported depressive symptoms" among "socially transitioned transgender youth, their siblings, and age- and gender-matched control participants" ages eight to fourteen); Lily Durwood et al., *Social Support and Internalizing Psychopathology in Transgender Youth*, 50 J. of Youth and Adolescence 841 (2021), https://link.springer.com/article/10.1007%2Fs10964-020-01391-y ("Parents who reported higher levels of family, peer, and school support for their child's gender identity also reported fewer internalizing symptoms."); Kristina R Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137(3) Pediatrics 1, 1 (2016), https://pubmed.ncbi.nlm.nih.gov/26921285 ("Socially transitioned transgender children who are supported in their gender identity have developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group.").

[51] *Compare* Alabama Amicus at 10–15 (citing to United Kingdom, Sweden, and Finland studies) *with* JA 951–55 (Turban Decl. ¶¶ 53–58 (highlighting inaccuracies and deficiencies in same studies, including lack of peer review)); *see, e.g.*, JA 920 (Turban Decl. ¶ 17 (refuting Defendants' criticisms of de Vries et al. study)); JA 921–24 (Turban Decl. ¶ 19 (addressing Defendants' experts' assertions regarding health risks of gender-affirming care)); JA 926–27 (Turban Decl. ¶ 24

Finally, Alabama asserts that gender-affirming medical interventions are inappropriate because some pre-pubertal children's identity as transgender "does not inevitably continue into adulthood." Alabama Amicus at 16 (quoting WPATH standards). This argument takes studies of children and misapplies them to teenagers.[52] No medical treatment is provided to transgender youth until they have reached a specific stage of puberty.[53] Adolescents—i.e., minors who have begun puberty[54]—with persistent gender dysphoria after reaching this stage almost always persist in their gender identity in the long-term whether or not they were

(addressing Defendants' experts' assertions regarding gender-affirming care and social transition)); JA 927–31 (Turban Decl. ¶¶ 25–30 (addressing Defendants' experts' assertions regarding "detransition")); JA 934–37 (Turban Decl. ¶¶ 34–37 (addressing Defendants' experts' assertions regarding gender-affirming surgery)); JA 937–40 (Turban Decl. ¶¶ 38–39 (addressing Defendants' experts' assertions regarding informed consent)); JA 941–46 (Turban Decl. ¶¶ 41–45 (addressing Defendants' experts' assertion regarding "sex ratios" and "social contagion")); JA 946–47 (Turban Decl. ¶¶ 46–47 (explaining medical and ethical deficiencies with attempts to change adolescents' gender identities through talk therapy)); JA 949–51 (Turban Decl. ¶¶ 49–52 (explaining that Defendants' experts' criticisms of diagnosing gender dysphoria based on patient-reported symptoms are "true of nearly all psychiatric conditions")).

[52] JA 924–25 (Turban Decl. ¶¶ 21–22).

[53] JA 105 (Adkins Decl. ¶ 47 (treatment for gender dysphoria begins at Tanner Stage 2 of puberty)); *see generally*, Mickey Emmanuel & Brooke R. Bokor, Nat'l Ctr. for Biotechnology Info., Tanner Stages (Dec. 18, 2020) https://www.ncbi.nlm.nih.gov/books/NBK470280/ (defining Tanner Stages).

[54] JA 924 (Turban Decl. ¶ 21).

provided gender-affirming medical care.[55] This is supported by Alabama amici's own evidence, including the fact that most adolescents prescribed puberty-delaying medication go on to initiate hormone replacement therapy. Alabama Amicus at 18 ("[T]he persistence of gender dysphoria into adulthood appears to be much higher for adolescents.").

Amici States have taken seriously their obligation to protect transgender adolescents by respecting the decisions reached between these patients, their doctors, and their parents. The Arkansas law is unconstitutional, and puts the well-being and lives of transgender minors at risk.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

[55] JA 105 (Adkins Decl. ¶ 47); *accord* Jack L. Turban et al., *Gender Incongruence & Gender Dysphoria*, *in* Lewis's Child and Adolescent Psychiatry: A Comprehensive Textbook (Martin A, Bloch et al., eds., 5th ed. 2018).

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